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

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)
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.2:06-CV-01268-PMP-RJJ

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
OPPOSITION TO DEFENDANT’S
MOTION TO DISMISS AND IN
FURTHER 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 opposition to Defendant Heller’s motion to dismiss and in further support of Plaintiffs’ emergency motion for a preliminary injunction.

PRELIMINARY STATEMENT

Defendant's brief in support of his motion to dismiss the Complaint and in opposition to Plaintiff's motion for a preliminary injunction is more striking for what it fails to say than for what it says. One would have thought the Defendant would have made a serious effort to address the Ninth Circuit's controlling decision in the *Daily Herald* case and its application to the statute at issue here, but he has not done so. One would have thought the Defendant would have attempted to distinguish the seven other decisions of federal district courts around the country striking down states' efforts to prohibit exit polling activities—joined by an eighth just yesterday¹—but he has not done so. Instead, Defendant has focused his effort on seeking to persuade the Court to dismiss this action on grounds that have no basis in the law and to urge that the factual record is too undeveloped to consider Plaintiff's request for preliminary injunctive relief. As we demonstrate below, Defendant's arguments are unpersuasive.

What is also striking about Defendant's submission is that, despite his own focus on the sufficiency of the factual record, Defendant has offered nothing to the Court seeking to defend the 100-foot ban on exit polling activities except his own affidavit (attached as Exhibit A to the submission) setting forth his "belief" that a 100-foot "buffer zone" is necessary to protect the voters of Nevada from "harassment or disruptions." Yet the Secretary offers no evidence — by way of legislative history or otherwise — that exit poll reporters have ever "harassed" a voter or otherwise "disrupted" activities at any polling

¹ In an opinion issued yesterday, the United States District Court for the Southern District of Florida permanently enjoined the Florida Secretary of State from prohibiting exit polling activities within 100 feet of polling places in Florida. *See CBS Broadcasting, Inc. v. Cobb*, No. 06-22463-CIV-Huck/Simonton (S.D. Fla. Oct. 24, 2006). The decision is addressed more fully below; a copy is appended hereto.

place at all. Defendant is apparently of the view that activities which are indisputably protected by the First Amendment can simply be prohibited without any showing that the state has a constitutionally defensible basis for prohibiting them. This turns the constitutional analysis on its head.

Plaintiffs have shown that they intend to engage in constitutionally protected activity at Nevada polling places on November 7, 2006 and on election days in the future. There can be no dispute about that. Plaintiffs have shown that Section 293.740 precludes them from engaging in that activity in a meaningful way. There can be no dispute about that. It was then up to Defendant to demonstrate that Section 293.740 is a narrowly tailored means of advancing a compelling state interest by the least restrictive means. Defendant has made no effort to do so. And because he has not, Plaintiffs' motion for a preliminary injunction should be granted.

Because Defendant's motion to dismiss raises one threshold issue under Article III, we first turn to that motion.

ARGUMENT

I. DEFENDANT'S MOTION TO DISMISS SHOULD BE DENIED

Defendant correctly concedes that “[t]he ‘complaint should not be dismissed [under Fed. R. Civ. P 12(b)(6)] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.’” *Hydrick v. Hunter*, ___ F.3d ___, 2006 WL 2773196, at *3 (9th Cir. June 1, 2006) (citation omitted). “[W]hen a federal court reviews the sufficiency of a complaint, . . . [its] task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Id.* (quoting *Scheuer v. Rho-*

des, 416 U.S. 232, 236 (1974)). As demonstrated below, Plaintiffs easily meet this pleading standard.

A. This Case Is Ripe for Adjudication

Defendant argues that this case is not ripe for adjudication because it does not yet present a justiciable case or controversy. *See* Defendant’s Motion to Dismiss and Opposition to Motion for Preliminary Injunctive Relief (“Def. Mem.”), at 3-7. However, Defendant’s argument mischaracterizes both the law and the facts. This case is clearly justiciable.

“[R]ipeness is peculiarly a question of timing[.]” *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974). The “basic rationale” of the ripeness doctrine is “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . .” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).² As Defendant correctly points out, Def. Mem. at 4, the constitutional component of the ripeness inquiry and the injury-in-fact prong of the constitutional requirement of standing are often, for all intents and purposes, one and the same. *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). Under a standing analysis, a plaintiff must allege an injury which is “concrete and particularized,” and is “actual or imminent, not conjectural or hypothetical[.]” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted). In other words, a “plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct

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Although the ripeness inquiry includes both a “constitutional component” and a “prudential component,” Defendant all but ignores the latter, which is usually guided by two considerations — (i) “the fitness of the issues for judicial decision,” and (ii) “the hardship to the parties of withholding court consideration” — both of which favor a finding of ripeness in this case. *See Maldonado v. Harris*, 370 F.3d 945, 953-54 (9th Cir. 2004) (internal citations and quotation marks omitted). The case is fit for judicial decision because the issues presented are predominantly legal and Plaintiffs will suffer hardship because their First Amendment rights will be violated if the Court withholds consideration. *See Abbott Laboratories*, 387 U.S. at 149.

injury as a result of the statute's operation or enforcement" rather than an "imaginary or speculative" injury. *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (citation omitted). Thus, whether analyzed under the rubric of ripeness or standing, the inquiry, from a constitutional standpoint, is whether the case presents a dispute that is "definite and concrete, not hypothetical or abstract." *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945).

Plainly, this case presents an actual case and controversy. Plaintiffs have alleged that they intend to conduct exit polls within 100 feet of about 20 Nevada polling places on November 7, 2006 and on future election days. *See* Complaint, ¶ 24; Affidavit of Joseph W. Lenski ("Lenski Aff't"), at ¶ 19. On September 29, 2006, the Secretary of State's office told Plaintiffs that it would prohibit exit polling within 100 feet of polling places on November 7.³ Complaint, ¶ 18; Affidavit of John W. Zucker, at ¶ 4. This is no "hypothetical or abstract" dispute; rather, it is clear that "[t]he parties remain philosophically on a collision course[.]" *Canatella v. California*, 304 F.3d 843, 853 (9th Cir. 2002) (citation omitted). Defendant's specific threat to enforce Section 293.740 to prevent Plaintiffs' exit polling within 100 feet of Nevada polling places is sufficient to give rise to an actual case or controversy. It is well settled that where a plaintiff faces an actual, verbalized threat by the authorities to enforce a statute against him, "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

³ Defendant's claim that this is inadmissible hearsay is frivolous and exemplifies the desperation of his attempt to avoid the merits of this dispute. Admissions by a party-opponent, including those made by a party's agent or anyone else authorized by the party to make the statement in question, are not hearsay. Fed. R. Evid. 801(d)(2).

Defendant argues that the September 29 statement by his office cannot constitute a “threat” to enforce Section 293.740(1)(a) against Plaintiffs’ exit polling activities because “[t]he Secretary of State has no authority to prosecute” violations of the statute and only “has authority to refer violations” of the statute to the Attorney General or local prosecutor. Def. Mem. at 6. This argument is belied by Defendant’s own job description, Nev. Rev. Stat. Ann. § 293.124(1), which provides in relevant part that he “shall serve as the chief officer of elections” and “is responsible for the execution and enforcement of the provisions of Title 24 of NRS”, including Section 293.740(1)(a), and “all other provisions of state and federal law relating to elections in this state.”⁴ What’s more, the argument is wholly inconsistent with Defendant’s own statement that “as the state’s Chief Elections Officer,” he would “*decline to allow*” exit polling within 100 feet of Nevada polling places. Def. Mem. Ex. D (emphasis added). Whether Defendant or Plaintiffs would be parties to civil or criminal proceedings enforcing Section 293.740(1)(a) is immaterial; it is the election officials under Defendant’s authority who will prevent Plaintiffs’ reporters from conducting exit polls at Nevada polling places on election day, thereby impairing Plaintiffs’ newsgathering activities.

In a virtually identical situation, the Ninth Circuit has held that “a ‘case or controversy’ may exist when it is demonstrated that the state attorney general intends *either* to enforce a statute or to ‘encourage local law enforcement agencies’ to do so.” *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 618 (9th Cir. 1999) (citation omitted) (emphasis in original). Indeed, this very Court has previously rejected an identical argu-

⁴ Nevada law also provides that “[t]he secretary of state may provide interpretations and take other actions necessary for the effective administration of the statutes and regulations governing the conduct of primary, general, special and district elections in this state.” Nev. Rev. Stat. Ann. § 293.247(3).

ment made by this very Defendant. *Americans for Medical Rights v. Heller*, 2 F. Supp. 2d 1307, 1313 (D. Nev. 1998) (Pro, J.) (“The reality is that a prosecution . . . will not likely occur unless the Secretary of State notifies a district attorney of a . . . violation” of law in an area where he is “generally responsible for insuring that [the] rules are followed.”).

Defendant still presses the point, arguing that the concurring opinion in *Thomas*, cited above, means that “litigants aggrieved by existing law . . . [are] virtually unable to bring pre-enforcement challenges in this circuit even in the most sensitive First Amendment context where the laws allegedly burden their freedom of speech. . .” Def. Mem. at 5 (quoting *Thomas*, 220 F.3d at 1143 (O’Scannlain, J. concurring)). This vastly overstates the impact of *Thomas*. Indeed, the *Thomas* majority expressly held:

Contrary to the view expressed in the concurrence, our decision neither shuts the door to pre-enforcement challenges to laws that allegedly infringe upon constitutional rights, nor does it establish a new approach to justiciability, which under our precedent requires a balancing of several factors. Rather, our decision remains true to our precedent, all of which remains good law.

220 F.3d at 1137 n.1. *Thomas* held (rather unremarkably) that in conducting the constitutional portion of the ripeness inquiry, courts “look to whether the plaintiffs have articulated a ‘concrete plan’ to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute.” *Id.* at 1139. These factors are present here. As discussed above, Plaintiffs have stated a “concrete plan” to conduct exit polls within 100 feet of about 20 polling places in Nevada on November 7, 2006, and Defendant’s office has specifically communicated to Plaintiffs that it intends to enforce Section 293.740 to prevent Plaintiffs from doing so. With respect to past enforcement, the Secretary of State’s office stated in no uncertain terms prior to the 2004 general election that it would not allow exit polling within 100 feet of Nevada polling places, *see* Def. Mem. Ex. D, and did so with considerable effect. *See* *Lenski Aff’t* ¶¶ 9, 21. Indeed, if Defendant

were seriously maintaining that he has no intention of enforcing the statute, it is difficult to understand why he is opposing Plaintiffs' motion for a preliminary injunction in the first place. Why else would Defendant submit an affidavit insisting that the 100-foot "buffer zone" must be kept free of exit polling?

Based on the foregoing, it is clear that this case presents a justiciable case and controversy, and is therefore ripe for adjudication.

B. The Secretary of State Is Not Entitled to Immunity Under the Eleventh Amendment

Defendant similarly argues that he is immune from suit under the Eleventh Amendment because he does not actually prosecute violations of Section 293.740(1)(a). Def. Mem. at 7-8. This argument is also without merit. As stated above, Nevada law is crystal clear that Defendant "is responsible for the execution and enforcement of" Nevada election law, Nev. Rev. Stat. Ann. § 293.124(1), and that Defendant "may provide interpretations and take other actions necessary for the effective administration of" such laws. Nev. Rev. Stat. Ann. § 293.247(3). Defendant has admitted that he has this authority, Def. Mem. Ex. D, as well as the authority to refer violations of Section 293.740(1)(a) to prosecutors. Def. Mem. at 6. There can be no dispute that Defendant has at least "some connection with the enforcement of" Section 293.740(1)(a). *See Ex Parte Young*, 209 U.S. 123, 157 (1908). Indeed, the Ninth Circuit has reached this conclusion in identical circumstances. *Culinary Workers Union*, 200 F.3d at 619 ("We have no difficulty . . . concluding that the requisite 'connection' exists here for the same reasons that the union has demonstrated that a case and controversy exists.").

An identical Eleventh Amendment argument by the Secretary of State of Ohio was recently rejected by the United States District Court for the Southern District of Ohio. *American Broadcasting Co. v. Blackwell*, No. 1:04cv750, slip op. at 22-24 (S.D.

Ohio Sept. 26, 2006) (“*Blackwell II*”) (“[S]tate officers who are violating a federal law may *always* be sued for purely injunctive relief — capacity and party in interest are irrelevant”) (citation omitted; emphasis in original). Defendant attempts to distinguish *Blackwell II* by arguing that only the Secretary of State’s directive interpreting the underlying statutes, and not the constitutionality of those statutes themselves, was at issue in *Blackwell II*, whereas here, by contrast, Plaintiffs challenge only the statute itself, not Defendant’s conduct. Def. Mem. at 8. But this argument mischaracterizes Plaintiffs’ claims in both this case and in *Blackwell II*. Count I of the Complaint in this case alleges that Section 293.740(1)(a) is unconstitutional as applied to Plaintiffs’ exit polling activities — the same claim that Plaintiffs made concerning the Ohio statutes at issue in Count III in *Blackwell II*. See *Blackwell II*, slip op. at 10. Count II of the Complaint in this case alleges that Defendant’s determination to prohibit exit polling within 100 feet of Nevada polling places under the authority of Section 293.740(1)(a) is unconstitutional — again, the same claim that Plaintiffs made concerning the Ohio Secretary of State’s directive in Count I in *Blackwell II*. See *Blackwell II*, slip op. at 10. This case is indistinguishable from *Blackwell II*. Defendant’s conduct is indisputably at issue.

“In determining whether the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.’” *Verizon Maryland Inc. v. Public Service Commission*, 535 U.S. 635, 645 (2002) (citation omitted); see also, e.g., *Wilbur v. Locke*, 423 F.3d 1101, 1111 (9th Cir. 2005) (same). The result of this “straightforward inquiry” in this case is clear: Plaintiffs have alleged that the enforcement of Section 293.740(1)(a) by the Secretary of State and local election officials under his authority against Plaintiffs’ exit polling activities violates the First Amendment and seek an injunction prohibiting the enforcement of the statute against Plaintiffs’ exit polling activities during the upcoming election on November 7, 2006,

as well as during subsequent elections. The Eleventh Amendment provides no defense to the Secretary of State and certainly provides no ground for the Court to dismiss the Complaint.

II. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE GRANTED

A. Plaintiffs Have Put Forth Sufficient Evidence to Demonstrate a Probability of Success on the Merits

Defendant argues, in essence, that Plaintiffs have not submitted sufficient evidence to enable the Court to resolve every conceivable factual question that may be involved in the ultimate disposition of this case, and that therefore Plaintiffs have failed to show that they are likely to succeed on the merits. *See* Def. Mem. at 8-14. The argument completely misapprehends the standard for granting *preliminary* injunctive relief, which, as its name suggests, is necessarily granted on an incomplete factual record. Defendant suggests that Plaintiffs must do more than show a *probability* of success on the merits, and that Plaintiffs must instead show a *certainty* of success on the merits. That is simply not the law. “It is not the function of a preliminary injunction to decide the case on the merits, and the possibility that the party obtaining a preliminary injunction may not win on the merits at the trial is not determinative of the propriety or validity of the trial court’s granting the preliminary injunction.” *B.W. Photo Utilities v. Republic Molding Corp.*, 280 F.2d 806, 807 (9th Cir. 1960); *see also Cumulus Media, Inc. v. Clear Channel Communications, Inc.*, 304 F.3d 1167, 1171 (11th Cir. 2002) (“Preliminary injunctions are, by their nature, products of an expedited process often based upon an underdeveloped and incomplete evidentiary record.”); *S.E.C. v. Lauer*, 52 F.3d 667, 671 (7th Cir. 1995) (in granting a preliminary injunction, a court “need only have sufficient confidence about . . . the merits to make the issuance of a preliminary injunction a reasonable measure for minimizing the possibility of error that is always present when a court is asked to act on the basis of an incomplete record”). In any event, the evidence submitted by Plaintiffs is more than sufficient to

demonstrate a likelihood of success on the merits. Indeed, the district court in *Blackwell* granted preliminary injunctive relief on the basis of nearly identical evidence prior to the 2004 general election. See *American Broadcasting Cos. v. Blackwell*, No. 1:04cv750 (S.D. Ohio Nov. 1, 2004) (“*Blackwell I*”) (copy appended hereto).

Defendant bases his “evidentiary” argument on the Ninth Circuit’s first opinion in the *Daily Herald* case, see *Daily Herald Co. v. Munro*, 758 F.2d 350 (9th Cir. 1985) (“*Daily Herald I*”), urging that the decision requires this Court to make specific factual findings in response to specific questions identified in the Court’s opinion in the context of this motion. What Defendant neglects to mention is that what the Ninth Circuit was considering in its first opinion in *Daily Herald* was the propriety of the district court’s entry of summary judgment, *sua sponte*, for the Secretary of State of Washington. Reversing the district court’s ruling in favor of the Secretary, the Ninth Circuit held that summary judgment should not have been granted under Fed. R. Civ. P. 56 because of the existence of genuine issues of material fact. *Id.* at 351. The Court then proceeded to identify certain factual issues (as well as certain legal ones) that the district court was to consider on remand. *Id.* at 351-52. The opinion says nothing about the nature of proof required on a motion for a preliminary injunction. Indeed, what both decisions in the *Daily Herald* case make abundantly clear is that it is the Secretary’s burden to come forward with evidence to establish that statutes restricting protected First Amendment activity are narrowly tailored to advance a compelling state interest. The Secretary of State of Washington did not do so in the *Daily Herald* case and Secretary Heller has not done so here.

Ignoring the procedural posture of *Daily Herald I*, Defendant goes on to argue that that decision requires Plaintiffs to prove that their exit polls will be “conducted in a ‘systematic and statistically reliable manner’” in order to prevail on their motion here. Def. Mem. at 10. Of course, *Daily Herald I* addressed a completely different question. It instructed the district court to consider on remand whether statistically reliable polls could be conducted outside

the restricted zone at issue there.⁵ Here the un rebutted evidence set forth in the Lenski Affidavit demonstrates that both the accuracy and the reliability of exit polls are substantially impaired if they are conducted at a distance of 100 feet. *See* Lenski Aff’t ¶ 9. That is the reason Plaintiffs are before the court. It is circular at best for Defendant to urge that because Plaintiffs have conceded that the accuracy and reliability of exit polls is severely affected by a 100-foot restriction that Plaintiffs are not entitled to challenge the constitutional propriety of the 100-foot restriction. If Defendant wanted to promote the accuracy of exit polls, he would not have opposed Plaintiffs’ motion.

In a similar vein, Defendant urges that some “well-publicized incidents . . . call into question the reliability and accuracy of exit polling[,]” pointing to the confusion surrounding the 2000 presidential election in Florida. Def. Mem. at 11. Defendant’s observation is entirely beside the point, especially since he disclaims any state interest in prohibiting exit polls on the ground that the data is also used to project the results of certain election contests. *See* Def. Mem. at 10, 14. Defendant’s decision not to take that route is wise in light of the final decision in *Daily Herald*. *See Daily Herald Co. v. Munro*, 838 F.2d 380, 387-88 (9th Cir. 1988) (“*Daily Herald II*”).

Defendant goes on to argue that Plaintiffs have failed to show their exit polls will be impaired because the Nevada polling places at which Plaintiffs intend to conduct their exit polls may be “situated so that exiting voters travel [more than 100 feet] along one path before getting into their vehicles or otherwise dispersing,” Def. Mem. at 12, and offers that there are some polling places where that is so. *See* Def. Mem., Exs. B (identifying one such polling place in Washoe County); C (claiming that there are “many” such polling

⁵ The particular question the *Daily Herald I* Court asked the district court to focus on was: “Can statistically reliable polls be conducted outside the 300-foot radius?” *Daily Herald I*, 758 F.2d at 351.

places in Clark County). Defendant’s hypothetical musings are as speculative as the conclusion he seeks to draw from them is implausible. In any event, Defendant misapprehends the constitutional analysis. If, as we maintain, Section 293.740 is unconstitutional as applied to Plaintiffs’ exit polling activities, it is of no moment that one, a few or many polling locations may have distant parking lots. The First Amendment does not require Plaintiffs to attack the statute on a polling place by polling place basis.⁶

Attempting to avoid strict scrutiny analysis, Defendant also claims that “whether sidewalks and parking lots outside of polling places are public forums for constitutional purposes is an open question.” Def. Mem. at 12. It is not an open question. *See Burson v. Freeman*, 504 U.S. 191, 196 (1992) (holding that 100-foot restricted zone around polling places “bars speech in quintessential public forums . . . such as parks, streets, and sidewalks”); *Daily Herald II*, 838 F.2d at 384-85 (public areas within 300 feet of polling places are public forums); *see also, e.g., United States v. Grace*, 461 U.S. 171, 177 (1983) (“‘public places’ historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be ‘public forums.’”) (citation omitted); *Perry Education Ass’n v. Perry Public Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (holding that streets and parks are quintessential public forums that “‘have immemorally been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions’”) (citation omitted); *American Civil Liberties Union v. City of Las Vegas*, 333

⁶ In several contexts Defendant insists that Plaintiffs should have advised him — and the Court — of the specific locations of the 20 polling places where exit polling is presently planned. The law imposes no such obligation on Plaintiffs. If a speaker desires to visit 20 polling places on Election Day to hand out leaflets within the 100-foot zone saying “Tell Your Friends to Vote Too” — an activity entirely permissible under Section 293.740 — the Constitution does not require that speaker to provide the state with her itinerary in advance.

F.3d 1092, 1099 (9th Cir. 2003) (“The quintessential traditional public forums are sidewalks, streets, and parks.”). Even the case relied upon most heavily by Defendant, *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004), held that a restriction on electioneering within the 100-foot zone around polling places was subject to strict scrutiny when applied to speech on public sidewalks, and, with respect to parking lots and walkways on private and school property, held that the fact that those locations were being used as polling places did not temporarily convert them from nonpublic to public forums.⁷ *Id.* at 748-51. While Defendant lamely asserts that in Nevada, “polling places are often located inside schools, recreation centers, and churches[,]” he says nothing about whether the 100-foot restriction would encompass public sidewalks or streets in the immediate vicinity of those locations. Def. Mem. at 12. The omission is telling.

Finally, Defendant argues that Plaintiffs have not established whether exit polling is “disruptive to the voting process.” Def. Mem. at 13. It is certainly true that Plaintiffs have not shown that exit polling is disruptive. What Plaintiffs *have* shown, however, is that exit polling is *not* disruptive. Plaintiffs have submitted evidence demonstrating that their exit poll reporters are instructed not to interfere with the election process in any way, that Plaintiffs have never received any complaint about the conduct of their exit poll reporters in Nevada and that, even in those few locations where Plaintiffs were permitted to conduct exit polls within 100 feet of Nevada polling places in 2004, the exit polls were conducted without incident. Lenski Aff’t ¶¶ 7, 20-21.⁸ More to the point, however, is that De-

⁷ The Eighth Circuit has come to the opposite conclusion, holding that walkways and parking lots leading to polling places located in schools become public forums on election day, even though such areas were otherwise nonpublic forums. *Embry v. Lewis*, 215 F.3d 884, 888 (8th Cir. 2000).

⁸ Indeed, every court that has considered the propriety of restrictions on exit polling activities has concluded that they are not disruptive. *See* discussion, *infra*, pp. 17-18.

fendant has shown nothing to the contrary.⁹ In a case where the Secretary is seeking to defend a statute banning speech on the ground that it is meant to remedy disruption — even though it bans speech whether or not is disruptive — it is he who has the burden of showing that Plaintiffs’ activities are disruptive. He could not bring himself to do so in his own affidavit;¹⁰ nor could either of the other knowledgeable election officials who filed affidavits in this case.

In the end, Defendant’s entire argument about the insufficiency of the record is meritless and boils down to an admission that neither he nor the Nevada legislature had any constitutionally permissible basis for prohibiting Plaintiffs’ constitutionally protected activities.

B. A 100-Foot Limit on Exit Polling is Not Narrowly Drawn to Achieve a Compelling State Interest

Plaintiffs readily concede that Nevada has a legitimate interest in maintaining peace, order, and decorum at the polls. *See Daily Herald II*, 838 F.2d at 385. The question presented here is whether Section 293.740(1)(a), as applied to Plaintiffs’ exit polling activities, is narrowly tailored to achieve that purpose. Plaintiffs submit that it is clearly not.

⁹ Defendant also claims that Plaintiffs have some burden to demonstrate that polling voters through email and the Internet would not be an adequate substitute for exit polling. That is not Plaintiffs’ burden either, but even if it were it has been satisfied. *See Lenski Aff’t* ¶ 8. Of course, even if “polling” through the Internet or e-mail were an adequate substitute — which it is not — the existence of alternative means for obtaining information is no defense in this case. *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 541 n.10 (1980) (“[W]e have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression”).

¹⁰ Indeed, the only thing the Secretary could say on the subject of disruption is that the presence of exit poll reporters might encourage others to engage in disruptive conduct. *See* Def. Mem. Ex. A.

Faced with controlling Ninth Circuit authority on this very issue, Defendant tries to distinguish *Daily Herald II* by pointing out that the restriction on exit polling in that case was 300 feet, whereas Nevada's restriction is only 100 feet. Def. Mem. at 15-16. Nothing in the *Daily Herald II* opinion, however, indicates that the result would have been any different if the restriction had been only 100 feet. Moreover, the three other federal district courts to have considered 100-foot restrictions on exit polls have all found those restrictions to be unconstitutional. See *CBS Broadcasting, Inc. v. Cobb*, No. 06-22463-CIV-Huck/Simonton, slip op. at 11 (S.D. Fla. Oct. 24, 2006) (Florida's 100-foot ban on solicitation of voters held unconstitutional as applied to exit polling); *Blackwell II*, slip op. at 45 (holding that Ohio could not prohibit exit polls within 100 feet of polling places consistent with the First Amendment); *CBS Inc. v. Growe*, 15 Med. L. Rep. (BNA) 2275 (D.Minn. 1988) (enjoining Minnesota's Secretary of State from enforcing that state's 100-foot ban against exit polling). Courts that have considered challenges to distance restrictions of fewer than 300 feet have unanimously reached the same conclusion. See *CBS Inc. v. Smith*, 681 F. Supp. 794 (S.D. Fla. 1988) (150 feet); *National Broadcasting Co. v. Colburg*, 699 F. Supp. 241 (D. Mont. 1988) (200 feet); *National Broadcasting Co. v. Cleland*, 697 F. Supp. 1204 (N.D. Ga 1988) (250 feet).

Defendant also claims, once again, that exit polling within 100 feet of polling places "is harassing to voters and discourages voter turnout." Def. Mem. at 15. And, once again, Defendant offers absolutely no evidence to support this assertion. While Defendant's affidavit states that he generally "believes any harassments or disruptions . . . within 100 feet of the entrance to a polling place discourage and dissuade voter turnout[.]" he never actually asserts that exit polling — which involves a courteous request by Plaintiffs' reporters to fill out a short survey — would constitute "harassment" or "disruption." Def. Mem. Ex. A. Again, the omission is telling. The reality is that Defendant's own evidence establishes that the Secretary of State's office has received *no* complaints alleging that exit polling constitutes a violation of

Section 293.740 since that statute was passed in its current form, *see* Def. Mem. Ex. E, and Defendant has not even identified a single complaint by a voter who felt harassed or disrupted by an exit pollster, or who decided not to vote out of fear of being approached by an exit pollster.¹¹

This lack of evidence of disruption is not surprising; every other court considering similar restrictions on exit polling has rejected the same or similar arguments. *See Daily Herald II*, 838 F.2d at 385 (“[p]rohibiting nondisruptive exit polling . . . does not advance the state’s interest” in maintaining peace, order, and decorum at the polls and preserving the integrity of the electoral process); *Cobb*, slip op. at 8 (“The Court would expect that if [defendant] had any real, direct evidence to support her contention that exit polling adversely affects the voting process, she would have presented it in an unequivocal way”); *Blackwell II*, slip op. at 38 (“there is no evidence that plaintiffs’ exit polls caused disruption, overcrowding or interfered with the voting process in any way”); *Grove*, 15 Med. L. Rep. (BNA) at 2278 (statute was not narrowly tailored to advance the state’s purposes “to preserve the sanctity of the polling place, to prevent harassment of voters, to prevent congestion and confusion around the polling place, and to encourage voter participation” because “it prohibits all exit polling, including nondisruptive exit polling”); *Journal Broadcasting, Inc. v. Logsdon*, No. C88-0147-L(A), 1988 U.S. Dist. LEXIS 16864, at *4 (W.D. Ky. Oct. 21, 1988) (holding that statute was not narrowly tailored to advance the government’s interest in maintaining peace, order,

¹¹ Defendant’s related (and totally unsubstantiated) assertion that exit polling might contribute to lower voter turnout is also belied by the statistics, which show that voter participation in Nevada is actually on the rise. Compare U.S. Election Assistance Comm’n, “Voter Registration and Turnout — 1996,” available at http://www.eac.gov/election_resources/96to.htm (last visited Oct. 24, 2006) (turnout of 59.67% of registered voters in 1996 general election), with Office of the Secretary of State of Nevada, “Voter Turnout: Official 2000 General Election Results,” available at <http://sos.state.nv.us/nvelection/2000General/VoterTurnout.htm> (last visited Oct. 24, 2006) (turnout of 70.15% of registered voters in 2000 general election), and Office of the Secretary of State of Nevada, “2004 Official General Election Results,” available at <http://sos.state.nv.us/nvelection/2004General/VoterTurnout.htm> (last visited Oct. 24, 2006) (turnout of 77.45% of registered voters in 2004 general election).

and decorum at the polls and preserving the integrity of the election process “‘since it prohibits nondisruptive polling’”) (citation omitted); *National Broadcasting Co. v. Karpan*, No. C88-0320, slip op. at 6 (D. Wyo. Oct. 21, 1988) (holding that statute was not necessary to protect “voter privacy” because “[v]oters who wish to avoid discussing their vote may simply refuse to talk to the pollsters”); *Cleland*, 697 F. Supp. at 1211-12 (holding that the evidence demonstrated that exit polling did not “*intrinsically invade*[] the privacy of voters” and that the state had “produced no first-hand evidence that any voter had ever decided not to vote because of the existence of exit polls, or that such a result was in any way a real danger”) (emphasis in original); *Colburg*, 699 F. Supp. at 242 (“It is said that the statute validly protects voters’ rights to privacy, but that isn’t true. The right of privacy is maintained by those desiring it simply by refusing to discuss how or why they voted.”); *Smith*, 681 F. Supp. at 803 (holding that “there has been no showing that exit polls or other voter interviews by journalists in any way have disrupted any polling place in this state” and that there was no evidence “that the presence of reporters near a polling place tends to discourage anyone from voting”).

Given the utter lack of evidence that exit polling is disruptive, Defendant is forced to retreat to a claim that allowing exit polling within 100 feet of polling places will encourage others with “nefarious purpose[s]” to harass voters in the 100-foot restricted area. Def. Mem. at 15. This speculative claim is based on nothing more than Defendant’s bald assertion that he has “no doubt” that members of “special interest groups . . . will feel entitled to disregard the 100 foot limit” if they see exit polls being conducted there. Def. Mem. Ex. A. The argument is also curious in light of Defendant’s simultaneous assertion that members of these groups already “often speak, or attempt to speak, to voters within 100 feet of the entrance to polling places.” *Id.* There is simply no reason to believe, and Defendant has offered none, that the presence of exit poll reporters will exacerbate this problem or make it more difficult for poll workers to enforce the 100-foot restricted area against those as to whom it may properly be enforced. If what Defendant is really saying is that poll workers will have difficulty distinguish-

ing exit poll reporters from others, it is certainly within the state's power to require that exit poll reporters be clearly identifiable as such. Plaintiffs exit poll reporters already are. As Mr. Lenski testified, "each wear a badge clearly identifying them as a representative of our client news organizations." Lenski Aff't ¶ 7. In short, there are many means, short of prohibiting protected speech, to address identification issues.

Next, Defendant argues that, "[a]ssuming that the areas where Plaintiffs want to conduct exit polls are not public forums, [Section] 293.740(1)(a) . . . survives constitutional challenge" because it is "viewpoint neutral and reasonable in light of the purpose served by the particular forum." Def. Mem. at 16. As discussed *supra*, pp. 13-14, Defendant's fanciful "assumption" is patently unrealistic. *Cf., e.g., Burson*, 504 U.S. at 196 (assuming that 100-foot restricted zone encompassed public forums); *Daily Herald II*, 838 F.2d at 384-85 (same with respect to 300-foot restricted zone). Furthermore, in the absence of *any* evidence that exit polling within 100 feet of a polling place has any deleterious effect on the voting process, a ban on such exit polling is completely unreasonable.

C. Plaintiffs Have Established That They Will Suffer Irreparable Injury in the Absence of Injunctive Relief

Defendant's claim that Plaintiffs have failed to establish the possibility of irreparable injury is frivolous and directly contradicted by the undisputed factual record. The notion that exit poll data will not be "forever lost" because Plaintiffs have in the past collected such data from outside the 100-foot restricted zone completely and deliberately disregards the undisputed evidence that exit polls conducted at such distances are significantly less reliable than exit polls conducted closer to the polling place. As Mr. Lenski explained, "if our exit poll reporters are held at a distance of 100 feet at our selected precincts in Nevada, their exit polling activities will be substantially impaired and the statistical reliability and accuracy of our exit poll will be substantially reduced." Lenski Aff't ¶ 22; *see id.* ¶ 9. In any event, it simply cannot be disputed that Plaintiffs' exit polling activities are protected by the First Amendment, *see Daily Herald II*,

838 F.2d at 384, that the application of a content-based restriction such as Section 293.740(1)(a) to those activities presumptively curtails that First Amendment freedom, *see id.* at 385, and 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). Therefore, Plaintiffs have plainly established the possibility of irreparable injury.

D. The Balance of Hardships Tips In Plaintiffs’ Favor

Defendant’s argument that allowing exit polls within 100 feet of polling places “will undoubtedly create serious hardships for election officials” and that “Plaintiffs face no serious hardships” borders on the absurd.¹² As discussed *supra*, Section II.B., Defendant has not established that allowing exit polls within 100 feet of polling places will cause *any* harm to the State of Nevada or its election officials. And as established *supra*, Section II.C., Plaintiffs will certainly suffer irreparable harm if they are prevented from conducting exit polls within 100 feet of Nevada polling places. In fact, Plaintiffs suffered precisely this harm in 2004, when exit poll reporters who were required to stand 100 feet or more from the polling location experienced significantly higher error rates than those allowed to stand within 25 feet. *Lenski Aff’t* ¶ 9.

¹² Defendant does not even bother to argue that the public interest is in his favor. For the reasons stated in Plaintiffs’ opening brief, it is clear that the public interest favors Plaintiffs.

III. THE COURT SHOULD REJECT
DEFENDANT'S PROPOSED
LIMITATIONS ON THE INJUNCTIVE
RELIEF REQUESTED

Finally, Defendant argues that if this Court grants the injunctive relief requested by Plaintiffs, such relief should be limited to the specific polling places where Plaintiffs intend to conduct exit polls on November 7, 2006 so that poll workers can prepare ahead of time “and be as vigilant as possible.” Def. Mem. at 17-18. This request is unnecessary and also makes no sense. First, Defendant does not say why the poll workers need to prepare at all for the presence of exit poll reporters. As noted, there have been no examples of exit poll-related disruptions at Nevada polling places. Second, if the statute is, as we urge, unconstitutional as applied to Plaintiffs’ exit polling activities, it is unconstitutional as applied to those activities at *all* Nevada polling places.

Defendant also argues that any injunction issued by this Court should make clear that exit polling should continue to be prohibited within 25 feet of the entrances to polling places. Def. Mem. at 18. However, Plaintiffs’ exit polling activities are no less protected by the First Amendment inside 25 feet than they are from 25 to 100 feet. As established *supra*, Section II.B., Defendant has not established that exit polling at *any* distance harms the decorum and integrity of the polling place, so a 25-foot restriction is no more justified than the 100-foot restriction. *See Burson*, 504 U.S. at 210 (reduction of protected zone from 100 to 25 feet was a “difference only in degree, not a less restrictive alternative in kind”). Nevada election officials already have the power to deal with anyone actually interfering with the conduct of an election. *See Nev. Rev. Stat. Ann. § 293.730(1)(a)*. As such, there is no basis for Defendant to insist that a 25-foot restriction is needed to protect voters from conduct that truly interferes.

But even assuming, without conceding, that a 25-foot restriction would not raise constitutional issues, the Secretary’s request that this Court incorporate such a restric-

tion in any preliminary injunction that may issue is a request that this Court effectively re-write Section 293.740(1)(a) and establish a new distance restriction never considered or approved by the Nevada legislature. If the Nevada legislature wishes to create a 25-foot restricted zone applicable specifically to exit polling, it may attempt to do so; the Court should not accept Defendant's invitation to exercise this purely legislative function.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12 (b)(6) should be denied, and a preliminary injunction should issue enjoining the Secretary of State from prohibiting Plaintiffs' exit polling activities within 100 feet of Nevada polling places on election day, November 7, 2006, and directing the Secretary of State to so advise state election officials forthwith.

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Respectfully submitted,

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