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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA**

\_\_\_\_\_  
AMERICAN BROADCASTING COMPANIES, INC., THE )  
ASSOCIATED PRESS, CABLE NEWS NETWORK LP, )  
LLLP, CBS BROADCASTING INC., FOX NEWS )  
NETWORK, L.L.C. and NBC UNIVERSAL, INC., )  
Plaintiffs, )  
- vs. - )  
DEAN HELLER, in his official capacity as the )  
SECRETARY OF STATE OF NEVADA, )  
Defendant. )  
\_\_\_\_\_

Case No. CV-S-06-01268

**EMERGENCY MOTION FOR  
PRELIMINARY INJUNCTIVE  
RELIEF AND MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN SUPPORT THEREOF**

Plaintiffs American Broadcasting Companies, Inc., The Associated Press, Cable News Network LP, LLLP, CBS Broadcasting Inc., Fox News Network, L.L.C. and NBC Universal, Inc. (collectively "Plaintiffs"), through their undersigned counsel, Campbell & Williams, hereby move the Court for the entry of a preliminary injunction enjoining Defendant and all those acting in concert with Defendant from prohibiting Plaintiffs, under the authority of Section 293.740 of the Nevada Revised Statutes or otherwise, from conducting exit polls within 100 feet of Nevada polling places on Election Day, November 7, 2006, and pending the entry of a final judgment in this action.



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ASSOCIATED PRESS, CABLE NEWS NETWORK LP,	)	
LLLP, CBS BROADCASTING INC., FOX NEWS	)	
NETWORK, L.L.C. and NBC UNIVERSAL, INC.,	)	
	)	
Plaintiffs,	)	Case No.
	)	
- <i>against</i> -	)	
	)	
DEAN HELLER, in his official capacity as the	)	
SECRETARY OF STATE OF NEVADA,	)	
	)	
Defendant.	)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
OF PLAINTIFFS' EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION**

This memorandum is respectfully submitted on behalf of plaintiffs American Broadcasting Companies, Inc. (“ABC”), The Associated Press, Cable News Network LP, LLLP (“CNN”), CBS Broadcasting Inc. (“CBS”), Fox News Network, L.L.C. (“Fox News”) and NBC Universal, Inc. (“NBC”) (collectively “Plaintiffs”) in support of their emergency motion for a preliminary injunction.

**PRELIMINARY STATEMENT**

Section 293.740 of the Nevada Revised Statutes provides, *inter alia*, that with certain exceptions not applicable here, “it is unlawful . . . within 100 feet from the entrance to the building or other structure in which [the] polling place is located: (a) For any person to solicit a vote or speak to a voter on the subject of marking his ballot . . . [or] (b) For any person, including an election board officer, to do any electioneering on election day.” Nev. Rev. Stat. Ann. § 293.740(1). “Electioneering” is defined as “campaigning for or against a candidate, ballot question or political party by,” among other things, “[p]olling

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.” Nev. Rev. Stat. Ann. § 293.740(4)(e).

Plaintiffs are six national news organizations that desire to interview voters at 20 selected precincts in the State of Nevada on this coming Election Day, November 7, 2006. Plaintiffs do not engage in electioneering activities of any kind. Rather, Plaintiffs’ polling reporters approach voters, after they have voted, and inquire if they would be willing to fill out a short, anonymous questionnaire. The questionnaire seeks voters’ views on issues of the day and also asks voters for whom they voted.

It is the position of the Secretary of State that Plaintiffs’ exit polling activities are prohibited within 100 feet of Nevada polling places by Nevada Revised Statutes § 293.740 *not* because Plaintiffs’ engage in electioneering but because exit pollsters speak to voters “on the subject of marking [their] ballot[s].” Plaintiffs respectfully submit that this prohibition is a content-based restriction on protected expression that is unconstitutional under the First Amendment as applied to Plaintiffs’ exit polling activities.

To date, eight federal courts across the country, including the Court of Appeals for the Ninth Circuit, have considered whether efforts of state officials to restrict Plaintiffs’ exit polling activities can be tolerated consistent with the First Amendment. All eight have concluded that they cannot be. For the reasons set forth herein, we respectfully urge that a preliminary injunction should issue enjoining the Secretary of State from prohibiting the conduct of exit polls within 100 feet of Nevada polling places on Tuesday, November 7, 2006, the day of the general election, and pending the entry of a final judgment in this action.

STATEMENT OF FACTS

1. Plaintiffs are the three national broadcast networks (ABC, CBS and NBC), two national cable news networks (CNN and Fox News) and The Associated Press. All of the Plaintiffs are engaged in the business, *inter alia*, of providing news and information to the public. (Complaint ¶¶ 3-8)

2. 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 (“Edison”) and Mitofsky International (“Mitofsky”), to conduct polls of voters at 20 selected precincts in Nevada and at other polling locations across the country. (Lenski Aff’t ¶¶ 1, 19)

3. 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, anonymous questionnaire as they leave the polling place in a scientifically pre-determined pattern. (Complaint ¶ 12, Lenski Aff’t ¶ 5)

4. Typically, one polling reporter is assigned to each of the polling places randomly selected for Plaintiffs’ polls. For reasons discussed below, the reporter stands just outside the exit of the building in which the polling place 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 ¶ 12, Lenski Aff’t ¶ 7)

5. Voter participation in the exit polls is purely voluntary. Those voters who elect to complete the questionnaire are asked their views on the elections and on issues of 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 ¶ 12, Lenski Aff't ¶ 6)

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 substantially impairs their exit polling activities and, accordingly, substantially reduces the statistical reliability and accuracy of their exit polls. (Complaint ¶ 13, Lenski Aff't ¶ 8)

7. An internal evaluation of the exit polling process in 2004 conducted by Edison and Mitofsky revealed that, when interviewers were required to stand 100 feet or

more from the polling location, there were error rates in those precincts that were more than twice the error rates experienced in precincts where the interviewer was able to stand within 25 feet of the polling place. Specifically in Nevada, the error rate in 2000 was triple the national average error rate; in 2004 it was almost double the national average error rate. (Lanski Aff't ¶ 9)

8. The information gathered from exit polls is used by Plaintiffs in a variety of ways on election night and thereafter. 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-a-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.

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

9. Plaintiffs also use the information gathered through exit polls in their election night coverage in formulating projections of the outcome of certain contests and 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 ¶ 14, Lenski Aff't ¶¶ 13-15)

10. In addition, the information gathered from the 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 data collected in those archives are used by a wide range of scholars, teachers, students, and other researchers and analysts. In particular, this information has been used extensively in the fields of political science, sociology, and public policy analysis, among others. (Complaint ¶ 15, Shapiro Aff't ¶¶ 2, 6, Lenski Aff't ¶ 17)

11. The information gathered from the 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)

12. Defendant Dean Heller is sued in his official capacity as the Secretary of State of the State of Nevada. (Complaint ¶ 9) Defendant Heller is the chief election officer of the State of Nevada and is responsible for obtaining and maintaining uniformity in the

application, operation and interpretation of the provisions of the Nevada election laws and for instructing the county boards of election as to election procedures consistent with the law of Nevada.. (*Id.*)<sup>1</sup>

13. Nevada Revised Statutes Section 293.740 provides in pertinent part as follows:

Soliciting votes and electioneering inside polling place or within certain distance from polling place prohibited; penalty

1. Except as otherwise provided in subsection 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:

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<sup>1</sup> See Nev. Rev. Stat. Ann. § 293.124(1).

\* \* \* \*

(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; . . .

Nev. Rev. Stat. Ann. § 293.740.

14. In response to recent inquiries by a representative of the Plaintiff news organizations, the Secretary of State's office has advised that Plaintiffs' planned newsgathering activities are prohibited by — indeed made criminal by — Nev. Rev. Stat. Ann. § 293.740(1)(a) because Plaintiffs' exit polling reporters “speak to a voter on the subject of marking his ballot.” Notwithstanding that section (1)(b) of the statute specifically prohibits *only* those polls conducted by those “campaigning for or against a candidate, ballot question or political party” (*see* § 293.740(4)(e)), the Secretary has made clear that exit polling will not be permitted within 100 feet of Nevada polling places under the authority of section (1)(a). (Zucker Aff't ¶ 4)

#### LEGAL ARGUMENT

##### I. THE STANDARD FOR THE ISSUANCE OF A PRELIMINARY INJUNCTION

“To obtain a preliminary injunction, a party must make a clear showing of either (1) a combination of probable success on the merits and a possibility of irreparable injury, or (2) that its claims raise serious questions as to the merits and that the balance of hardships tips in its favor.” *Connecticut General Life Insurance Co. v. New Images*, 321 F.3d 878, 881 (9th Cir. 2003); *accord Price v. City of Stockton*, 390 F.3d 1105, 1109 (9th Cir. 2004). “[T]hese two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.”

*Sammartano v. First Judicial District Court*, 303 F.3d 959, 965 (9th Cir. 2002) (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) (internal citation and quotation omitted)). “Additionally, ‘[i]n cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff.’” *Sammartano*, 303 F.3d at 965 (quoting *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992)).

As demonstrated below, Plaintiffs easily meet these criteria for obtaining a preliminary injunction. First, Plaintiffs are highly likely to succeed on the merits because the application of Section 293.740 to Plaintiffs’ exit polling activities cannot be reconciled with controlling constitutional principles. There can be no dispute that exit polling is conduct subject to the most stringent protections of the First Amendment, as every court that has considered the issue has held, including the Court of Appeals in this Circuit. Section 293.740’s prohibition against “speak[ing] to a voter on the subject of marking his ballot” within 100 feet of Nevada polling places restricts speech based on its content, subjecting it to the highest form of constitutional scrutiny. The Secretary of State cannot demonstrate — as he must — that the blanket prohibition of all exit polls in proximity to Nevada polling places — however they may be conducted — is a narrowly tailored means of advancing any compelling government interest whatsoever. It is also clear that Plaintiffs will suffer irreparable injury if Section 293.740 is applied to them. It is black-letter law that any interference with the exercise of First Amendment freedoms is sufficient to constitute irreparable injury. Furthermore, if Plaintiffs’ exit poll reporters are forced to stand over 100 feet away from Nevada polling places, the accuracy and reliability of the data they gather will be irretrievably compromised. When this injury is weighed against the virtually non-existent hardship that exempting exit polling from the 100-foot restriction would impose on the Secretary of State and the State of Nevada, it is clear that the balance of hardships tips decisively in

Plaintiffs' favor. Finally, the public interest in free political discussion and the collection and dissemination of information clearly favors Plaintiffs.

II. PLAINTIFFS ARE HIGHLY LIKELY TO SUCCEED ON THE MERITS

A. Federal Courts Have Unanimously Concluded That Exit Polling Activities Cannot Be Restricted By The State Consistent With The First Amendment

There can be no dispute that Section 293.740 restricts Plaintiffs' ability to speak freely with individuals in Nevada who have voted and who choose to speak with journalists about important political issues. As a result, Plaintiffs' ability to communicate with the public about how and why people have voted in the State of Nevada is clearly curtailed by the statute. Yet, the freedom to speak about elections, government and politics is at the heart of the First Amendment.

In *Mills v. Alabama*, 384 U.S. 214 (1966), the seminal case on the interrelationship between First Amendment rights and legislative efforts to assure "purer" elections, the United States Supreme Court unanimously invalidated a broadly phrased corrupt practices law that imposed criminal penalties on newspapers for publishing editorials on election day urging the public to vote in favor of a particular ballot issue. The Court concluded that:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs. This of course includes discussions of 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. The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs.

384 U.S. at 218-19.<sup>2</sup>

Subsequently, in *Brown v. Hartlage*, 456 U.S. 45, 52 (1982), the Supreme Court, quoting *Mills*, strongly reaffirmed these “basic conceptions about the manner in which political discussion in a representative democracy should proceed,” which are “[a]t the core of the First Amendment.” The Court held that the First Amendment prohibits a state from declaring an election void because the victorious candidate publicly announced during his campaign that he intended to serve at a salary less than that fixed by law, in contravention of a statute prohibiting candidates from offering voters material benefits in exchange for their votes. In so holding, the Court observed:

We begin our analysis . . . by acknowledging that the States have a legitimate interest in preserving the integrity of their electoral processes. Just as a State may take steps to ensure that its governing political institutions and officials properly discharge public responsibilities and maintain public trust and confidence, a State has a legitimate interest in upholding the integrity of the electoral process itself. But when a State seeks to uphold that interest by restricting speech, the limitations on state authority imposed by the First Amendment are manifestly implicated.

456 U.S. at 52.<sup>3</sup>

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<sup>2</sup> Since its decision in *Mills*, the Supreme Court has repeatedly reaffirmed that speech concerning political affairs and election matters is entitled to the fullest constitutional protection even when measured against a state’s concededly important interest in ensuring fair elections. *See, e.g., Meyer v. Grant*, 486 U.S. 414 (1988); *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

<sup>3</sup> *See also Vanasco v. Schwartz*, 401 F. Supp. 87, 100 (E.D.N.Y. & S.D.N.Y. 1975) (three judge court) (“[W]hen the State through the guise of protecting the citizen’s right to a fair and honest election tampers with what it will permit the citizen to see and hear even that important state interest must give way to the irresistible force of protected expression under the First Amendment.”), *aff’d mem.*, 423 U.S. 1041 (1976).

It was just these principles that led the Court of Appeals for the Ninth Circuit to conclude that Plaintiffs' exit polling activities are protected — indeed encouraged — by the First Amendment. *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988). There, the court concluded:

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 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (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 (1980) (“Free speech carries with it some freedom to listen.”); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”). . . . Exit polling is thus speech that is protected, on several levels, by the First Amendment.

*Id.* at 384 (citations and footnotes omitted).

In *Daily Herald*, the Court of Appeals considered a statute similar to section 293.740. The Washington statute banned the conduct of exit polls within 300 feet of polling places in Washington while permitting other voter interviews within the same area. The Ninth Circuit unanimously held that Washington's statute was unconstitutional on its face and affirmed the district court's judgment striking down the law as violative of the First Amendment. *Id.* at 389.

After finding that the questioning of voters outside the polling place is speech subject to the full protections of the First Amendment, *id.* at 384, the Ninth Circuit concluded that “[t]he statute is content-based because it regulates a specific subject matter, the discussion of voting. . . .” *Id.* at 385 (citation omitted). As such, the Court held that the statute could survive constitutional scrutiny “only if it is narrowly tailored to accomplish a

compelling government interest . . . and is the least restrictive means available.” *Id.* (citations omitted).

The Ninth Circuit then turned to examine the goals said to be furthered by the statute. The State of Washington urged that the ban was justified as a means for protecting the peace, order and decorum of the polling place. Examining that goal, the Court of Appeals concluded that, while the State had a legitimate interest in maintaining peace, order, and decorum at the polls and in preserving the integrity of its electoral process, the statute at issue was not narrowly tailored to further that goal because it prohibited *all* voter polling, including nondisruptive polling. *Id.* at 385. The court also found that the statute was not the least restrictive means of advancing Washington State’s interest in preserving the sanctity of the polls because it was duplicative of other statutory provisions which already prohibited disruptive conduct at the polls, and because there existed numerous less restrictive means of advancing the State’s interest. *Id.*

To date, every court that has considered state efforts to restrict exit polling has agreed with the *Daily Herald* decision. Federal courts in Florida, Georgia, Kentucky, Montana, Minnesota, Ohio and Wyoming have all 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. Each time, the court struck down or enjoined enforcement of the challenged statutes, holding that exit polling is protected by the First Amendment.

In Minnesota, the United States District Court for the District of Minnesota enjoined Minnesota election officials from enforcing a Minnesota statute that was startlingly similar to Nev. Rev. Stat. Ann. § 293.740. *CBS Inc. v. Growe*, 15 Med. L. Rep. [BNA] 2275 (D. Minn. 1988) (annexed hereto). The Minnesota statute prohibited anyone “either inside a polling place or within 100 feet of the entrance to it [from asking] a voter how [he

or she] intends to vote or has voted on any office or question on the ballot.” *Id.* at 2276 (quoting Minn. Stat. § 204C.06(1)). The court held that this statute was an unconstitutional content-based restriction on speech. 15 Med. L. Rep. at 2277-78. The court rejected the state officials’ argument that this statute was content-neutral because it sought only to eliminate undesirable “secondary effects” of exit polling:

[T]he questioned language relates to one specific inquiry, how a person voted, and is, therefore, specifically content based. The statute does not prohibit all polling, but bans only one inquiry, [an] individual’s answers to questions posed on [the] ballot. The statute allows polls to be conducted within the 100-foot zone, provided the pollster refrains from requesting individuals to identify how they will vote or have voted. Thus, the statutory language . . . directly regulates the speech of the person asking how a voter voted within the 100-foot zone of the polling place, and indirectly regulates the speech of a cooperating voter in answering the question, as well as any speech by the polling party or person using the data gathered, that would flow from the response.

*Id.* at 2277. The court concluded that the challenged language was “constitutionally valid only if it is narrowly tailored to accomplish a compelling governmental interest.” *Id.* at 2278. Additionally, the court found that the statute was not narrowly tailored to serve the legitimate state interest in maintaining order at the polls and preserving the integrity of the electoral process. *Id.* The court found that the statute was both overinclusive, because it prohibited even non-disruptive exit polling, and underinclusive, because it permitted other types of polls to be taken within the 100-foot zone. *Id.*

In Florida, 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. *CBS Inc. v. Smith*, 681 F. Supp. 794 (S.D. Fla. 1988). 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 Broad-*

*casting Co. v. Cleland*, 697 F. Supp. 1204 (N.D. Ga. 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). 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 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 hereto).

Just two weeks ago, the federal district court in Ohio issued an order permanently enjoining the Secretary of State from prohibiting exit polls within 100 feet of polling places there. 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. 1:04cv0750, slip. op. at 39 (S.D. Ohio Sept. 26, 2006) (annexed hereto). 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 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., Cleland*, 697 F. Supp. at 1209; *Grove*, 15 Med. L. Rep. at 2278; that exit polls do not disrupt activities at the polls; *see e.g., Smith*, 681 F. Supp. at 804; and that the distance restrictions at issue so burdened the press' ability to gather information as to render the restrictions unconstitutional, *see e.g., Smith*, 681 F. Supp. at 801; *Cleland*, 657 F. Supp. at 1209-1210; *Journal Broadcasting*, 1988 U.S. Dist. LEXIS 16864, at \*2; *Karpan*, slip op. at 7.

B. A 100-Foot Ban On Plaintiffs' Exit Polling Activities Is Not Narrowly Tailored To Accomplish A Compelling Government Interest And Is Not The Least Restrictive Means Available

Like the statutes challenged in *Daily Herald* and *Grove*, section 293.740(1)(a) is a content-based restriction, because it only regulates speech "to a voter on the subject of marking his ballot." Thus, the statute is subject to the most strict constitutional scrutiny, and can be applied to Plaintiffs' exit polling activities "only if it is narrowly tailored to accomplish a compelling government interest . . . and is the least restrictive means available." *Daily Herald*, 838 F.2d at 385 (citations omitted).

The legislative history of Section 293.740 indicates that the current version of 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 electioneering within 100 feet of polling places. *Burson* held that Tennessee's 100-foot restriction on electioneering was both historically justified and narrowly tailored to advance the compelling government interests in preventing the "two evils" of "voter intimidation and election fraud." *Id.* at 206. In the course of its opinion in *Burson*, the Supreme Court was quite careful to distinguish electioneering activities from other activities at polling places, including exit polling activities, finding that while "there is . . . ample evidence that political candidates have used campaign workers to commit voter intimidation or elec-

toral fraud. . . . there is simply no evidence that political candidates have used other forms of solicitation or *exit polling* to commit such electoral abuses.” *Id.* at 207 (emphasis added). Thus, nothing about the Supreme Court’s decision in *Burson* supports the constitutionality of Section 293.740 as applied to exit polling. To the contrary, the case condemns the statute as applied to Plaintiffs’ activities.

Every other court to have considered the issue has agreed that exit polling is not electioneering. *See 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 (“[E]lectioneering is a much different process from exit polling.”).<sup>4</sup> Indeed, as the Court in *Burson* further observed, “allowing members of the general public access to the polling place makes it more difficult for political machines to buy off all the monitors.” 504 U.S. at

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<sup>4</sup> Indeed, Secretary Heller has all but conceded that exit polling is not electioneering by relying on § 293.740(1)(a) in support of his position (which bans “speak[ing] to a voter on the subject of marking his ballot”) rather than on § 293.740(1)(b) and (4)(e) (which prohibits polling by those “campaigning for or against a candidate, ballot question or political party”). Attorneys General across the country have also consistently concluded that exit polling activities do not constitute electioneering. *See, e.g.*, Louisiana Op. Att’y Gen. 05-0101, 2005 WL 3556205, at \*4 (Nov. 14, 2005) (“Exit polls conducted by the media are permissible within 600 feet of the polling place . . .”); Arkansas Op. Att’y Gen. 2004-268, 2004 WL 2270856, at \*2 (Oct. 5, 2004), interpreting Arkansas C.A. § 7-1-103(a)(9)(A)(B) &(C) (“My predecessor concluded and I agree, that this subsection [banning ‘electioneering’ within 100 feet of polling places] has no applicability to exit polling activities”); Arkansas Op. Att’y Gen. 99-330, 2000 Ark. AG LEXIS 2, at \*4-\*5 (Jan. 27, 2000), interpreting Arkansas C.A. § 7-1-103(a)(9)(A)(B) &(C) (“The most relevant question is whether ‘exit polling’ can be classified as ‘electioneering of any kind.’ In my opinion the answer to this question is ‘no’. . . . ([E]xit polling) does not fit within the definition of ‘electioneering . . .’”); Maryland Op. Att’y Gen. 92-035, 1992 Md. AG LEXIS 49, at \*4 n.3 (Oct. 20, 1992) (“The electioneering ban does not prohibit exit polling by the media within the ‘depoliticized’ zone.”); Kentucky Op. Att’y Gen. 92-73, 1992 Ky. AG LEXIS 73, at \*4 (Apr. 27, 1992) (exit polling did not fall within “the scope of electioneering, since exit polling occurs after a voter has cast his ballot and could not in any sense be deemed an effort to influence the voter’s decision”).

207. Citing that passage from *Burson*, the district 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).

That concerns about election fraud and voter intimidation prompted the passage of the current version of Section 293.740 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 materials 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 October 10, 2006). *See also* 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*).

A ban on exit polling within 100 feet of Nevada polling places exit is not narrowly tailored to accomplish any of the government interests articulated by the Nevada legislature. Significantly, these interests are virtually indistinguishable from the “interest in maintaining peace, order, and decorum at the polls and ‘preserving the integrity of [the State’s] electoral processes’” put forward by the Washington Secretary of State in *Daily Herald*. 838 F.2d at 385 (citations omitted). In that case, the Ninth Circuit held that, because it would “prohibit[] all exit polling, including nondisruptive exit polling” in the re-

stricted area, the state statute was fatally overbroad. *Id.* Here, Plaintiffs have shown that their exit poll reporters are instructed to be courteous and businesslike, to approach voters only after they have voted and left the polling place, and to inform voters both that their participation is voluntary and that the questionnaire is anonymous. (Lenski Aff't ¶ 7) There is simply no basis for concluding that exit polling within 100 feet of polling places will constitute "electioneering," will interfere with "the sanctity of polling places," or will result in the "harassment and intimidation" of voters. Thus, the application of Section 293.740 to exit polling would interfere with protected expression without promoting any of the goals that the Nevada legislature sought to advance.

Furthermore, the application of Section 293.740 to exit polling is not the least restrictive means of advancing these goals. As the *Daily Herald* court observed, the State already has the power to prohibit disruptive conduct directly, and can employ any number of alternative, less restrictive means to alleviate any potential for disruption that exit polls present. 838 F.2d at 385. No one has suggested, and Plaintiffs readily concede, that exit poll reporters may lawfully be asked to move should their individual activity in fact prove to obstruct the proper functioning of the election at any particular polling place at any particular time. A sweeping prohibition of Plaintiffs' exit polling activities, however, would abridge Plaintiffs' First Amendment rights without any corresponding increase in the State's ability to conduct orderly elections. As was true in Washington, Florida, Georgia, Montana, Minnesota, Wyoming, and Ohio, the application of state law to ban exit polling near polling places ignores other alternatives that are narrowly tailored to directly serve the government's asserted interest.

Because Section 293.740 cannot be construed to apply to Plaintiffs' exit polling activities on any theory consistent with firmly established First Amendment legal precedent,

there is a substantial likelihood that Plaintiffs will succeed on the merits of their challenge to such an application of the statute.

III. PLAINTIFFS WILL SUFFER  
IRREPARABLE HARM UNLESS  
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, e.g., Warsoldier v. Woodford*, 418 F.3d 989, 1002 (9th Cir. 2005) (same); *Brown v. California Department of Transportation*, 321 F.3d 1217, 1226 (9th Cir. 2003) (same). Because the application of Nev. Rev. Stat. Ann. § 293.740 to Plaintiffs’ exit polling so severely restricts Plaintiffs’ and voters’ rights under the First Amendment, a preliminary injunction should issue.

Not only would enforcement of the Nevada statute against Plaintiffs’ exit polling activities restrict Plaintiffs’ and voters’ First Amendment rights, it would also result in the loss of valuable voter information during this election year. *See Lenski Aff’t* ¶¶ 8-9; *Daily Herald*, 838 F.2d at 386 (affirming district court’s finding that “alternative polling techniques would not produce the same information, or constitute as scientific a study[,]” and noting that such information was “uniquely derived from exit polling”); *Smith*, 681 F. Supp. at 805 (“Because of the very nature of exit polls, there are no alternative days or different methods to collect the data they gather.”); *see also Journal Broadcasting*, 1988 U.S. Dist. LEXIS 16864, at \*3 (“[I]nformation obtained from exit polling could not be obtained by other methods.”). If the 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 which cannot be recompensed by a monetary award. *See Elrod*, 427 U.S. at 373; *Warsoldier*, 418 F.3d at 1002; *Brown*, 321 F.3d at 1226. This

factor weighs decidedly in favor of granting Plaintiffs' emergency motion for a preliminary injunction.

IV. THE BALANCE OF HARDSHIPS  
TIPS IN PLAINTIFFS' FAVOR

As established above, Plaintiffs will clearly suffer irreparable injury if Section 293.740 is applied to their exit polling activities. Indeed, Plaintiffs would be deemed to have established irreparable injury even if their claim of interference with First Amendment rights were merely "colorable." *Warsoldier*, 418 F.3d at 1001 ("[U]nder the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim.") (quoting *Sammartano*, 303 F.3d at 973-74 (internal citations omitted)).

On the other side of the balance, the requested order will cause no substantial hardship for the Secretary of State or the State of Nevada. As noted, Plaintiffs' exit poll reporters are instructed to be courteous and businesslike, to approach voters only after they have voted and left the polling place, and to inform voters both that their participation is voluntary and that the questionnaire is anonymous. (Lenski Aff't ¶ 7) Thus, there is no reason to believe that their presence within 100 feet of polling places will be disruptive of the electoral process or otherwise cause *any* harm to the State or its election officials. Certainly, there is nothing in the legislative history to suggest that exit polling has infringed on any citizen's right to vote or otherwise disrupted the electoral process. As the Ohio district court recently concluded, "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." *Blackwell*, slip. op. at 38. Of course, if actual

disruption occurs, election officials still retain the authority to appropriately address any disruptive behavior.

V. THE PUBLIC INTEREST  
FAVORS PLAINTIFFS

The public interest will be served in two important and related respects by granting Plaintiffs the relief requested. First, the citizens of Nevada 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. *See Mills v. Alabama*, 384 U.S. at 218-19; *Brown v. Hartlage*, 456 U.S. at 52-3; *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”). 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. In the present case, more speech about this upcoming election and voters’ actions, not less, is in the public interest. *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *Brown v. Hartlage*, 456 U.S. at 61. Furthermore, “[c]ourts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles.” *Sammartano*, 303 F.3d at 974 (citing *Homans v. Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001) (“[W]e believe that the public interest is better served by following binding Supreme Court precedent and protecting the core First Amendment right of political expression.”); *Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) (finding a district court did not abuse its discretion in granting a preliminary injunction because “the potential harm to independent expression and certainty in public discus-

sion of issues is great and the public interest favors protecting core First Amendment freedoms”); *Suster v. Marshall*, 149 F.3d 523, 530 (6th Cir. 1998) (holding candidates for judicial office were entitled to preliminary injunction of expenditure limit given likelihood of success on the merits, irreparable harm and lack of public interest in enforcing a law that curtailed political speech), *cert. denied*, 525 U.S. 1114 (1999); *Elam Construction, Inc. v. Regional Transportation District*, 129 F.3d 1343, 1347 (10th Cir. 1997) (stating, in context of a request for injunctive relief, that “[t]he public interest ... favors plaintiffs’ assertion of their First Amendment rights”), *cert. denied*, 523 U.S. 1047 (1998); *G & V Lounge, Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071, 1079 (6th Cir. 1994) (noting “it is always in the public interest to prevent the violation of a party’s constitutional rights”); *Cate v. Oldham*, 707 F.2d 1176, 1190 (11th Cir. 1983) (holding the “strong public interest in protecting First Amendment values” favored preliminary injunctive relief)).

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 exit polling. Thus, the public interest factor of the inquiry also weighs in favor of granting Plaintiffs’ emergency motion for a preliminary injunction.



