

Exhibit 1

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October 5, 2004

Dear Secretary Heller:

I write on behalf of our clients ABC News, the Associated Press, CBS News, CNN, Fox News and NBC News in connection with their plans to cover the upcoming election in Nevada on November 2, 2004.

Our clients have jointly retained two well-respected polling organizations — Edison Media Research, Inc. and Mitofsky International — to assist them in conducting polls of selected voters in Nevada on this coming election day (commonly referred to as “exit polls”). Our clients have been advised by Ronda Moore, Deputy Secretary of State for Elections, that no exit polls can be conducted within 100 feet of any polling place in the state.

Our clients are committed to conducting reliable and accurate exit polls on November 2, 2004 to better inform the public about important issues of our day. To do so, their exit pollers (typically one exit poller per polling place) are instructed to approach willing voters after they have left the polling place in a predetermined pattern — such as every third or fourth voter, depending on the number of expected voters at the polling place — and to ask the voter in a courteous and unobtrusive way whether he or she would care to fill out a short questionnaire. As the distance from the polling place increases, and with it the tendency of voters to disperse before the exit poller can approach them, the reliability of the exit poll diminishes. Experience has proven to our clients that if exit pollers are precluded from speaking to voters within 100 feet of the polling place, their ability to conduct accurate and reliable exit polls is greatly impeded. I am writing to you to ask for your assurance that exit polls may indeed be conducted within 100 feet of polling places in Nevada and to seek your assistance in communicating that advice to appropriate election officials.

As you know, Nevada has a statute that prohibits electioneering and the solicitation of votes within 100 feet of polling places. *See* NRS 293.270. It is this statute that has been

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cited to our clients as authority for the proposition that exit polling can also be restricted within the 100 foot limit. As a matter of straightforward statutory construction, we do not believe that the statute should or can be so construed. We also believe that if Nevada officials were to construe it to prohibit exit polling activities within 100 feet of Nevada polling places, the statute would violate the First Amendment under controlling Ninth Circuit precedent.

The Statute

Section 293.740 provides in relevant part:

Soliciting Votes and electioneering inside polling place or within certain distance from polling place is prohibited; penalty.

1. Except as otherwise provided in section 2, it is unlawful inside a polling place or within 100 feet from the entrance to the building or other structure in which a polling place is located:

(a) For any person to solicit a vote or speak to a voter on the subject of marking his ballot.

(b) For any person, including an election board officer, to do any electioneering on election day.

The county clerk or registrar of voters shall ensure that, at the outer limits of the area within which electioneering is prohibited, notices are continuously posted on which are printed in large letters "Distance Marker: No electioneering between this point and the entrance to the polling place."

* * * * *

3. Any person who violates any provision of this section is guilty of a gross misdemeanor.

4. As used in this section, "electioneering" means campaigning for or against a candidate, ballot question or political party by:

* * * * *

(e) Polling or otherwise soliciting from a voter information as to whether the voter intends to vote or has voted for or against a particular political party, candidate or ballot question; . . .

Nevada Revised Statutes 293.740.

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The Statute Cannot Be Construed
to Prohibit Exit Polling Activities

As the title of the statute confirms, Section 293.470 is a statute concerned with electioneering and the solicitation of votes. Subsection 1(a) prohibits the solicitation of votes within the 100 foot distance. Subsection 1(b) prohibits electioneering within the same area. Subsection 4 defines "electioneering" specifically to include "polling" and "soliciting information from a voter as to whether the voter . . . has voted for or against a particular . . . candidate" but is expressly limited to those who are engaging in such activities in the course of "campaigning for or against a candidate, ballot question or political party."

In conducting exit polls, our clients do not engage in any campaigning of any kind. Instead, they have a brief discussion with selected voters who have left the polling place and ask whether they would be interested in filling out a short questionnaire inquiring as to their views on topics of the day and inquiring, as well, as to how they voted in particular races. Thus, it is clear that subsection 1(b) (as defined in section 4(e)) cannot be construed to apply to our clients' planned journalistic activities because exit pollers are not "campaigning."

Subsection 1(a) prohibits any person from "solicit[ing] a vote or speak[ing] to a voter on the subject of marking his ballot." That subsection too should not be construed to apply to exit pollers given the discussion above. In other words, since the Nevada legislature went out of its way in subsection 4 to make clear that only *polling by those who are campaigning* is considered unlawful, subsection 1(a) should not be construed to prohibit polling by those who are *not* engaged in campaigning. Moreover, the very structure of the statute and the future-looking nature of the words used in subsection 1(a) (prohibiting "speak[ing] to a voter on the subject of marking his ballot") make clear that what subsection 1(a) is about (as the title of the statute confirms) is soliciting a voter to vote in a particular fashion.

The legislative history of Section 293.740 also confirms that the statute was not intended to prohibit exit polling. Indeed, it is clear from the legislative record that the statute was passed in direct response to the Supreme Court's decision in *Burson v. Freeman*, 504 U.S. 191 (1992), which upheld the constitutionality of a Tennessee statute prohibiting partisan electioneering within 100 feet of polling places and which distinguished electioneering from exit polling activities of the media. *Id.* at 207. That the decision in *Burson* was the impetus for the passage of what is now Section 293.70 is made clear in the summary that accompanied the bill that proposed it. The bill summary states:

Current Nevada law prohibits electioneering and the solicitation of votes inside a polling place. The 1963 Legislature included in the prohibition those areas within 100 feet of a polling place. The prohibited area was increased to 300 feet in 1987. The entire distance limitation was repealed in 1989, however, for assumed constitutional reasons. In 1992, the United States Supreme Court upheld a Tennessee statute that prohibits the solicitation of votes and the display of campaign materi-

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als within 100 feet of the entrance of a polling place. Thus, Assembly Bill 18 reinstates a formerly questionable provision that since has been found constitutional by the United States Supreme Court.

Bill Summary of Assembly Bill 18, 69th Leg. (Nev. 1997), prepared by Research Division, Legislative Counsel Bureau, Nonpartisan Staff of the Nevada State Legislature, available at <http://www.leg.state.nv.us/lcb/research/library/1997/AB018,1997.pdf>, at p.2 (last visited September 15, 2004). *And see* Minutes of the Assembly Committee on Elections, Procedures and Ethics, January 30, 1997 (available at the same site); Minutes of the Senate Committee on Government Affairs, April 2, 1997 (available at the same site). The committee minutes clearly indicate that the Nevada legislature was concerned with the very same activities that had prompted the Tennessee legislature to pass the statute upheld in *Burson*: partisan campaigning and vote solicitation, *not* exit polling. Indeed, nowhere in the available legislative history is there any suggestion whatsoever that Section 293.740 was intended to apply to exit polling or other journalistic activities; indeed there is simply no mention of exit polling in any of the debates leading to the passage of the statute at all.¹

¹ State Attorneys General and courts have repeatedly recognized that exit polling by the news media is not and should not be considered electioneering. For example, in 2000, the Attorney General of the State of Arkansas concluded that exit polling did not fall within the state's ban on "electioneering of any kind" within 100 feet of the polling place building. Arkansas Op. Att'y Gen. 99-330, 2000 Ark. AG LEXIS 2 (2000), interpreting Arkansas C.A. § 7-1-103(a)(9)(A)(B)&(C). Electioneering, said the Arkansas Attorney General, "refers to espousing the cause of a candidate or issue" and "tak[ing] an active part in an election;...work[ing] for the election of a candidate or party." *Id.* (quoting Op. Ark. Att'y Gen. 78-077 and Webster's Seventh New Collegiate Dictionary). He concluded:

The most relevant question is whether "exit polling" can be classified as "electioneering of any kind." In my opinion the answer to this question is "no" . . . [E]xit polling does not fit within the definition of "electioneering," and therefore is not prohibited within the area described in A.C.A. § 7-3-103(a)(9).

Id. The Arkansas Attorney General's opinion quoted approvingly an earlier opinion by the Attorney General of Kentucky, who had similarly held that exit polling did not fall "within the scope of electioneering, since exit polling occurs after a voter has cast his ballot and could not in any sense be deemed an effort to influence the voter's decision." Kentucky Op. Att'y Gen. 92-73, 1992 Ky. AG LEXIS 73 (1992). *See also Journal Broadcasting of Kentucky v. Logsdon*, No. C88-0147-L(M) and L(A), 1988 U.S. Dist. LEXIS 16864 and 18329 (W.D. Ky. 1988)(state's distance regulation of "electioneering" does not apply to exit polling; "electioneering is a much

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Thus we respectfully urge that based on the plain language of the statute (and as confirmed by the legislative history), you should not construe Section 293.740 to apply to exit polling activities at all.

The Statute Cannot Constitutionally Be Applied
To Prohibit Newsgathering Activities

If there were any doubt as to whether the statute should be construed to apply to exit polling activities, that doubt is resolved by resort to constitutional principles. The statute cannot constitutionally be applied, consistent with the First Amendment, so as to prohibit journalists from asking willing voters to complete a short questionnaire soliciting their views after they have voted within 100 feet of the polls on election day. This view is consistent with the view of every court that has considered this issue including the United States Court of Appeals for the Ninth Circuit.

To date, federal courts in seven states — Florida, Georgia, Kentucky, Montana, Minnesota, Washington and Wyoming — have considered challenges to various statutes that have either explicitly attempted to ban exit polling within various distances of polling places or have been interpreted by state officials as doing so. Every court that has considered the issue has struck down or enjoined enforcement of the challenged statutes, holding that exit polling is protected by the First Amendment and that the distance restraints impermissibly infringed on that activity.

The landmark decision on this issue is *Daily Herald v. Munro*, 838 F.2d 380 (9th Cir. 1988) (copy attached at Tab 1). The action was instituted by The Daily Herald Company, CBS News, ABC News, NBC News and The New York Times to challenge the constitutionality

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different process from exit polling”). Similarly, the Maryland Attorney General’s office issued an opinion in 1992 in which it noted that exit polling would not fall within the state’s broad ban on “electioneering” within a proscribed distance from the polling place:

Although not defined in [our statute], the term “electioneering” has a generally accepted meaning: “to work for, or in the interest of, a person, ticket, party, or the like, in an election.”

Maryland Op. Att’y Gen. 92-035; 1992 Md. AG LEXIS 49; 77 Op. Atty. Gen. Md. 62 (1962)(citation omitted). Thus, the Maryland Attorney General continued, “the electioneering ban does not prohibit exit polling by the media within the ‘depoliticized’ zone.” *Id.*

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of a Washington statute that prohibited the conduct of exit polls within 300 feet of polling places on election day. The Ninth Circuit held:

The media plaintiffs' 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. "[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates" *Brown v. Hartlage*, 456 U.S. 45, 52-53, 102 S.Ct. 1523, 1528, 71 L.Ed.2d 732 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1436, 16 L.Ed.2d 484 (1966)). Moreover, the First Amendment protects the media's right to gather news. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576, 100 S.Ct. 2814, 2827, 65 L.Ed.2d 973 (1980) ("Free speech carries with it some freedom to listen."); *Branzburg v. Hayes*, 408 U.S. 665, 681, 92 S.Ct. 2646, 2656, 33 L.Ed.2d 626 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."); see also *In re Express News Corp.*, 695 F.2d 807 (5th Cir. 1982); *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978), [FN3] Exit polling is thus speech that is protected, on several levels, by the First Amendment.

Id. at 384.

The Court emphasized that exit polling provides uniquely valuable information to journalists, academics and others about voting results, voting demographics and issues that are of most concern to voters and ruled that given the superior scientific reliability of exit polls, this valuable information could not be gathered by other means. *Id.* at 386.

Having concluded that exit polling is protected by the First Amendment, the Court went on to consider whether Washington's effort to prohibit the activity was narrowly tailored to advance a compelling governmental interest. Although the Court recognized that the State of Washington did have an interest in promoting peace, order and decorum at polling places, the Court concluded that there were far less constitutionally offensive means at the State's disposal to advance that interest — such as barring disruptive conduct — than to prohibit the conduct of all exit polls. As such, the Court struck down the Washington statute finding that it was unconstitutional on its face. *Id.* at 386. A judgment enjoining enforcement of the statute was thereafter entered by the district court and attorneys' fees in excess of \$ 700,000 were awarded to the media plaintiffs pursuant to 42 U.S.C. § 1988. The *Daily Herald* decision is, of course, binding on the federal district courts of Nevada, the likely venue for any constitutional challenge to efforts by Nevada officials to apply Section 293.740 to exit polling activities.

It is our understanding that shortly after the decision in *Daily Herald* was issued, Nevada's then-Secretary of State, Frankie Sue Del Papa, issued an advisory to all county election

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officials making clear that Nevada statutes in effect at that time should not be interpreted to apply to exit polling activities, particularly in light of the Ninth Circuit's ruling. Two statutes were at issue then. The first prohibited loitering near polling places and specifically prohibited asking another person "for whom he intends to vote." That statute was Section 293.730 which remains in effect in substantially similar form today. The second statute was quite similar to what is now section 293.740(1). It provided:

[Former] Section 293.740 Soliciting votes; electioneering

1. Except as otherwise provided in subsection 2, it is unlawful inside a polling place or within 300 feet of the exterior of the building in which a polling place is located:
 - (a) For any person to solicit a vote or to speak to a voter on the subject of marking his ballot.
 - (b) For any person, including an election board officer, to do any electioneering on election day.
2. Subsection 1 does not apply to any person in a private residence . . .

Former Section 293.740 was repealed in 1989 and reenacted in its present form in 1997. See discussion above.

The considered determination by Secretary of State Del Papa that, in light of the *Daily Herald* decision, neither statute could constitutionally be applied to prohibit exit polling activities on election day was clearly correct; we urge you to adopt the same view. Indeed, judicial decisions issued after the decision in *Daily Herald* unanimously confirm the correctness of Secretary Del Papa's determination.

In litigation instituted by ABC News, CBS News, NBC News and The Miami News, the United States District Court for the Southern District of Florida enjoined Florida election officials from enforcing a Florida statute that prohibited the "solicitation of voters' opinions" within 150 feet of Florida polling places during that state's presidential preference primary on March 8, 1988. *CBS Inc., et al. v. Smith, et al.*, 681 F.Supp. 794 (S.D. Fla. 1988) (copy attached at Tab 2). The district court found that it was "clear that the conduct of exit polling and journalistic interviews are protected by the First Amendment guarantees of free speech and free press." *Id.* at 802. The court went on to state:

The gathering of news of political consequence is a necessary corollary to the freedom to report about politics and government. See *Richmond Newspapers Inc. v. Commonwealth of Virginia*, 448 U.S. 555, 576 (1980). Simply put, newsgath-

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ering is a basic right protected by the First Amendment; "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *In re The Express-News Corp.*, 695 F.2d 807, 808 (5th Cir. 1982). And, indeed, without the ability to collect information, viewpoints, and opinions from voters, the right to report and publish political news would be left with little means of fulfillment. [The Florida statute at issue] constricts not only the ability to gather important news about voters' preferences and opinions, but perhaps even more basic, the right to speak freely about matters of undisputed importance. We add that while the exact contours of the protections afforded various categories of speech by the First Amendment have been widely debated "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The ability to speak on matters of public importance is fundamental to self-government.

The injunction entered in Florida was thereafter extended by the district court to cover the national election as well.

In Georgia, the United States District Court for the Middle District of Georgia has permanently enjoined Georgia election officials from prohibiting exit polling activities more than 25 feet from Georgia polling places. *National Broadcasting Company, Inc. et al. v. Cleland*, 697 F.Supp. 1204 (N.D. Ga. 1988) (copy attached at Tab 3). 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 Company, Inc., et al. v. Colburg*, 699 F.Supp. 241 (D. Mont. 1988) (copy attached at Tab 4). 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 of Kentucky, Inc. v. Logsdon*, 1988 U.S. Dist. Lexis 16864 (W.D. Ky. 1988) (copy attached at Tab 5). 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 Company, Inc., et al. v. Karpan*, No. C88-0320 (D. Wyo. October 21, 1988) (copy attached at Tab 6). Finally, in Minnesota, state officials were enjoined from enforcing that state's 100 foot ban on exit polls during the 1988 national election. *CBS, Inc., et al., v. Growe*, 15 Med. L. Rep. 2275 (D.Minn. 1988) (copy attached at Tab 7).

In the course of striking down (or enjoining the enforcement of) the various state statutes at issue in these cases, the courts emphasized many of the same points that had been emphasized by the Ninth Circuit in *Daily Herald*: that exit polls provide invaluable information to the public, see, e.g., *National Broadcasting Company, Inc. et al. v. Cleland*, 697 F. Supp. at 1209; *CBS, Inc., et al., v. Growe*, 15 Med. L. Rep. at 2278; that exit polls do not disrupt activities at the polls; see e.g., *CBS Inc., et al. v. Smith*, 681 F.Supp. at 804 and; that the distance restrictions at

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issue so burdened the press' ability to gather information as to render the restrictions unconstitutional, *see e.g., id.* at 801; *National Broadcasting Company, Inc. et al. v. Cleland* at 1209-1210; *Journal Broadcasting of Kentucky, Inc. v. Logsdon* at *2; *National Broadcasting Company, Inc., et al. v. Karpan* at 7.

In light of this unanimous body of authority establishing that exit polling is conduct that is entitled to the most stringent protections of the First Amendment and in light of the binding authority of the *Daily Herald* decision in the Ninth Circuit, we respectfully urge that Section 293.740 should not be construed to apply to our clients' journalistic activities, because to do so would violate the First Amendment.

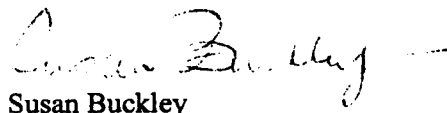
* * * * *

I hope we have persuaded you that Nevada law should not be construed to prohibit the conduct of exit polls within 100 feet of polling places on election day — whether as a matter of statutory construction or on constitutional grounds or for both reasons. If we have, I respectfully request that you issue an advisory or other appropriate written communication to Nevada election officials making clear that exit polls may be conducted within 100 feet of Nevada polling places so as to avoid any confusion on election day. If for any reason you do not feel that such a step is appropriate, I would appreciate your letting me know as soon as possible so that we can consider taking action to protect our clients' rights should that course prove to be necessary. We sincerely hope that such action will not be required as it would likely result in a significant expenditure of public resources by the State of Nevada and possible liability for attorneys' fees under 42 U.S.C. § 1988.

Finally, let me emphasize that our clients have no desire to interfere with the conduct of elections or disrupt the orderly process of voting in any way. They wish only to conduct their voter polls peacefully and unobtrusively. Typically, exit pollers stand just outside the building where polling takes place, even if they are legally permitted to stand inside the building closer to the polling room. Those who conduct the polls do not engage in disruptive behavior and make clear to those voters they speak to — only after they have voted — that filling out the short questionnaire is entirely voluntary and completely anonymous.

Thank you for your time and attention to this matter. I look forward to hearing from you.

Very truly yours,


Susan Buckley

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The Honorable Dean Heller
Secretary of State
Office of the Secretary of State
202 North Carson Street
Carson City, Nevada 89701

[Attachments]

By Federal Express

cc: Ms. Ronda Moore (w/att.)
Deputy Secretary of State for Elections

By Federal Express

Exhibit 2

DEAN HELLER
Secretary of State

STATE OF NEVADA

CHARLES E. MOORE
Securities Administrator

RENEE L. PARKER
Chief Deputy Secretary
of State



SCOTT W. ANDERSON
Deputy Secretary
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PAMELA A. RUCKEL
Deputy Secretary for
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RONDA L. MOORE
Deputy Secretary
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OFFICE OF THE
SECRETARY OF STATE

October 15, 2004

Ms. Susan Buckley
Cahill Gordon & Reindel LLP
Eighty Pine Street
New York, N.Y. 10005-1702

Dear Ms. Buckley:

This correspondence is sent in response to yours of October 5, 2004, wherein you request our office to interpret Nevada law in a manner that would allow your clients to conduct exit polls within 100 feet of polling places on Election Day. For the reasons discussed below, we disagree with your proposed interpretation of the statutes.

As you are aware, NRS 293.740(1)(a) states that it is unlawful within 100 feet from the entrance of a polling place "for any person to solicit a vote or speak to a voter on the subject of marking his ballot." [Emphasis added]. In your letter you contend that the statute should be construed to apply to polling that is conducted only by those persons who are campaigning because the definition of "electioneering" only applies to such persons. However, the definition of electioneering is irrelevant to the prohibitions contained in subsection 1 of the statute, and the plain language of the statute indicates that it applies to any person. There is no limitation on the type of person who engages in the prohibited activities. Therefore, it is our position that the statute prohibits within the excluded area, any person, not just persons campaigning, from speaking to a voter on the subject of marking his ballot.

In addition, you assert that the statutory language could reasonably be construed to apply only to prohibit speaking to a voter on the subject of marking his ballot *prior* to voting, not afterwards, such as during an exit poll. While you provide extensive research concerning the legislative history of the statute, it is our position that the statutory language is clear and should be given its plain meaning under which the timing of when the voter is approached is not limited. Therefore, we decline to interpret the statute in a manner that would allow exit polling activities to be conducted within the 100 foot prohibition.

Finally, we are deeply concerned about the precedent such an allowance would set, and the possibility of opening up a virtual Pandora's Box of similar requests by partisan

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organizations—political parties, special interest groups, ballot advocacy groups, etc.—who would conclude as you have that exit polling does not interfere with someone voting since that person has already cast their ballot. Voters might be left with the option of running a gauntlet of various exit pollers, or avoiding the situation by not voting to avoid the confrontation that could result if we followed your logic. Although your intentions may be benign and you claim you will be unobtrusive in your approach to voters, the nature of your activities could have a chilling effect on the process.


Certainly, if polled, the citizens of America would opt for higher voter turnout rather than the right of network television and other media outlets to proclaim a victor based on exit polling.

Therefore, as the state's Chief Elections Officer and a duly elected constitutional officer sworn to uphold the laws of this State, we must place the weight of this issue on the side of the voters of Nevada and decline to allow exit polling within the 100 foot mark established by our state Legislature to protect voters from possible harassment and intimidation.

Please do not hesitate to contact me at (775) 684-5714, or our Elections Deputy, Ronda Moore, at (775) 684-5705, if you have any questions or require additional information.

Respectfully,

DEAN HELLER
Secretary of State


Renee L. Parker, Esq.
Chief Deputy Secretary of State

cc: County Clerks and Registrars of Voters

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