

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

BRYAN NORRIS and
NORRIS FOR ARKANSAS,

Plaintiffs,

v.

TIM GRIFFIN, in his official capacity
as Attorney General of Arkansas, and
COLE JESTER, in his official capacity
as Secretary of State of Arkansas

Civil Action No. 5:26-cv-05005-SOH

**MEMORANDUM IN SUPPORT
OF MOTION FOR A
PRELIMINARY INJUNCTION**

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
BACKGROUND	3
Exit Polling.....	3
State Statutory Bans on Electioneering.....	5
The Enactment of Act 728 in 2021.....	5
Plaintiffs’ Exit Polling Plan	7
ARGUMENT	8
I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.....	8
A. The 100-Foot Blanket Ban Burdens Exit Polling, Which is Protected by the First Amendment	8
B. The 100-Foot Blanket Ban on Exit Polling Advances No Significant Governmental Interest.....	9
C. Even if Restricting Exit Polling Served a Significant Governmental Interest, the 100-Foot Blanket Ban Is Not Narrowly Tailored to Serve That Interest.....	13
II. PLAINTIFFS FACE IRREPARABLE HARM ABSENT AN INJUNCTION	17
III. THE EQUITIES FAVOR AN INJUNCTION	18
IV. THE COURT SHOULD WAIVE RULE 65(C)’S SECURITY REQUIREMENT	18
CONCLUSION	19

TABLE OF AUTHORITIES

Cases

American Broadcasting Co., Inc. v. Blackwell,
479 F. Supp. 2d 719 (S.D. Ohio 2006)9, 13-14

American Broadcasting Companies, Inc. v. Heller,
2006 WL 3149364 (D. Nev. Nov. 1, 2006) 14-15

American Broadcasting Companies, Inc. v. Wells,
669 F. Supp. 2d 483 (D.N.J. 2009)9, 11, 14

Burson v. Freeman,
504 U.S. 191 (1992)..... 5, 10-11, 13

CBS Broadcasting, Inc. v. Cobb,
470 F. Supp. 2d 1265 (S.D. Fla. 2006) 15

Daily Herald Co. v. Munro,
838 F.2d 380 (9th Cir. 1988)8-9, 11, 14

Dakotans for Health v. Noem,
52 F.4th 381 (8th Cir. 2022).....8, 17-18

Elrod v. Burns,
427 U.S. 347 (1976)..... 17

Get Loud Arkansas v. Thurston,
748 F. Supp. 3d 630 (W.D. Ark. 2024) 1

Goyette v. City of Minneapolis,
338 F.R.D. 109 (D. Minn. 2021)..... 18

Hopkins v. Jegley,
508 F. Supp. 3d 361 (E.D. Ark. 2020) 18

Kleindienst v. Mandel,
408 U.S. 753 (1972)..... 8

Mills v. Alabama,
384 U.S. 214 (1966).....8-9

Minnesota Voters Alliance v. Mansky,
138 S. Ct. 1876 (2018) 5

Morehouse Enters., LLC v. BATFE,
78 F.4th 1011 (8th Cir. 2023) 18

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

National Broadcast Co., Inc. v. Cleland,
697 F. Supp. 1204 (N.D. Ga. 1988)..... 15

Peterson v. City of Florence, Minn.,
727 F.3d 839 (8th Cir. 2013) 10

Phelps-Roper v. Nixon,
545 F.3rd 685 (8th Cir. 2008) 18

Richland/Wilkins Joint Powers Auth. v. U.S. Army Corps. of Eng’rs,
826 F.3d 1030 (8th Cir. 2016)..... 18

Roman Catholic Diocese v. Cuomo,
592 U.S. 14 (2020)..... 17

Turtle Island Foods SPC v. Soman,
424 F. Supp. 3d 552 (E.D. Ark. 2019) 19

Virginia St. Board of Pharmacy v. Virginia Citizens Council, Inc.,
425 U.S. 748 (1976)..... 8

Ward v. Rock Against Racism,
491 U.S. 781 (1989)..... 9

Statutes, Rules, and Attorney General Opinions

Act 728 of 2021 (Senate Bill 486), codified at A.C.A. § 7-1-103(a)(24).....*passim*

Arkansas Code Ann. § 7-1-103(a)(8)(B) 5

Arkansas Code Ann. § 7-1-103(a)(24)*passim*

Ohio Rev. Code §§ 3501.20, 3501.35 & 3599.24 14

Fed. R. Civ. P. 65(c)18-19

Opinion No. 99-330, Arkansas Attorney General,
Jan. 27, 2000, 2000 Ark. AG LEXIS 2 11

Opinion No. 2004-268, Arkansas Attorney General,
Oct. 5, 2004, 2004 Ark. AG LEXIS 261.....9-11

Other Authorities

Adam Clymer, “Warren J. Mitofsky, 71, Innovator
Who Devised Exit Poll, Dies,” *N.Y. Times*, Sept. 4, 2006 3

William J. Mitofsky & Murray Edelman,
“The Exit Poll Phenomenon,” in Paul J. Lavrakas
& Jack K. Holley (Eds.), *Polling and Election Coverage* (1991) 3

Liberty Vittert and Xiao-Li Meng,
“An Interview With Murray Edelman on the History of
the Exit Poll,” *Harvard Data Science Review*, Feb. 24, 2021 3

James J. Woodruff II, *Freedom of Speech & Election Day at the Polls:
Thou Doth Protest Too Much*, 65 Mercer L. Rev. 331 (2014)..... 5

This memorandum is respectfully submitted on behalf of Plaintiffs Bryan Norris and his state campaign committee, Norris for Arkansas, in support of their motion for a preliminary injunction.

INTRODUCTION

Act 728, enacted by the Arkansas legislature on April 19, 2021, amended the election code to add to the existing, narrowly tailored ban on “electioneering” within 100 feet of a polling place (codified at A.C.A. § 7-1-103(8); *see* Complaint ¶¶ 14-15), the following blanket prohibition:

A person shall not enter or remain in an area within one hundred feet (100') of the primary exterior entrance to a building where voting is taking place except for a person entering or leaving a building where voting is taking place for lawful purposes.

Act 728 of 2021 (codified at A.C.A. § 7-1-103(a)(24)).

From the brief debates held on this measure in both the Senate and the House, it is clear that it was prompted not by any concerns about exit polling, but solely by complaints about ostensibly “nonpartisan” activists who, in the guise of “voter support” efforts, had a regular practice of offering drinks, and even meals, to voters standing in line within this 100-foot distance (often setting up tables for that purpose), in an effort both to encourage early voting and evidently also to build voter support for the group, whose members wore T-shirts identifying their nonprofit organization. Complaint ¶ 32 & note 12; Exhibits F & G. The legislative intent was to stop such “nonpartisan” groups from engaging in covert electioneering, in the guise of “voter support,” and in the process obstructing access to the polling location. There was no recognition of the impact this amendment

would have on exit polling, which the Arkansas Attorney General had previously acknowledged is an activity that does not constitute “electioneering,” and is protected by the First Amendment. Complaint ¶¶ 16-17; Exhibits C & D.

Exit polling was not even mentioned during the legislative debates on Act 728. Notwithstanding one legislator’s objection that “the language is not tailored to the behavior that we’re trying to target,” Complaint ¶ 32, the legislature went ahead and enacted this blanket prohibition on *all* nonvoters—even exit-poll interviewers—remaining within 100 feet of the polling place.

Even though not a single legislator suggested in debates over Act 728 that it was intended to restrict the First Amendment right to engage in exit polling, the statute is being applied in Arkansas to prohibit all exit polling within 100 feet of a polling place. This is illustrated by the Attorney General’s press release dated Oct. 9, 2025, announcing one such prosecution. Complaint ¶ 21; Exhibit H.

Plaintiffs have brought this lawsuit to have Act 728 held unconstitutional as applied to exit polling, both to permit Plaintiffs to go ahead with their plans to conduct exit polling during the Arkansas primary election on March 3, 2026, and also to obtain broadly applicable permanent relief, removing from the election code a restriction that impinges on the rights of all political candidates, private citizens, and media organizations to conduct exit polling in Arkansas.

It is well established, as illustrated by the expert analysis of the matter set forth in Complaint ¶¶ 11-12 and Exhibits A & B, that effective exit polling is simply not viable if conducted at a distance of 100 feet. For that reason, all eight federal courts that have considered state statutes requiring exit polling to be conducted at

100 feet or farther from the polling site have invalidated these statutes, concluding that they are not narrowly tailored to address any compelling or significant governmental interest. See pp. 13-15 & note 6, *infra*. In enacting the 100-foot blanket ban, the legislature made no attempt to narrowly tailor it, to ensure that effective exit polling would be viable under the statute. Under well-established precedent, Act 728 must be held unconstitutional as applied to exit polling.

BACKGROUND

Exit Polling

Exit polling of voters who agree to answer questions upon leaving the polling place is a well-accepted method for obtaining accurate information about *for whom* voters have cast their ballots, and *why*, which has been in use since the 1960s.¹ In addition to being used by media outlets to inform the public about voting behavior, voting trends, and voters' reactions to important issues of the day, exit polling is also a tool relied on by political campaigns.

How exit polls are conducted, and why they are important, are summarized in exhibits to the Complaint prepared by leading experts in the field. See Affidavit

¹ See also William J. Mitofsky & Murray Edelman, "The Exit Poll Phenomenon," in Paul J. Lavrakas & Jack K. Holley (Eds.), *Polling and Election Coverage* 1-25 (1991) (https://us.sagepub.com/sites/default/files/upm-assets/47512_book_item_47512.pdf) (<https://perma.cc/ATF3-XU7X>); Liberty Vittert and Xiao-Li Meng, "An Interview With Murray Edelman on the History of the Exit Poll," *Harvard Data Science Review*, Feb. 24, 2021 (<https://hdsr.mitpress.mit.edu/pub/fekmqbv4/release/3>) (<https://perma.cc/F4EG-SGC4>); Adam Clymer, "Warren J. Mitofsky, 71, Innovator Who Devised Exit Poll, Dies," *N.Y. Times*, Sept. 4, 2006 (<https://archive.is/DxcIh>).

of Joseph W. Lenski, III (Exhibit A); Declaration of Dr. Kathleen A. Frankovic (Exhibit B). Typically, one exit poll worker is assigned to each of the polling places selected for the polling. The pollster stands just outside the exit of the building in which the polling is being conducted. Pollsters wear a badge clearly identifying them as conducting an exit poll, and as not being affiliated with a political candidate or political party. Pollsters are instructed to be courteous and businesslike and not to interfere with the election process in any way. Pollsters engage voters only after they leave the polling place, in a predetermined pattern (e.g., every third voter, every fifth voter, etc.), and they ask if the voter would be willing to fill out a brief, anonymous questionnaire. The typical questionnaire solicits information on how the voter voted in the election, and on the voter's views of various political topics of the day, and it also requests demographic information from each participating voter. Lenski Aff. ¶¶ 5-9; Frankovic Decl. ¶¶ 8-12.

Effective exit polling requires face-to-face interaction with voters immediately upon their exit from the polling place, and therefore pollsters are instructed to position themselves as close to the exit as possible without impinging on the ability of voters to freely enter and exit, typically within 10 to 25 feet of the exit. Lenski Aff. ¶¶ 8, 15. Both the quantity and quality of the information collected through exit polling decreases significantly if a pollster is required to stand more than 25 feet from a polling location. Lenski Aff. ¶ 8; Frankovic Decl. ¶¶ 8, 11. Effective exit polling is not viable if it must be conducted at a distance of 100 feet from the polling place. Lenski Aff. ¶¶ 16-18; Frankovic Decl. ¶¶ 8, 11.

State Statutory Bans on Electioneering

Beginning in 1888, as part of their efforts to protect voters from confusion and undue influence in voting, various states, in addition to adopting the “Australian ballot” (ensuring the ability to vote anonymously), began enacting statutes to prevent electioneering near a polling place.² Nearly all states now have statutes in place that prohibit electioneering during voting hours within a defined radius of the entrance to a polling place, with the majority of states having set the distance at between ten and 100 feet.³ The Arkansas statute bans electioneering within 100 feet, a prohibition codified in A.C.A. § 7-1-103(a)(8)(B). Its provisions are summarized in Complaint ¶¶ 14-15.

The Enactment of Act 728 in 2021

Until 2021, there existed under Arkansas law no statutory basis for limiting exit polling within 100 feet outside a polling place. Complaint ¶¶ 16-17; Exhibits C & D. Indeed, there was no ban on any speech-related activity, conducted by anyone within this radius, other than the ban on electioneering. Individuals were free to be present within this radius and engage in speech activity, restricted only by the prohibition against electioneering.

² See generally, *Burson v. Freeman*, 504 U.S. 191, 199-206 (1992) (plurality opinion of Blackmun, J.). See also *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1882-83 (2018).

³ James J. Woodruff II, *Freedom of Speech & Election Day at the Polls: Thou Doth Protest Too Much*, 65 Mercer L. Rev. 331, 348-49 & n.141 (2014) (https://digitalcommons.law.mercer.edu/jour_mlr/vol65/iss2/2) (listing nine states and the District of Columbia as specifying a radius of between 10 and 50 feet, and 20 states as specifying a radius of 100 feet).

That changed on April 19, 2021, with the Arkansas legislature’s enactment of Act 728 (Senate Bill 486).⁴ Act 728, its sponsors explained, was prompted by complaints about ostensibly “nonpartisan” activists who, in the guise of “voter support” efforts, had a regular practice of offering drinks, and even meals, to voters standing in line within this 100-foot distance (often setting up tables for that purpose), in an effort both to encourage early voting and evidently also to build voter support for the group (whose members wore T-shirts identifying their nonprofit organization as the source of the largess). Complaint ¶ 32 & note 12.⁵

The legislative measure adopted to address this concern was to impose a flat ban on *all* speech activity within 100 feet of the polling entrance, by *anyone* except voters who are waiting in line to vote. This flat speech ban was accomplished by banning nonvoters from coming within 100 feet of the polling entrance, except while entering or leaving the building for some other (i.e., non-voting) lawful purpose. This amendment did not supplant the existing ban on electioneering; rather, this new prohibition was added on top of it, appended at the end of the subsection of the section of the election code that contained the electioneering ban:

⁴ Although considered in conjunction with other amendments to the election code that were ultimately adopted, Senate Bill 486 was a standalone measure, spanning a single page: <https://arkleg.state.ar.us/Home/FTPDocument?path=%2FACTS%2F2021R%2FPublic%2FACT728.pdf> (<https://perma.cc/2CY8-YN3A>) (Exhibit E). (Originally slated for codification as A.C.A. § 7-1-103(a)(23), to accommodate a later amendment it was codified as A.C.A. § 7-1-103(a)(24).)

⁵ Videos of the debates on Senate Bill 486 are archived here: <https://arkleg.state.ar.us/Bills/Detail?id=SB486&ddBienniumSession=2021/2021R>

For the Court’s convenience, unofficial transcripts of the debates in the Senate and House of Representatives are included as Exhibit F and Exhibit G, respectively.

A person shall not enter or remain in an area within one hundred feet (100') of the primary exterior entrance to a building where voting is taking place except for a person entering or leaving a building where voting is taking place for lawful purposes.

Act 728 of 2021 (codified at A.C.A. § 7-1-103(a)(24)).

Plaintiffs' Exit Polling Plan

As part of their campaign efforts, Plaintiffs have entered into an agreement with Rasmussen Reports, LLC ("Rasmussen"), a well-established polling and survey research firm, to have it conduct exit polling in at least seven counties in Arkansas (including Benton, Sebastian, and Washington) during the primary election on March 3, 2026. Complaint ¶ 22. Under the agreement, assuming that the exit polling goes forward as contemplated, Plaintiffs will receive the raw polling data, a description of the polling methodology (including sampling and weighting procedures), tabulated data summaries, and a final written report summarizing the findings. Exhibit I (Exit Polling Services Agreement, Jan. 6, 2026) ¶¶ 1.2 & 1.3.

The agreement provides that the work, of course, must be performed in compliance with all applicable federal and state statutes, rules, regulations and other directives. *Id.* ¶ 2.1. Given Act 728 and the Attorney General's recent indication that it will be strictly enforced against exit pollsters, Complaint ¶ 21 & note 11; Exhibit H, Plaintiffs' polling plans can only proceed if this Court issues a preliminary injunction by February 17, 2026, based on the likelihood that Plaintiffs will ultimately succeed in establishing that Act 728 is unconstitutional as applied to exit polling. Complaint ¶¶ 24-25.

ARGUMENT

To obtain a preliminary injunction, Plaintiffs must show: (1) that they are “likely to succeed on the merits”; (2) that they are “likely to suffer irreparable harm in the absence of preliminary relief”; (3) that “the balance of equities tips in [their] favor”; and (4) that “an injunction is in the public interest.” *Dakotans for Health v. Noem*, 52 F.4th 381, 398 (8th Cir. 2022) (cleaned up). *See, e.g., Get Loud Arkansas v. Thurston*, 748 F. Supp. 3d 630, 655 (W.D. Ark. 2024).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

That Act 728 violates the First Amendment, as incorporated against the states by the Due Process Clause of the Fourteenth Amendment, follows from three points. First, the blanket ban on nonvoters remaining within 100 feet of the polling place burdens exit polling, an activity protected by the First Amendment. Second, the 100-foot blanket ban advances no significant governmental interest, because exit polling is in no way disruptive of the voting process. Third and finally, even if the government had some legitimate reason to restrict exit polling, the 100-foot blanket ban is not narrowly tailored toward that end.

A. The 100-Foot Blanket Ban Burdens Exit Polling, Which is Protected by the First Amendment

The First Amendment, of course, protects not merely the right to speak, but also the right to obtain information. *See, e.g., Virginia St. Board of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 748, 756-57 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972). This right includes the right to obtain political information through exit polling. *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (First

Amendment protects all “matters relating to political processes”); *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988) (“exit polling constitutes speech protected by the First Amendment” because “the process of obtaining the information requires a discussion between pollster and voter.”). *See also American Broadcasting Companies, Inc. v. Wells*, 669 F. Supp. 2d 483, 487 (D.N.J. 2009) (“exit-polling is protected speech under the First Amendment”); *American Broadcasting Co., Inc. v. Blackwell*, 479 F. Supp. 2d 719, 734-35 (S.D. Ohio 2006) (same); Opinion No. 2004-268, Arkansas Attorney General, Oct. 5, 2004, 2004 Ark. AG LEXIS 261, at *5 (Exhibit D) (“Exit polling is an activity protected by the First Amendment.”) (citing *Daily Herald Co.*).

As two highly qualified experts offered by Plaintiffs confirm, exit polling is utilized worldwide as a vital means of obtaining information on the voting behavior and political opinions of voters. Affidavit of Joseph W. Lenski, III (Exhibit A), ¶¶ 11-13; Declaration of Dr. Kathleen A. Frankovic (Exhibit B), ¶¶ 9-11.

B. The 100-Foot Blanket Ban on Exit Polling Advances No Significant Governmental Interest

Because Act 728 imposes a blanket ban, extending 100 feet from the polling place, on *all* speech between a nonvoter and voters (as no nonvoter is allowed to remain in this area to converse with voters, on any subject), it may appropriately be evaluated as a content-neutral (not a content-based) restriction on speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791-92 (1989).

Therefore, whether applying this ban *to exit polling* violates the First Amendment turns on whether banning exit polling within 100 feet is narrowly

tailored to advance a substantial governmental purpose. *E.g.*, *Peterson v. City of Florence, Minn.*, 727 F.3d 839, 843 (8th Cir. 2013). If this 100-foot blanket ban applicable to exit polling can be defended at all, it must be defended as a permissible time, place, and manner restriction. It is of course well established that “the government may regulate the time, place and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.” *Burson v. Freeman*, 504 U.S. 191, 197 (1992).

Setting aside for the moment the narrow-tailoring element, it is clear that the “significant governmental interest” element cannot be established with respect to restrictions on exit polling, for there is no basis for concluding that the government has *any* interest in restricting exit polling.

In *Burson*, in upholding a Tennessee statute banning electioneering within 100 feet of a polling place, the Supreme Court concluded that there is certainly a governmental interest justifying a ban on *electioneering*, given the “ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud.” 504 U.S. at 207. The Court rejected an objection that the ban was “underinclusive because it does not restrict other types of speech, such as . . . exit polling, within the 100-foot zone,” noting that “there is simply no evidence that political candidates have used . . . *exit polling* to commit such electoral abuses.” *Id.* (emphasis added). It concluded: “The First Amendment does not require States to regulate for problems that do not exist.” *Id.*

That the Arkansas legislature, like the Tennessee legislature, has never legislated based on a concern that exit polling poses *any* problem, much less one in need of regulation, is illustrated by the opinions issued by two previous Arkansas Attorneys General, explaining that the prohibition on electioneering within 100 feet of a polling place does not apply to exit polling. *See* Complaint ¶¶ 16-17 (quoting Opinion No. 99-330, Arkansas Attorney General, Jan. 27, 2000, 2000 Ark. AG LEXIS 2, at *1 (Exhibit C); Opinion No. 2004-268, Arkansas Attorney General, Oct. 5, 2004, 2004 Ark. AG LEXIS 261, at *1-*2 (Exhibit D)).

Federal appellate and district courts are agreement with the Supreme Court's observation in *Burson* that there is "simply no evidence," 504 U.S. at 207, of exit polling being abused in any way that might interfere with the political process. *See, e.g., Daily Herald Co. v. Munro*, 838 F.2d at 385 n.8 ("no evidence that someone did not vote or voted differently because of the exit polls"); *American Broadcasting Companies, Inc. v. Wells*, 669 F. Supp. 2d 483, 488 (D.N.J. 2009) ("There is no evidence on the record that exit pollsters have ever been engaged in such activity. Even more persuasive is the fact that the exit polling takes place after individuals vote. Voters are not approached entering polling places—and it is conduct affecting voters on their way to the polls that the government may have an interest in protecting."); *American Broadcasting Co., Inc.*, 479 F. Supp. 2d 719, 739 (S.D. Ohio 2006) ("exit polls do not hinder the act of voting itself"); *CBS, Inc. v. Smith*, 681 F. Supp. 794, 803 (S.D. Fla. 1988) ("there has been no showing that exit polls . . . in any way have disrupted any polling place in this state"); *National Broadcast Co., Inc. v. Cleland*, 697 F. Supp. 1204, 1211-12 (N.D. Ga. 1988) ("The State produced no

first-hand evidence that any voter had ever decided not to vote because of the existence of exit polls, or that such a result was in any way a real danger.”).

These observations in federal court opinions issued between 1988 and 2009 are corroborated, and brought up to date, by the opinions of two experts offered by Plaintiffs, who each have several decades of experience, at the highest levels, in the field of political opinion polling. *See* Lenski Aff. ¶ 6 (exit polling is conducted “unobtrusively”); ¶ 9 (clear notice is given that exit pollsters are not “affiliated with a political candidate or political party”; pollsters are trained “not to interfere with the election process in any way”; voters are “approached only after they have voted” and “are informed that their participation is voluntary”); ¶¶ 10-12 (unaware of any unmanageable issues with exit polling that have ever arisen in Arkansas or anywhere else in the last several decades, even in countries less firmly dedicated to orderly elections than the United States); Frankovic Decl. ¶ 12 (“Exit-poll interviews take place after someone has voted, and only with voters who readily consent to be interviewed. As Mr. Lenski has explained in detail, and I concur, exit polling is conducted by highly professional interviewers, who are carefully trained to avoid disrupting the voting process in any way. It is therefore not surprising that exit polling has been conducted over the past half century, both in the United States and abroad, with no indication that it interferes in any way with the voting process.”).

C. Even if Restricting Exit Polling Served a Significant Governmental Interest, the 100-Foot Blanket Ban Is Not Narrowly Tailored to Serve That Interest

Even if Defendants could somehow articulate a significant governmental interest in restricting exit polling—which would require that they produce *evidence* of problems presented by exit polling that have somehow escaped the attention of the state officials sued in all the previous cases in which exit-poll restrictions were struck down, and that likewise have somehow been overlooked by Plaintiffs’ two experts, who each have decades of experience in this field, and are unaware of any such problems—Act 728 cannot meet the requirement that a content-neutral restriction on activity protected by the First Amendment must be “narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.” *Burson, supra*, 504 U.S. at 197. Forcing exit polling to be conducted at a distance of 100 feet is not a measure narrowly tailored to avoid whatever problems the Arkansas legislature *might* imagine could be posed by exit polling even though it, to date, has not imagined *any* problem.

As Mr. Lenski and Dr. Frankovic have summarized, effective exit polling generally requires that the pollster be stationed between ten and 25 feet from the polling place, close enough to sample the opinions of persons who have actually voted, in a statistically reliable manner. Lenski Aff. ¶¶ 14-16; Frankovic Decl. ¶ 11. Effective exit polling is simply not viable at a 100-foot distance. Lenski Aff. ¶¶ 17-18; Frankovic Decl. ¶ 13.

The decision of the federal district court in *ABC v. Blackwell* exemplifies the legal conclusion that follows from the fact that exit polling 100 feet removed from

the polling place is simply not viable: bans set at 100 feet or farther violate the First Amendment, even if they are content-neutral bans. *ABC v. Blackwell* involved Ohio statutes that, similar to the Act 728, imposed a blanket ban on the presence of anyone but voters, and various individuals charged with carrying out the election, from remaining within 100 feet of the polling place. 479 F. Supp. 2d at 722-23 (citing Ohio Rev. Code §§ 3501.20, 3501.35 & 3599.24). After the Ohio Secretary of State issued guidance interpreting the statutes as banning all exit polling within 100 feet (expressing a concern that exit polling might cause problems with crowding near the doors), various media companies sued to invalidate the blanket ban as applied to exit polling. *Id.* at 724-25. The court rejected the state’s argument that it could “ban all speech within the 100 foot zone,” *id.* at 734, holding that the flat 100-foot ban was not “narrowly tailored to serve the State of Ohio’s interest in preventing overcrowding and disruption,” and that because “exit polls conducted 100 feet away from polling places produce less reliable results,” the 100-foot restriction “does not effectively leave open ample alternatives for expression as required by” the legal standard for upholding content-neutral restrictions on speech. *Id.* at 740-41.

ABC v. Blackwell is hardly alone in striking down a state statute mandating that exit polling be conducted at a distance of 100 feet or more from a polling place. Such statutes have been struck down in seven other cases, dating back to 1988: *no ban of 100 feet or more* has ever survived First Amendment scrutiny.⁶

⁶ *Daily Herald Co.*, 838 F.2d at 382-83 (300-foot Washington ban); *ABC v. Wells*, 669 F. Supp. 2d at 484-8 (100-foot New Jersey ban); *American Broadcasting*

It bears emphasis that, unlike some of the legislatures that enacted the bans at issue in those cases, in passing Act 728 the Arkansas legislature never articulated *any* governmental interest at all in restricting exit polling, which for two decades had been explicitly authorized under Arkansas law (via the opinions of two Attorneys General), without incident. It is clear from the legislative debates on Senate Bill 486, which became Act 728, that the measure was prompted not by any concerns about exit polling, but solely by complaints about ostensibly “nonpartisan” activists who, in the guise of “voter support” efforts, had a regular practice of offering drinks, and even meals, to voters standing in line within this 100-foot distance (often setting up tables for that purpose, impinging on access to polling places), in an effort both to encourage early voting and evidently also to build voter support for the group (whose members wore T-shirts identifying their nonprofit organization as the source of the largess).⁷

Companies, Inc. v. Heller, 2006 WL 3149364, *1 (D. Nev. Nov. 1, 2006) (100-foot Nevada ban); *CBS Broadcasting, Inc. v. Cobb*, 470 F. Supp. 2d 1265, 1371-72 (S.D. Fla. 2006) (100-foot Florida ban); *National Broadcasting Co., Inc. v. Colburg*, 699 F. Supp. 241, 242 (D. Mont. 1988) (200-foot Montana ban); *NBC v. Cleland*, 697 F. Supp. at 1206 (250-foot Georgia ban); *CBS v. Smith*, 681 F. Supp. at 796 (150-foot Florida ban).

⁷ See, e.g., Exhibit F (Senate debate) at 3 (“what we found during the last election cycle, that there were those who were setting up tables within the hundred foot” area); *id.* at 4 (bill “would prevent anybody from setting anything up within the hundred-foot line zone . . . from camping out or setting up tables or anything of that nature”); *id.* at 5 (“But to go into that hundred-foot zone and set up a table, and part of this, as it was testified in committee, is dealing with, you know, disability rights, as far as blocking any obstructions going in and out.”); *id.* at 7 (“this last election, I saw ‘nonpartisan’ people, campaigning directly in line, multiple times, under the guise of doing it for voter reasons”); *id.* at 8 (“But Senator, there are people that disobey, that break the rules. . . . So the fact is, if we can’t get people to be honest, then this is what happens. This is what has to be done. . . .

That the bill sponsors were unwilling to amend the bill to narrowly tailor it to the specific problem they were addressing is clear from the objection one legislator, who gave an example of how a failure to narrowly tailor the bill could criminalize conduct unrelated to the concerns that had prompted the bill. As Senator Clarke Tucker observed:

[T]o the extent you're trying to prevent voter harassment or blocking of entrances, I'm totally in support of that.

But either way, the language is not tailored to the behavior that we're trying to target. And I think it is going to create criminal behavior that is not part of the intent.

Like, for example, if I'm just taking my kids to vote with me, they're entering and remaining in that space if there's a long line, which I always take my kids to vote with me. And my kids could be guilty of this misdemeanor, in the way that this law is written.

Exhibit F at 7-8.

We're just saying, stop the electioneering, or coming in and trying to influence people's votes, under the guise of something like that."); *id.* at 9 ("The simple fact of the matter is, there are people that have claimed to be nonpartisan, and it's hard to stop it. And so, unfortunately, what they're saying is we're just going to stop it wholly altogether!"); *id.* at 11 (bill "[p]revents groups or persons from setting up tables and remaining within a hundred feet of the polling site for unlawful purposes, which could lead to a violation of ADA. . . . Pulaski County received multiple complaints regarding campaign workers offering meal tickets to voters within the hundred foot zone. . . . Several nonpartisan groups set up food and information tables at vote centers in Pulaski County."); Exhibit G (House debate) at 3 ("There were several instances where voters called to complain that there were people crowding around the entrance where they were entering and, you know, handing out water. I think there were sandwiches being handed out. But, you know, this—they were wearing their T-shirts for their organization that was doing this."); *id.* ("Considering the complaints, and considering the fact that there is to be no electioneering within 100 feet of the voting location, this language had to be crafted, considering that people were not respecting that."); *id.* at 5 ("But you don't need to be hanging out in that hundred—camping out in that 100-foot perimeter that is considered sacrosanct on election day.").

The uniform body of precedent striking down blanket bans on exit polling, plus the expert analysis of Mr. Lenski and Dr. Frankovic, plus the legislative record demonstrating that the sponsors of Act 728 did not articulate *any* governmental interest in restricting exit polling, and made no effort to narrowly tailor the statute to ensure that exit polling could remain viable, do much more than demonstrate Plaintiffs are *likely* to succeed on the merits.

Act 728's 100-foot blanket ban *obviously* violates the First Amendment as applied to exit polling. There is no plausible basis on which to defend it. In the interest of judicial efficiency, and to bring the Arkansas election code in compliance with the federal Constitution as soon as practicable, Plaintiffs respectfully request that this Court consider Plaintiff's motion for a preliminary injunction as a vehicle for a final decision on the merits of the case. After allowing Defendants to be heard on the matter (perhaps Defendants will readily accede to the relief requested), the Court should issue an order granting final declaratory and permanent injunctive relief against the application of Act 728 to exit polling.

II. PLAINTIFFS FACE IRREPARABLE HARM ABSENT AN INJUNCTION

“To show irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.” *Dakotans for Health*, 52 F.4th at 392 (cleaned up). “There can be no question that the challenged [law], if enforced, will cause irreparable harm.” *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 19 (2020). “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). In this case,

absent a grant of relief by February 17, Plaintiffs will suffer irreparable injury, through the loss of the ability to engage in exit polling during the March 3 primary election. See p. 7, *supra*.

III. THE EQUITIES FAVOR AN INJUNCTION

“The third and fourth factors for a preliminary injunction—harm to the opposing party and the public interest—merge when the Government is the party opposing the preliminary injunction.” *Morehouse Enters., LLC v. BATFE*, 78 F.4th 1011, 1018 (8th Cir. 2023). Arkansas “has no interest in enforcing overbroad restrictions that likely violate the Constitution.” *Dakotans for Health*, 52 F.4th at 392. And “it is always in the public interest to protect constitutional rights.” *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008). The third and fourth factors for a preliminary injunction thus strongly favor Plaintiffs.

IV. THE COURT SHOULD WAIVE RULE 65(C)’S SECURITY REQUIREMENT

Courts have discretion to waive the security requirement of Fed. R. Civ. P. 65(c) when “the damages resulting from a wrongful issuance of an injunction have not been shown” or where the public interest is served by not requiring a bond. *Richland/Wilkins Joint Powers Auth. v. U.S. Army Corps. of Eng’rs*, 826 F.3d 1030, 1043 (8th Cir. 2016). Defendants face no monetary harm from an injunction preventing them from enforcing Act 728’s 100-foot blanket ban on exit polling. And “[c]ourts have concluded that a bond is not required to obtain preliminary injunctive relief when a plaintiff is seeking to prevent a government entity from violating the First Amendment.” *Goyette v. City of Minneapolis*, 338 F.R.D. 109, 121 (D. Minn. 2021). See, e.g., *Hopkins v. Jegley*, 508 F. Supp. 3d 361, 454 (E.D. Ark. 2020)

(waiving Rule 65(c) bond because the defendants offered no evidence they would be financially harmed if wrongfully enjoined and plaintiffs were “serving a public interest in acting to protect constitutional rights”); *Turtle Island Foods SPC v. Soman*, 424 F. Supp. 3d 552, 579 (E.D. Ark. 2019) (waiving Rule 65(c) bond because “the State has not requested security in the event this Court grants a preliminary injunction nor is there evidence regarding whether, or in what amount, the State will be financially harmed if the Court grants a preliminary injunction”). The Court should waive the security requirement here.

CONCLUSION

The Court should, at minimum, issue a preliminary injunction no later than February 17, to preserve the ability of Plaintiffs to carry out exit polling as planned on March 3. Ideally the Court should also use this motion to resolve the merits of the case, by placing Defendants on notice that it will be converted to a motion for summary judgment and, as soon as practicable, by issuing final declaratory and permanent injunctive relief holding Act 728 unconstitutional as applied to exit polling.

Dated: January 8, 2026

Respectfully submitted,

/s/ Chris Corbitt

Kenneth Chesebro*
Texas Bar No. 4184400
5000 Plaza on the Lake
Ste. 100 2050
Austin, TX 78746
(617) 895-6196
kenchesebro@msn.com

Chris Corbitt
Arkansas Bar No. 2004089
Corbitt Law Firm, PLLC
P.O. Box 11200
Conway, AR 72304
chris@corbittlawfirm.com
(501) 255-0112

Harry W. MacDougald*
Georgia Bar No. 453076
Caldwell, Carlson, Elliott,
& DeLoach, LLP
6 Concourse Parkway, Ste. 2400
Atlanta, GA 30328
(404) 843-1956
hmacdougald@ccedlaw.com

Clinton W. Lancaster
Arkansas Bar No. 2011179
900 S. Shackelford, Ste. 300
Little Rock, AR 72211
(501) 786-3593
clint@clintlancaster.com

**pro hac vice admission being sought*

Counsel for Plaintiffs

RETRIEVED FROM DEMOCRACYDOCKET.COM