No. 09-861

IN THE

Supreme Court of the United States

CITIZENS FOR POLICE ACCOUNTABILITY POLITICAL COMMITTEE,
Petitioner,

—and—

FLORIDA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Petitioner,

—v.—

KURT S. BROWNING, in his capacity as Secretary of State of the State of Florida,
Respondent,

—and—

SHARON L. HARRINGTON, in her official capacity as Supervisor of Elections, Lee County,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Citizens for Police Accountability Political Committee has no parent, subsidiary or affiliated corporations. Petitioner Florida State Conference of the NAACP is a unit of the National NAACP, which is a nonprofit corporation incorporated in New York with its principal place of business in Maryland. It does not issue stock.

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As this Court recently explained, "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United v. FEC*, 130 S. Ct. 836, 898 (2010) (citation omitted). "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Id.* "For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Id.*

The law at issue in this case – Florida Statutes Section 102.031(4)(a)-(b) (2008) (the "Challenged Law") – suppresses political speech. It does this by prohibiting Petitioners, who wish to obtain petition signatures from exiting voters, from speaking near polling places. *Id.* But it simultaneously permits media and non-media exit pollsters to ask the same exiting voters questions on a nearly unlimited number of topics. As this Court recognizes, "the Government may commit a constitutional wrong when by law it identifies certain preferred speakers." *Citizens United*, 130 S. Ct. at 898. The Challenged Law undoubtedly identifies certain preferred – and certain disfavored – speakers. As applied to Petitioners' speech, it is unconstitutional.

All 50 states limit some speech around polling places, but not in a consistent or uniform way. Because the Challenged Law embodies the inconsistency in these laws, review of this case would

enable the Court to revisit its decision in *Burson v. Freeman*, 504 U.S. 191 (1992), and to clarify the proper application of First Amendment principles to polling-place speech restrictions.

1. The State's Opposition Brief Ignores the Key Dispute in this Case.

In opposing the Petition, the State ignores the single most important issue in this case – the fact that Petitioners sought to obtain signatures only from *exiting* voters. This fact is critical not only to the merits of this case, but also to why the Court should review it.

In the seventeen years since this Court's plurality decision in *Burson v. Freeman*, 504 U.S. 191 (1992), every court that has considered a challenge to a polling-area speech prohibition, brought by a plaintiff seeking to speak to voters *after* they have voted, has found the prohibition to be unconstitutional. *See, e.g.*, *Amer. Broad. Co. v. Ritchie*, No. 08-5285, 2008 WL 4635377, at *6 (D. Minn. Oct. 15, 2008); *Amer. Broad. Co. v. Heller*, No. 2:06-CV-01268-PMP-RJJ, 2006 WL 3149365, at *12 (D. Nev. Nov. 1, 2006); *CBS Broad., Inc. v. Cobb*, 470 F. Supp. 2d 1365, 1370 (S.D. Fla. 2006); *Amer. Broad. Co. v. Blackwell*, 479 F. Supp. 2d 719 (S.D. Ohio 2006). The Eleventh Circuit's decision is in conflict with these cases.

In its Opposition, the State has nothing to say about the exit-speech cases. It cannot explain why exit speech by a media pollster must be permitted

under the First Amendment but exit speech by a petition circulator (speaking about an issue not on the current ballot) can be prohibited. Nor can it explain why the Challenged Law permits anyone to conduct an exit poll on any subject, but prohibits petition circulators from engaging in essentially indistinguishable speech. Indeed, save for a single quotation from the district court's decision (Opp. at 2), the Opposition Brief never even mentions the fact that Petitioners sought to engage solely in *exit petitioning*.

Rather than address the primary point made in the Petition for Writ of Certiorari – that this case should be reviewed because exit petitioning is different from the speech at issue in *Burson* (*i.e.*, vote solicitation) – the State acts as if it is a settled point of law that exit petitioning is simply another form of "political speech" or "electioneering." The State adopts this position in order to rely on those cases that have suggested that there is a constitutionally significant distinction between exit polling and electioneering, and that while exit polling must be permitted, electioneering can be banned. *See, e.g.*, *Cobb*, 470 F. Supp. 2d at 1371 ("exit polling is significantly distinguishable from the electioneering and campaigning [in *Burson*]").

The problem with this argument, however, is that it is contrary to the State's own position. In an earlier case involving a prior version of the Challenged Law, the State took the position that petition circulation is not "electioneering" and that "[p]etition circulation is different than vote solicitation." *See* Defendant Cobb's Memorandum of

Law in Opposition to Plaintiffs' Motion for Preliminary Injunction at 11, *CBS Broad. Co. v. Cobb*, 470 F. Supp. 2d 1365 (S.D. Fla. 2006), 2006 WL 3668126. Moreover, the State's effort to distinguish the undefined "exit polling" permitted under the Challenged Law from so-called "political speech" is based not on any definition or guidance provided by the Challenged Law, and not on any record evidence in this case or in the legislative history of the Challenged Law, but merely on the State's bald assertion.

The fact remains – as the Eleventh Circuit noted – that *Burson* concerned a narrow set of facts different from the facts at issue in this case. (App. at 11a.) The fact also remains that courts are in conflict about how to apply *Burson* to statutes that prohibit speech different from the campaign speech prohibited by the Tennessee statute at issue in *Burson* (*i.e.*, speech by candidates and their campaign workers soliciting votes from voters on their way into the polls).

As described in the Petition, confusion about the application of *Burson* in the real world is an undeniable fact. (Pet. at 21-23.) For example, the New Jersey Supreme Court understands *Burson* as authorizing a state to prohibit "all expressive activity" near polling places. *In re: Attorney General's "Directive on Exit Polling: Media and Non-partisan Public Interest Groups," Issued July 18, 2007*, 981 A.2d 64, 82 (N.J. 2009). The federal district court in New Jersey, by contrast, reads *Burson* to mean that the state cannot prohibit exit polling absent record

evidence that such a prohibition is necessary to further a compelling state interest. *See Amer. Broad. Co. v. Wells*, 669 F. Supp. 2d 483, 489 (D.N.J. 2009) ("While no one disputes that voter intimidation and fraud are compelling government interests, there is no historical evidence that the concern is addressed in any way by prohibiting exit polling by the Plaintiffs."). It also reads *Burson* as having little if any application to exit-speech cases because "it is conduct affecting voters on their way to the polls that the government may have an interest in protecting." *Id.* at 488. Both decisions cannot be right.

The same inconsistency exists between the Eleventh Circuit's decision in this case and the decision of the district court for the Southern District of Florida in *Cobb*. *Cobb* required the state to provide evidence that a ban on exit polling was necessary. 470 F. Supp. 2d at 1369. In this case, the Eleventh Circuit ruled that evidence showing that the Challenged Law was necessary was not needed, but it did not overrule or even mention *Cobb*. (App. at 16a.) Again, both decisions cannot be right. Lower courts are applying *Burson* inconsistently.

As this Court recently affirmed in *Citizens United*, "political speech must prevail against laws that would suppress it, whether by design or inadvertence." 130 S. Ct. at 898.[1] If this is an

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[1] In more concrete terms, the Court confirmed that a law oppressing core First Amendment speech must satisfy strict

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accurate description of the protections applicable to political speech under the First Amendment, then it counsels in favor of a narrow reading of *Burson*. The State and the Eleventh Circuit, however, read *Burson* broadly. Review of this case will permit the Court to provide guidance and clarification to the states, to grassroots political organizations, and to the lower courts about the First Amendment protections afforded expressive speech and activity near polling places.

2. This Case Presents a Sufficient Factual Record for Review by this Court.

The State's procedural arguments against granting the writ of certiorari are neither factually compelling nor internally consistent.

The State's procedural arguments are not compelling because they are contrary to this Court's actual practice. For example, the State maintains that "[t]his Court does not commonly review the grant or denial of a preliminary injunction" (Opp. at 15), but in fact this Court has taken up numerous preliminary injunction cases in recent years, a

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scrutiny analysis, "which *requires* the Government *to prove* that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 130 S. Ct. at 898 (quoting *FEC* v. *Wisconsin Right to Life, Inc.,* 551 U.S. 449, 464 (2007)) (emphasis added). Here, the Eleventh Circuit ignored this requirement and expressly rejected the proposition "that the State *must offer its own evidence* demonstrating that the ban on exit solicitation is necessary to serve its compelling interest." (App. at 16a (emphasis added).)

number of which have involved First Amendment claims. *E.g.*, *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 370 (2008); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 423 (2006); *McCreary County, Ky. v. A.C.L.U. of Ky.*, 545 U.S. 844, 854-58 (2005); *Ashcroft v. A.C.L.U.*, 542 U.S. 656, 660-61 (2004). Indeed, just this term the Court has granted review in two preliminary injunction cases, one of which concerns First Amendment rights. *See Nelson v. NASA*, 530 F.3d 865, 872 (9th Cir. 2008), *cert. granted*, 78 U.S.L.W. 3517 (U.S. Mar. 8, 2010) (No. 09-530); *Doe v. Reed*, 586 F.3d 671, 673 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 1133 (U.S. Jan. 15, 2010) (No. 09-559). Thus, the fact that this case concerns the reversal of a grant of a preliminary injunction does not render it an inappropriate case for certiorari review.

The State's procedural argument also is not compelling because it grossly overstates the limited opportunity to develop an evidentiary record below. The State argues that because this case arises from a preliminary injunction, there was little record evidence for the district court or Eleventh Circuit to consider. (*See generally* Opp. at 16-17.) What the State fails to mention is that any evidence of fraud or intimidation at the polls caused by petition circulators would be exclusively in the State's hands, but the State did not present any such evidence to the district court. Indeed, despite the fact that during a recent 16-year period (from 1989 to 2005) Florida permitted petition circulators to gather near polling places, the State did not identify in its possession a single document evidencing a complaint or concern

from any voter about exit-petition circulation (or any other type of petition circulation) near polling places anywhere in the State. Given that Florida's laws requiring the maintenance of – and access to – public records are among the most robust in the nation, *see, e.g.*, Fla. Const. Art. I, § 24, this lack of any documentary evidence is revealing. The fact of the matter is that there could not realistically be any further development of the evidentiary record in this case because evidence that the Challenged Law is necessary with respect to prohibiting petition circulation does not exist. The Challenged Law is not based on evidence, it is based on speculation.

Moreover, the State's concerns about the purported dearth of the evidentiary record should be viewed in light of the position it took before the Eleventh Circuit. There, the State argued that the court could decide the merits of the case without reference to the facts, but it also argued, contrary to the position it now takes, that "the record includes specific evidence" and "[i]f strict proof were required, this uncontroverted evidence would be sufficient." (Appellant's Initial 11th Cir. Br. at 33 & 34.)

The State's procedural arguments about mootness also are not consistent with the position the State took before the Eleventh Circuit. As explained in the Petition for Writ of Certiorari, after the district court granted the preliminary injunction, Petitioners circulated their petition near polling places on August 26, 2008, and gathered the requisite number of signatures. Because Petitioners were not seeking any further relief before the district court (*i.e.*, they were

not seeking to gather any more petition signatures), they took the logical position that the case had become moot.

In the Eleventh Circuit, Petitioners could have attempted to avoid review by arguing that the appeal too was moot, but they did not. Rather, Petitioners acceded to the argument put forth by the State that the case was not moot because it was capable of repetition yet evading review. The State now castigates Petitioners for seeking review of a "moot" case in this Court, but the State certainly did not view the case as moot when review of the case was something it desired. To borrow the State's wording (*see* Opp. at 18), it would be anomalous indeed if the State could obtain Eleventh Circuit review and reversal of the district court's grant of a preliminary injunction by arguing that the case is not moot, but avoid this Court's definitive review by now claiming the case is moot.

A denial of review on mootness grounds would also be contrary to the approach this Court often has taken in election-related cases, where the election at issue frequently occurs before this Court can provide review. In those circumstances, the Court recognizes that purported mootness typically is not a compelling reason to deny review.

For example, in *Storer v. Brown*, 415 U.S. 724 (1974), a case arising out of the 1972 California congressional and presidential elections, the Court granted review despite the fact that, by the time the case reached the Court, the 1972 election was "long

over." *Id.* at 737. The Court explained that "[t]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held." *Id.* at 737 n.8. Other decisions from this Court are in accord. *See, e.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (explaining that the "capable of repetition, yet evading review" doctrine for election cases applied to both as-applied and facial challenges); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 300 n.12 (1979) (stating that "[t]here is value in adjudicating election challenges notwithstanding the lapse of a particular election") (citing *Storer*); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 126 (1974) (relying on *Storer*, among other cases, and explaining that with respect to mootness, "[t]he important ingredient in these cases was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society").

CONCLUSION

Earlier this year, this Court explained that there is "no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion." *Citizens United*, 130 S. Ct. at 899. Moreover, "First Amendment standards . . . 'must give the benefit of any doubt to protecting rather than stifling speech.'" *Id.* at 891. The Challenged Law does not give the

benefit of the doubt to protecting speech. Nor does the Eleventh Circuit's decision. The Court should grant the Petition for Writ of Certiorari to protect Petitioner's core First Amendment speech, to reverse the Eleventh Circuit, to clarify the effect of *Burson v. Freeman*, and to provide much needed guidance to the lower courts on how to analyze polling-place speech restrictions.

Respectfully submitted,

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