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.

06 - 22463

Case No. CIV - HUCK

MAGISTRATE JUDGE

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

Raymond V. Miller, Esq.
GUNSTER, YOAKLEY & STEWART P.A.
One Biscayne Tower, Suite 3400
Two South Biscayne Blvd.
Miami, Florida 33131
Telephone: (305) 376-6000
Facsimile: (305) 376-6010

Of Counsel:

Susan Buckley
Kevin J. Burke
Brian Markley
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005

4
D

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

ARGUMENT 11

I. THERE IS A SUBSTANTIAL LIKELIHOOD THAT PLAINTIFFS WILL PREVAIL ON THE MERITS 11

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM UNLESS PRELIMINARY INJUNCTIVE RELIEF IS GRANTED 16

III. PLAINTIFFS WILL SUFFER MORE HARM FROM DENIAL OF PRELIMINARY INJUNCTIVE RELIEF THAN DEFENDANTS WILL SUFFER IF THE RELIEF IS GRANTED 16

IV. THE PUBLIC INTEREST WILL BE SERVED BY GRANTING PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

American Broadcasting Cos. v. *Blackwell*, No. 1:04cv 750 (S.D. Ohio Nov. 1, 2004) 18

American Broadcasting Co. v. *Blackwell* Case No. 1:04cv0750 (S.D. Ohio Sept. 16, 2006) 15, 17-18, 18n

Brown v. *Hartlage*, 456 U.S. 45 (1982) 12

Burson v. *Freeman*, 504 U.S. 191 (1992) 17-18, 18n

Cate v. *Oldham*, 707 F.2d 1176 (11th Cir. 1983) 16

CBS Inc. v. *Growe*, 15 Med. L. Rep. (BNA) 2275 (D. Minn. 1988) 14-15

CBS Inc. v. *Smith*, 681 F. Supp. 794 (S.D. Fla. 1988) ..... *passim*

Clean-Up '84 v. *Heinrich*, 582 F. Supp. 125 (M.D. Fla. 1984) 6

Clean-Up '84 v. *Heinrich*, 590 F. Supp. 928 (M.D. Fla. 1984) 6

Clean-Up '84 v. *Heinrich*, 759 F.2d 1511 (11th Cir. 1985) 6-8, 13, 15

Daily Herald Co. v. *Munro*, 838 F.2d 380 (9th Cir. 1988) 13-14

Deja Vu, Inc. v. *Metropolitan Government*, 274 F.3d 377 (6th Cir. 2001), cert. denied, 535 U.S. 1073 (2002) 19

Elrod v. *Burns*, 427 U.S. 347 (1976) 16

Firestone v. *News-Press Publishing Co.*, 538 So. 2d 457 (Fla. 1989) 8, 10, 13, 15, 17

Florida Committee For Liability Reform v. *McMillan*, 682 F. Supp. 1536 (M.D. Fla. 1988) 7, 13-15

Page

G & V Lounge, Inc. v. *Michigan Liquor Control Commission*, 23 F.3d 1071 (6th Cir. 1994) 19

Journal Broadcasting, Inc. v. *Logsdon*, No. C 88-0147-L(A), 1988 U.S. Dist. LEXIS 16864 (W.D. Ky. Oct. 21, 1988) 14-15, 18n

KH Outdoor, LLC v. *City of Trussville*, 458 F.3d 1261 (11th Cir. 2006) 11

Mills v. *Alabama*, 384 U.S. 214 (1966) 12

National Broadcasting Co. v. *Cleland*, 697 F. Supp. 1204 (N.D. Ga. 1988) 14-15

National Broadcasting Co. v. *Colburg*, 699 F. Supp. 241 (D. Mont. 1988) 14-15

National Broadcasting Co. v. *Karpan*, No. C88-0320 (D. Wyo. Oct. 21, 1988) 15

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 19

Republican Party v. *White*, 536 U.S. 765 (2002) 12

Roth v. *United States*, 354 U.S. 476 (1957) 19

Spanish International Communications Corp. v. *Firestone*, No. 85-3453 (S.D. Fla. November 6, 1985) 7-8, 13, 15

Constitutional Provisions

U.S. Const. amend. I ..... *passim*

Legislative Documents

1989 Fla. Sess. Law Serv. 89-338 (West) 8-9, 17

Florida House of Representatives Staff Analysis, H.B. 1567 (Apr. 20, 2005) 9, 17, 18n

Page

Rules

Fed. R. Civ. P. 23 ..... 1n

Statutes

Fla. Stat. Ann.

§ 101.121 (repealed 1989) 8
§ 102.031 (2005) ..... *passim*
§ 102.031 (1987) 10-11,16

This memorandum is respectfully submitted on behalf of plaintiffs CBS Broadcasting Inc. ("CBS"), American Broadcasting Companies, Inc. ("ABC"), The Associated Press, Cable News Network, LP, LLLP ("CNN"), Fox News Network, L.L.C. ("Fox News"), and NBC Universal, Inc. ("NBC") (collectively "Plaintiffs") in 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 at Florida polling places during the general elections scheduled for November 7, 2006.[1]

PRELIMINARY STATEMENT

Plaintiffs are the three national broadcast networks (ABC, CBS and NBC), two national cable news networks (CNN and Fox News) and The Associated Press. Each is engaged in the business, *inter alia*, of providing news and information to the public. As part of these activities, Plaintiffs have for many years gathered opinions from and interviewed voters at polling places in Florida on election day. The information from these "exit polls" has been used to analyze and report upon voters' attitudes about issues of public concern, as well as to analyze and report on who voted for particular candidates and why.

Over the years, the Florida legislature has repeatedly attempted to restrict Plaintiffs' ability to conduct exit polls based on the ostensible State interest in promoting order and decorum at polling places. The laws have come in several forms. Some have barred reporters and anyone else from being present within a certain vicinity of the polls, while others have specifically prohibited the "solicitation" of voters' opinions. While the laws have differed slightly, their effect has been the same: to seek to restrict Plaintiffs' ability to analyze and report upon voters' attitudes about candidates and public issues. The Supreme Court of Florida has definitively rejected the legislature's efforts on one occasion, and federal courts in this State, including this court and the Eleventh Circuit Court of Appeals, have invalidated these laws no fewer

---

[1] Concurrent with this motion, Plaintiffs are filing a motion pursuant to Fed. R. Civ. P. 23 to certify a defendant class comprised of all Supervisors of Elections in the State of Florida.

than four times. The courts have often used strident language, holding in no uncertain terms that such laws violate core principles of the First Amendment and simply cannot be sustained.

In 1989, following the fifth opinion to invalidate a Florida statute restricting exit polling, the legislature passed amendments to the Florida election law that expressly permitted exit polling *anywhere* near the polling place, provided that it was conducted in a cordoned-off area and did not impede or otherwise interfere with citizens' ability to vote. The amendments came in direct response to an opinion of this court and were designed to conform the law with the strictures of the First Amendment.

In 2005, however, the legislature inexplicably turned back the clock by amending the election laws again to revive the very same prohibitions that were struck down two decades earlier. That is where we are today. The law on the books, Fla. Stat. Ann. §102.031(4)(a), (b), is virtually indistinguishable from the laws previously invalidated by this court and others. The law is thus plainly, even by design, unconstitutional. But even without the prior decisions of courts in this State and Circuit, there would be ample authority for striking down section 102.031(4)(a), (b), as it applies to exit polling. To date, seven other federal courts across the country have considered whether State efforts to restrict Plaintiffs' exit polling activities can be tolerated consistent with the First Amendment. All seven have concluded, like this court, that they cannot be. The authority in support of Plaintiffs' motion is thus not only extensive, but also unanimous.

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction enjoining Defendants from enforcing Fla. Stat. Ann. §102.031(4)(a), (b), as against their exit polling activities should be granted.

STATEMENT OF FACTS

In support of this motion for a preliminary injunction, Plaintiffs have submitted, *inter alia,* the Affidavit of Joseph W. Lenski, sworn to on September 28, 2006 ("Lenski Aff't"); the Affidavit of Professor Robert Shapiro, sworn to on September 26, 2006 ("Shapiro Aff't");

and the Affidavit of Raymond V. Miller, sworn to on September 27, 2006 ("Miller Aff't"), as well as materials annexed thereto. Mr. Lenski provides detailed examples of how the information obtained from exit polls has been used by Plaintiffs and others to report on the political process. Lenski Aff't ¶¶ 10-18. Based on his experience in Florida and throughout the country, Mr. Lenski also describes how Fla. Stat. § 102.031(4)(a), (b), as amended, will cripple the ability of reporters to conduct exit polls in Florida. Lenski Aff't ¶ 23. Professor Shapiro describes how scholars and educators use the uniquely reliable information obtainable only from exit polls in their studies of the American political process. Shapiro Aff't ¶¶ 6-14. And Mr. Miller in his affidavit describes the Florida legislature's repeated, unsuccessful attempts to restrict Plaintiffs' exit polling activities and the repeated and definitive decisions of the courts of this State and Circuit rebuffing those efforts. Miller Aff't ¶¶ 3-12.

Plaintiffs' Newsgathering Activities

In order to provide informative and timely information to the public about voting trends and behavior, Plaintiffs have jointly conducted exit polls throughout the United States for many years. In preparation for the national election on November 7, 2006, Plaintiffs have retained, as they have in the past, two highly respected national research organizations, Edison Media Research and Mitofsky International, to conduct polls of voters in Florida and across the country. Lenski Aff't ¶1.

Properly defined, the term "exit poll" refers to the collecting of data from a random sample of voters at a sample of polling places on election day. This is accomplished by asking voters to fill out a short questionnaire as they leave the polling place in a scientifically pre-determined pattern. (Complaint ¶ 13, Lenski Aff't ¶ 5) Typically, one polling reporter is assigned to each of the polling places randomly selected for Plaintiffs' polls.[2] For reasons discussed below, the reporter stands just outside the exit of the building in which the polling place

[2] Plaintiffs intend to conduct exit polls at a total of 40 randomly selected polling places in Florida on November 7, 2006. (Lenski Aff't ¶ 19).

is located unless election officials insist otherwise. Polling reporters wear badges clearly identifying them as representatives of the Plaintiff news organizations. They are instructed to be courteous and businesslike and not to obstruct voters or interfere with the election process in any way. (Complaint ¶ 13, Lenski Aff't ¶ 7)

Voter participation in the exit polls is purely voluntary. Those voters who elect to complete a questionnaire are asked their views on the elections and on issues of general public concern. Voters are also asked for their reactions to contests for president, governor, and senator in applicable years as well as their opinions relating to issues of national and statewide importance. Demographic information about voters is also gathered. (Complaint ¶ 13, Lenski Aff't ¶ 6)

Exit polls provide accurate data about voter behavior because of the near certainty that the persons interviewed have actually voted. The greater the distance from the polling place that the polling reporter is required to stand, however, the less reliable is the information gathered. There are several reasons for this. As a polling reporter moves farther and farther away from the polling place, the likelihood of a voter getting into his or her car and driving away, or of melding into a crowd of non-voters, increases. Second, as distance increases, it becomes harder to discern those who are voters from those who are not. Third, as distance increases, the statistical reliability of the sample itself decreases because it becomes impossible to interview in the scientifically selected pattern (*i.e.*, every fourth voter, every fifth voter, etc.). A distance restriction will have a different impact on exit polling at any particular precinct depending on the particular layout of the area — for example, how close the parking lot is to the polling place. However, requiring exit pollsters to stand at least 100 feet from the place where voters exit the polling place at the selected precincts will substantially impair their exit polling activities and, accordingly, substantially reduce the statistical reliability and accuracy of their exit polls. (Complaint ¶ 14, Lenski Aff't ¶ 8)

Use of Exit Poll Data

The information gathered from exit polls is used by Plaintiffs in a variety of ways on election night and thereafter. As noted, the information is used to analyze and report upon voters' attitudes about issues of public concern, as well as to analyze and report on who voted for particular candidates and why. The following example is excerpted from the transcript of ABC News' election night coverage on November 2, 2004:

> PETER JENNINGS, ABC NEWS: Let's go to our political director, Mark Halperin, to see what else you can contribute on the state of Ohio or for that matter on any other issue.
>
> MARK HALPERIN, ABC NEWS: Well, Peter, the exit poll matches up what you found when you went to Cincinnati, it's nice when that works out that the reporting matches up with what we've managed to talk to voters [about]. In Ohio today, . . . [a] gay marriage ban on the ballot, it passed by a decisive margin. They asked Ohio voters if they supported banning gay marriage, and that passed decisively. And of the people who voted for the gay marriage ban, the President won 66 percent to 34 percent for Senator Kerry. Pretty decisive. Also, that issue was, we thought would be a key motivator for a key group, that strong vote for the president amongst White protestant churchgoers. They voted overwhelmingly for the president. And a key group not just in Ohio but in almost all the battleground states. That group voted 70 percent for the President, 30 percent for Mr. Kerry. They voted in about the same proportions as they did four years ago.
>
> And then one other number from Ohio, Peter. Kerry supporters, their top issue, 42 percent said it was the economy. For Bush supporters, moral values was cited by 38 percent. And obviously, a lot of those voters I'm sure were concerned with that gay marriage ban.
>
> PETER JENNINGS: So 40 percent to 38 percent of the economy vis-à-vis the so-called moral character issues?
>
> MARK HALPERIN: Again, for, for Kerry supporters the top issue for almost half of them, 42 percent was the economy. For Bush voters it was moral values 38 percent was their top issue.
>
> PETER JENNINGS: Okay. Many thanks, Mark.

(Complaint ¶ 15, Lenski Aff't ¶ 12). Additional examples are set forth, and attached to, the Lenski Affidavit. *See* Lenski Aff't ¶¶ 11-16 & Exs. D-G.

Plaintiffs also use the information gathered through exit polls to prepare post-election night news reports and other programming analyzing and commenting upon the results of the election and the significance of any particular vote. (Complaint ¶ 15, Lenski Aff't ¶¶ 14-15)

In addition, the information gathered from Plaintiffs' exit polls is archived after each election at the Roper Center at the University of Connecticut and at the Inter-University Consortium at the University of Michigan. The information is available through those archives to historians, social scientists, and others worldwide and benefits scholarship in the areas of politics and social science, among others. (Complaint ¶ 16, Shapiro Aff't ¶¶ 2, 6) Information gathered from exit polls has also been used by elected officials in their study of voting trends and issues and as an aid to understanding their own electoral mandate. (Lenski Aff't ¶ 18)

The Florida Legislature's Failed Attempts to Prohibit Exit Polling

This court, the Eleventh Circuit Court of Appeals, other federal courts in this State and the Supreme Court of Florida have repeatedly held that laws virtually identical to (and in some cases less onerous than) the law being challenged here, violate the First Amendment. These decisions are discussed briefly below and in greater detail in the Miller Affidavit submitted herewith.

The first decision to address Florida's restrictions on exit polling was *Clean-Up '84* v. *Heinrich*, 590 F. Supp. 928, 930 (M.D. Fla. 1984), which considered the constitutionality of Fla. Stat. Ann. § 104.36. That law, similar to the statute being challenged in this case, restricted the solicitation of any opinion, vote, or contribution or the solicitation of signatures on petitions within 300 feet of any Florida polling place. *Clean-Up '84* did not specifically involve exit polling, but rather dealt with attempts to solicit signatures at polling places. The district court for the Middle District of Florida struck down the statute on grounds that it was unconstitutionally overbroad and not drawn in the least restrictive manner. *Clean-Up '84*, 590 F. Supp. at 930 ("The court cannot uphold a law that substantially infringes First Amendment protections based only upon a vague specter of future disorder"). *See also Clean-Up '84* v. *Heinrich*, 582 F. Supp. 125 (M.D. Fla. 1984) (granting preliminary injunction restraining election officials from enforcing the statute at polling places in Florida on November 6, 1984). The decision of the district court was unanimously affirmed by the Court of Appeals which also concluded that the law was unconstitutionally overbroad. *Clean-Up '84* v. *Heinrich*, 759 F.2d

1511, 1514 (11th Cir. 1985) (hereinafter "*Clean-Up '84*"). The legislature did not immediately amend or repeal the statute.

Several months after the Court of Appeals' decision in *Clean-Up '84*, this court issued a temporary restraining order enjoining the Dade County Supervisor of Elections from enforcing the same law against a broadcaster seeking to conduct exit polls on the day of the November 1985 election. *Spanish International Communications Corp.* v. *Firestone*, No. 85-3453 (S.D. Fla. Nov. 6, 1985) ("*Spanish International*"). That order, which is unpublished, is attached as Exhibit 4 to the Miller Affidavit.

Shortly after the decision in *Spanish International*, the legislature amended the law to permit the solicitation of opinions, signatures and the like during the 1986 election provided that notice of such activities was first given to election officials. Miller Aff't ¶ 7. In 1987, however, the Florida legislature amended the election laws to once again prohibit all solicitation of opinions, etc., within 150 feet of buildings housing polling places, regardless of whether notice was given. *Id.* That provision, Fla. Stat. Ann. 102.031(3), was promptly challenged in *Florida Committee For Liability Reform* v. *McMillan*, and held, again, to be unconstitutionally overbroad. 682 F. Supp. 1536, 1540 (M.D. Fla. 1988) ("This provision prohibits virtually every form of expression between persons who are within 150 feet of the polling place. The broad scope of this prohibition directed at expressive activity renders [it] facially invalid.").

Four days after the decision in *Florida Committee*, this court issued an opinion in *CBS Inc.* v. *Smith*, 681 F. Supp. 794 (S.D. Fla. 1988) (Marcus, J.), which involved a challenge by the three national broadcast networks (all plaintiffs here) who wished then, as they do now, to engage in exit polling. The court once again enjoined enforcement of the legislature's ban on exit polling within 150 feet of polling places. In so doing, Judge Marcus concluded in no uncertain terms:

> The Florida statute at issue is fatally overbroad . . . because it prohibits even peaceful, thoughtful discussions with voters regarding how they voted and why. Under Florida law, no person may approach a voter within the [restricted] zone

> and ask the voter his or her opinion. It does not matter that the voter wants to speak or that the reporter wishes to listen, or that the discussion is wholly non-disruptive.

Id. at 803. The court in *Smith* found other constitutional defects as well, including that the law contained no exception for soliciting opinions in private homes and businesses (where there was no conceivable concern over disrupting the voting process) and that it was unconstitutionally underinclusive insofar as it permitted individuals to do virtually anything they wanted within the restricted zone as long as they did not solicit the opinions of voters. *Id.* The court concluded its opinion by observing that enforcement of section 102.031 "would destroy the ability effectively to conduct exit polls and reporters' interviews throughout Florida," resulting "in the loss of valuable voter information[.]" *Id.* at 805.

Lastly, in 1989, the Supreme Court of Florida decided a case concerning a similar statute, Fla. Stat. Ann. § 101.121, that prohibited all nonvoters from coming within 50 feet of Florida polling rooms on election day or primary day. *See Firestone* v. *News-Press Publishing Co.*, 538 So.2d 457 (Fla. 1989) ("*Firestone*"). The challenge was brought by the publisher of the *Fort Myers News-Press* after a photographer for that paper, intending to photograph a candidate at the polls, was ejected by poll workers for breaching the fifty-foot restricted zone. *Id.* at 458. The Supreme Court struck down the law based on the same reasoning used by the federal courts in *Smith* and its predecessors. Among other things, the Court found that the State's "unsubstantiated concern of potential disturbance [was] not sufficient to overcome the chilling effect on first amendment rights." *Id.* at 459. Although the Court recognized that the State could prohibit nonvoters from the polling room itself, the Court found the fifty-foot restricted zone to be otherwise unconstitutional. *Id.* at 459-60.

Later that same year, the Florida legislature finally overhauled its election laws to make them consistent with the unanimous views of the courts. *See Clean-Up '84*; *Spanish International*; *Florida Committee*; *Smith*; *Firestone*, *supra*. These 1989 amendments were comprehensive. First, the ban on all non-voters within 50 feet of polling rooms was repealed. Second, the zone in which it was illegal to solicit opinions (*i.e.*, to conduct exit polling) was

reduced from 150 feet to 50 feet. More importantly, the new law provided that solicitation of opinions would be permitted from *any distance*, provided that the activity 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). The 1989 amendments further provided that exit polling would always be permissible in a "residence, established business, private property, sidewalk, park, or property traditionally used as a public area for discussion," unless it was known to be "impeding, obstructing, or interfering with voter access to the polling room or polling place." *Id.*. Thus, after being rebuffed by the courts on numerous occasions, the legislature attempted with at least some success to "fix" the law to comport with the courts' decisions and to insulate the law from future constitutional challenges.

The 2005 Amendments to Fla. Stat. § 102.031

Against this backdrop the legislature amended section 102.031 again in 2005, essentially returning it to its pre-1989 form. Incredibly, the statute now mirrors, almost word-for-word, the earlier versions of the law that this court and others repeatedly held to be unconstitutional. Once again Plaintiffs are precluded from asking a voter's "opinion" within the 100-foot zone ("facts" are now off limits too); "conducting a poll" is precluded as well. The legislature's official explanation for turning back the clock on section 102.031 consists of a general assertion that the 1989 amendments "created a lot of confusion," placed "a lot of discretion in the hands of the poll workers," and had "the potential to be applied inconsistently and in an arbitrary manner." *See* Florida House of Representatives Staff Analysis, H.B. 1567 (Apr. 20, 2005) ("Florida Staff Analysis"). But rather than clarifying the allegedly confusing and *potentially* arbitrary exceptions in the law, the legislature abolished those exceptions altogether — exceptions that were effectively mandated by the courts some 20 years earlier. Now, for the first time in almost two decades, Plaintiffs are once again prohibited from interviewing voters within 100 feet of Florida polls.

Whatever its reasons, the legislature acted in total disregard for the decisions of no fewer than five courts holding that similar laws violated the First Amendment. If the legislature were serious about achieving the goals it purports to advance, it would have left the 1989 amendments in place, or at least made an effort to craft amendments that comport with the First Amendment and the clear instructions of the courts. To appreciate the striking similarities between the now current version of section 102.031 and the version previously deemed unconstitutional, consider the following chart containing the relevant portions of each statute:

Fla. Stat. § 102.031 (Today)	**Fla. Stat. § 102.031 (Held Unconstitutional in 1988)**
(4)(a) No person, political committee, committee of continuous existence, or other group or organization *may solicit voters inside the polling place or within 100 feet of the entrance to any polling place, or polling room where the polling place is also a polling room, or early voting site.* Before the opening of the polling place or early voting site, the clerk or supervisor shall designate the no-solicitation zone and mark the boundaries. (emphasis added)	(3)(a) No person, political committee, committee of continuous existence, or other group or organization *may solicit voters within 150 feet of any polling place, or polling room where the polling place is a shopping center or mall on the day of any election.* (emphasis added)
(b) For the purpose of this subsection, the term "solicit" shall include, but not be limited to, *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. (emphasis added)	(b) For the purpose of this subsection, the term "solicit" shall include, but not be limited to, *soliciting or attempting to solicit any vote, opinion, or contribution for any purpose*; distributing or attempting to distribute any political or campaign material; soliciting or attempting to solicit a signature on any petition; and selling or attempting to sell any item, except within an established place of business. (emphasis added)

Plainly, the only substantive difference between the new law and the old law is that the new law prohibits exit polling within 100 feet, instead of 150 feet. But that is a distinction without a difference. *See Firestone,* 538 So. 2d at 459 (invalidating 50 foot ban). As demonstrated in the Lenski Affidavit, a 100 foot prohibition poses a severe hardship on Plaintiffs' ability to reliably and accurately report on voting trends. Lenski Aff't ¶¶ 9, 23. Moreover, the newly amended version of the statute, like the version previously invalidated, prohibits *all* activities which seek to obtain information from a voter, whether disruptive or not. As discussed below, peaceful and unobtrusive interviews or exit polls of willing voters after they have voted simply do not implicate the State's interest in maintaining the integrity of the electoral process.

The 1989 amendments to section 102.031 accounted for this by expressly permitting non-disruptive exit polling; the more recent amendments, however, do not.

Indeed, the recently amended statute contains none of the provisions added to the law in 1989 to make it constitutionally sound. Not only does it lack an exception for non-disruptive solicitation, it also lacks an exception for soliciting opinions in private homes and businesses and, further, remains underinclusive by permitting anyone to be within the restricted zone as long as they do not gather information from voters. Thus, Plaintiffs are right back where they were in 1988 when section 102.031 was last declared unconstitutional. The statute should be struck down again insofar as it prohibits Plaintiffs' exit polling activities and, until then, its enforcement should be appropriately enjoined.

ARGUMENT

The prerequisites for obtaining preliminary injunctive relief in this Circuit are well established. Movants must demonstrate that: (i) they have a substantial likelihood of success on the merits; (ii) irreparable injury will be suffered unless the injunction issues; (iii) the threatened injury to movants outweighs whatever damage the proposed injunction may cause the opposing parties; and (iv) if issued, the injunction would not be adverse to the public interest. *KH Outdoor, LLC* v. *City of Trussville*, 458 F.3d 1261, 1268 (11th Cir. 2006). Here, as demonstrated below, Plaintiffs easily satisfy the criteria for obtaining preliminary injunctive relief.

I. THERE IS A SUBSTANTIAL LIKELIHOOD THAT PLAINTIFFS WILL PREVAIL ON THE MERITS

It is beyond dispute that exit polling is protected under the First Amendment. This court has said so explicitly, *see Smith*, 681 F. Supp. at 802 ("the conduct of exit polling and journalistic interviews are protected by the First Amendment guarantees of free speech and free press"), and as discussed below, every other federal court to consider the question has agreed. These decisions make sense. Any prohibition of exit polling necessarily restricts the freedom of the press to communicate with the public about how and why people have voted,

which is precisely the sort of discussion protected by the core of the First Amendment. *See Mills* v. *Alabama*, 384 U.S. 214, 218-19 (1966) (recognizing that one "major purpose" of the First Amendment was to protect free discussion about "candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes").

Section 102.031 is a "content-based" restriction on protected speech. As such, the law cannot survive constitutional scrutiny unless the defendants here prove that it is narrowly tailored to serve a compelling state interest. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002). To show that a law is narrowly tailored, its defenders must demonstrate that it "does not 'unnecessarily circumscrib[e] protected expression.'" *Id.* at 775 (quoting *Brown* v. *Hartlage*, 456 U.S. 45, 54 (1982)).

Accordingly, this court in *Smith* considered whether section 102.031 was "the least restrictive means" by which the State could achieve its interest. 681 F. Supp. at 804. Although the court recognized that Florida "surely has a substantial interest in preserving the fairness and integrity of elections and ensuring a protected area of voter sanctity and decorum," the court concluded that the statute struck far too broadly at protected activities:

> The statute forbids "soliciting or attempting to solicit any ... opinion ... for any purpose ..." Fla. Stat. § 102.031(3)(b). By its literal terms, the solicitation of all "opinion" from voters within 150 feet of the polling place is outlawed. . . . To the extent 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.

Id. at 803-04 (citations omitted). Plainly, the same can be said of the new version of the law, which also prohibits all forms exit polling and interviewing in the restricted zone.

In *Smith*, the court rejected the State's argument that this broad prohibition was "necessary to the orderly functioning of the electoral process." *Id.* at 802. To the contrary, the court observed that there had been "no showing that exit polls or other voter interviews by journalists in any way have disrupted any polling place" or that "the presence of reporters near a polling place tends to discourage anyone from voting." *Id.* at 803. *See also Firestone*, 538 So.

2d at 459 (striking down ban on all non-voters within fifty feet of polling places because State's "unsubstantiated concern of potential disturbance [was] not sufficient to overcome the chilling effect on first amendment rights"). Nor is there any such evidence today. *See* Lenski Aff't ¶ 21 ("Our polling reporters have conducted such exit polls immediately outside the exit of polling place buildings in Florida during prior elections, including both the 2004 and 2000 general elections and the 2004 presidential primary election, and I am not aware of any complaint from the Secretary of State or any other election official that any of our exit poll reporters interfered with the voting process or hindered any voters in any manner.").

The decisions in *Smith*, *Clean-Up '84*, *Spanish International*, and *Florida Committee*, all of which considered virtually the same statute at issue here, provide more than enough basis to conclude that Plaintiffs are likely to succeed in this case. The decision of the Supreme Court of Florida in *Firestone*, 538 So. 2d at 459, which struck down a ban on non-voters within a *narrower* area of fifty feet, provides more support for enjoining the new law, if any were needed. As noted, each of the constitutional shortcomings identified by the courts in those cases is present in the new law as amended — *i.e.*, the new law prohibits even non-disruptive exit polling; it includes no exception for private homes and business; and it is fatally underinclusive. Thus, based on the reasoning of these Florida state and federal courts, Plaintiffs have an extraordinarily high likelihood of prevailing in this case.

Even if these decisions were not enough support for the present motion, there is ample additional authority. As noted, each of the federal courts to have considered whether exit polling may be restricted consistent with the First Amendment has held that it cannot. This unanimity of authority provides still more reason for this court to grant Plaintiffs' request for preliminary injunctive relief.

The leading case in this field outside of Florida is *Daily Herald Co.* v. *Munro*, 838 F.2d 380 (9th Cir. 1988), which was decided one month prior to the decisions in *Smith* and *Florida Committee*. In *Daily Herald*, the United States Court of Appeals for the Ninth Circuit held that "exit polling constitutes speech protected by the First Amendment, not only in that the

information disseminated based on the polls is speech, but also in that the process of obtaining the information requires a discussion between pollster and voter." *Id.* at 384. Similar to the decisions in *Smith* and *Florida Committee*, the Court of Appeals in *Daily Herald* found that a blanket ban on exit polling (in that case extending 300 feet from the polling place) was impermissible because it would prohibit exit polling even where it is not disruptive to the electoral process. *Id.* 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."). Section 102.031, as amended, plainly suffers from the same defect.

Federal courts in Georgia, Kentucky, Minnesota, Montana, Ohio and Wyoming have also considered challenges to the constitutionality of exit polling regulations and all have either struck down or enjoined enforcement of the challenged statutes. In Minnesota, for example, state officials were enjoined from enforcing that state's 100-foot ban on exit polls during the 1988 national election. *CBS Inc.* v. *Growe*, 15 Med. L. Rep. (BNA) 2275 (D. Minn. 1988) (annexed as Exhibit 12 to the Miller Aff't). Likewise, in Georgia, the United States District Court for the Middle District of Georgia permanently enjoined Georgia election officials from prohibiting exit polling activities more than 25 feet from Georgia polling places. *National Broadcasting Co.* v. *Cleland*, 697 F. Supp. 1204 (N.D. Ga. 1988). In Kentucky, the United States District Court for the Western District of Kentucky enjoined election officials from enforcing that state's statute prohibiting exit polls and entered judgment declaring that the statute at issue was unconstitutional as applied to exit polling activities. *Journal Broadcasting, Inc.* v. *Logsdon*, No. C88-0147-L(A), 1988 U.S. Dist. Lexis 16864 (W.D. Ky. Oct. 21, 1988). In Montana, the United States District Court there enjoined state officials from enforcing that state's 200-foot ban on exit polls in connection with the Montana presidential preference primary. *National Broadcasting Co.* v. *Colburg*, 699 F. Supp. 241 (D. Mont. 1988). And in Wyoming, the United States District Court there struck down Wyoming's 300-foot ban on polling activities

and permanently enjoined state officials from enforcing it. *National Broadcasting Co.* v. *Karpan*, No. C88-0320 (D. Wyo. Oct. 21, 1988) (annexed as Exhibit 15 to the Miller Aff't).

Most recently — indeed, just this week — a federal district court in Ohio issued an order permanently enjoining the Secretary of State of Ohio from prohibiting exit polls within 100 feet of polling places. The court found that "exit polling is a form of speech protected under the First Amendment" and held that "the challenged restriction does not survive strict scrutiny because it is neither necessary nor narrowly tailored to serve the State of Ohio's interest in preventing overcrowding and disruption" at the polls. *See American Broadcasting Co.* v. *Blackwell*, Case No. 1:04cv750, slip op. at 39 (S.D. Ohio Sept. 26, 2006) (annexed as Exhibit 11 to the Miller Aff't). Among other things, the court also noted 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 "the impact of exit polls on the voter egress appears to be negligible." *Id.* at 38.

In the course of striking down (or enjoining the enforcement of) the various statutes and directives at issue in these cases, the courts emphasized many of the same points that had been emphasized by courts in this State and Circuit, including that exit polls provide invaluable information to the public, *see, e.g.*, *Cleland*, 697 F. Supp. at 1209; *Growe,* 15 Med. L. Rep. at 2278, and that the distance restrictions at issue so burdened the press' ability to gather information as to render the restrictions unconstitutional, *see e.g., Cleland*, 657 F. Supp. at 1209-1210; *Journal Broadcasting,* 1988 U.S. Dist. LEXIS 16864, at *3; *Karpan*, slip op. at 7.

Plainly, the decisions in *Clean-Up '84*, *Spanish International*, *Florida Committee*, *Smith*, and *Firestone*, combined with the overwhelming and unanimous authority from other jurisdictions, establish that Plaintiffs are likely to succeed in their request for a declaration in this case that Fla. Stat. §102.031(4)(a), (b), violates the First Amendment as applied to their exit polling activities.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM UNLESS PRELIMINARY INJUNCTIVE RELIEF IS GRANTED

The Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). *See also Cate* v. *Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983). Because section 102.031 so severely restricts Plaintiffs' rights under the First Amendment, a preliminary injunction should issue.

Not only would enforcement of the statute against Plaintiffs restrict their First Amendment rights, it would also result in the loss of valuable voter information. *See* Lenski Aff't ¶ 23. In that regard, the court in *Smith* observed that "[b]ecause of the very nature of exit polls, there are no alternative days or different methods to collect the data they gather." 681 F. Supp. at 805. If Plaintiffs' request for an injunction is denied, the important information that would otherwise have been gathered will be forever lost. Such an irretrievable loss of valuable information constitutes irreparable harm that cannot be recompensed by a monetary award, a factor that weighs decidedly in favor of granting Plaintiffs' motion for a preliminary injunction. *See Elrod*, 427 U.S. at 373.

III. PLAINTIFFS WILL SUFFER MORE HARM FROM DENIAL OF PRELIMINARY INJUNCTIVE RELIEF THAN DEFENDANTS WILL SUFFER IF THE RELIEF IS GRANTED

Plaintiffs will suffer enormous harm if their request for an injunction is not granted. As the court observed in *Smith*, enforcement of the old section 102.031 against the solicitation of all opinion within 150 feet of the polling place would have "destroy[ed] the ability effectively to conduct exit polls and reporters' interviews throughout Florida." 681 F. Supp at 805. The same is true of the current law and its 100 foot prohibition. *See* Lenski Aff't ¶¶ 9, 23 ("[W]hen our interviewers were required to stand 100 feet or more from the polling location, we had statistical error rates in those precincts that were more than twice the error rates we experienced in precincts where the interviewer was able to stand within 25 feet of the polling lo-

cation. . . . On the basis of my experience . . . if our exit poll reporters are held to a distance of 100 feet at our selected precincts in Florida, their exit poll activities will be substantially impaired and the statistical reliability and accuracy of our exit poll will be substantially reduced.")

By the same token, the requested order will cause no substantial harm to the defendants or the voters of Florida. Exit polling had been expressly permitted in the State of Florida since the 1989 amendments to section 102.031. There is nothing in the legislative history, and Plaintiffs are aware of nothing, to suggest that their exit polling has infringed on any Floridians right to vote or otherwise disrupted the electoral process. While the Staff Analysis report for section 102.031 indicated that the "solicitation of voters in close proximity to polling places leads to voter intimidation and interferes with the maintenance of order at the polls," Florida Staff Analysis, *nothing* in the legislative history so much as hints that exit polling, in particular, is responsible for any intimidation or disruption. This should come as no surprise. The court in *Smith* specifically observed that there was "no evidence suggesting that exit polling or reporters' interviews within 150 feet would disrupt any polling place in any manner[.]" 681 F. Supp. at 805. *See also Blackwell*, slip op. at 38 (concluding "there is no evidence that plaintiffs' exit polls caused disruption, overcrowding or interfered with the voting process in any way" and "the impact of exit polls on the voter egress appears to be negligible"). *See generally, Firestone*, 538 So. 2d at 459 (noting that State submitted no evidence of disturbances having occurred within *fifty feet* of polling places). Likewise, in *Burson* v. *Freeman*, 504 U.S. 191, 207 (1992), which upheld a ban on electioneering near polling places, the Supreme Court concluded that while "there is . . . ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud . . . there is simply no evidence that political candidates have used other forms of solicitation *or exit polling* to commit such electoral abuses." (emphasis added).[3] The Court in *Burson* further observed that "allowing members of

[3] According to the Staff Analysis, the legislature believed that the plurality and concurring opinions in *Burson* supported the constitutionality of the 2005 amendments because in that case, the Court upheld a 100-foot ban on electioneering. To the contrary, the Supreme Court's decision in *Burson* was extraordinarily careful to distinguish electioneering activities from other activities at polling

Footnote continued on next page.

the general public access to the polling place makes it more difficult for political machines to buy off all the monitors." *Id.* Citing that passage from *Burson*, the court in *Blackwell* concluded that "[t]he presence of the press at polling places would likely serve as a *deterrent* to fraud and intimidation." *Blackwell*, slip op. at 34 (emphasis added).

In any event, even if there were any reason to presume some disruption from Plaintiffs' exit polling activities (which there is not), election officials have more than enough in their legislative arsenal to address the concern without prohibiting exit polling altogether. *Smith*, 681 F. Supp. at 805 ("Moreover, there exist other statutory provisions concerning polling place activities by which order and decorum may be maintained at Florida's polls and the integrity of the voting process protected."); *American Broadcasting Co.* v. *Blackwell*, Case No. 1:04cv0750, slip op. at 8 (S.D. Ohio Nov. 1, 2004) (attached as Exhibit 10 to the Miller Aff't) (granting temporary restraining order against enforcement of 100-foot ban on exit polling because, *inter alia*, "statutory mechanisms are in place which permit election officials to remove individuals who become disruptive.").

IV. THE PUBLIC INTEREST WILL BE SERVED BY GRANTING PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF

The public interest will be served in two important and related respects by granting Plaintiffs the requested relief. First, the citizens of Florida and of the United States as a whole have an interest in the robust and free debate of public issues. In particular, all citizens have an interest in unfettered communication and commentary about elections, government, and politics — issues that are at the heart of representative democracy and self-government.

Footnote continued from previous page.

places (specifically including exit polling activities) in concluding that a ban on electioneering was both historically justified and narrowly tailored to advance the state's interest in preventing electoral fraud. As every court that has considered the issue has concluded, exit polling is not electioneering. *See Burson*, 504 U.S. at 207. *See also Blackwell*, slip op. at 33 ("Unlike the speech at issue in *Burson* . . . exit polling cannot reasonably be construed as a form of electioneering under any definition of that term."); *Journal Broadcasting*, 1988 U.S. Dist. LEXIS 16864, at *5.

In this regard, the court in *Smith* concluded that "an injunction would not be adverse to the public interest," but instead "that interest would be advanced as our system of government begins with 'a profound national commitment to the principal that debate on public issues should be uninhibited, robust and wide open.'" *Id.* at 805 (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)). *See also Roth* v. *United States*, 354 U.S. 476, 484 (1957) (the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."). Plainly, the interchange that occurs during the exit polling process is one that goes to the core of the First Amendment and touches upon the very essence of self-governance in a democracy.

Second, it is axiomatic that "'it is always in the public interest to prevent violation of a party's constitutional rights.'" *Deja Vu, Inc.* v. *Metropolitan Government*, 274 F.3d 377, 400 (6th Cir. 2001) (quoting *G & V Lounge, Inc.* v. *Michigan Liquor Control Commission*, 23 F.3d 1071, 1079 (6th Cir. 1994)), *cert. denied*, 535 U.S. 1073 (2002). First Amendment rights have historically been accorded stringent protection, not only because of the intangible nature of the benefits flowing from the exercise of those rights, but also because of the fear that if such rights are not jealously safeguarded persons will be deterred, even if imperceptibly, from exercising those rights in the future. The public interest will be better served by the prevention of any such chilling effect, which would deprive citizens, political leaders, journalists, and scholars of some or all of the uniquely accurate and detailed information that is provided by such polling. Thus, the public interest factor of the inquiry also weighs in favor of granting Plaintiffs' motion for a preliminary injunction.

CONCLUSION

The Court should grant Plaintiffs' motion for a preliminary injunction and enjoin defendants from enforcing Fla. Stat. § 102.031 (4)(a), (b), so as to prohibit Plaintiffs' exit polling activities within 100 feet of Florida polling places on November 7, 2006.

Dated: September 27, 2006

Respectfully submitted,

GUNSTER, YOAKLEY & STEWART P.A.

By: _____

Raymond V. Miller, Esq.
GUNSTER, YOAKLEY & STEWART P.A.
One Biscayne Tower, Suite 3400
Two South Biscayne Blvd.
Miami, Florida 33131
Telephone: (305) 376-6000
Facsimile: (305) 376-6010

Counsel for 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.,

Of Counsel:

Susan Buckley
Kevin J. Burke
Brian Markley
CAHILL GORDON & REINDEL LLP
80 Pine Street
New York, New York 10005

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing is being served upon the Defendants along with the Complaint and Summons.

By: _____ FBN: 818054
for Raymond V. Miller