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9
10 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

11 AMERICAN BROADCASTING)
12 COMPANIES, INC., THE ASSOCIATED)
PRESS, CABLE NEWS NETWORK LP,)
13 LLLP, CBS BROADCASTING INC., FOX)
NEWS NETWORK, LLC, and NBC)
14 UNIVERSAL, INC.,)
15 Plaintiffs,)
16 vs.)
17 DEAN HELLER, in his official capacity as)
the SECRETARY OF STATE OF NEVADA,)
18 Defendant.)
19

2:06-cv-01268-PMP-RJJ

DEFENDANT'S MOTION TO DISMISS
AND OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTIVE RELIEF

20
21 COMES NOW the Honorable Dean Heller, Secretary of State of Nevada, through his
22 attorney George J. Chanos, Attorney General, by his deputies Joshua J. Hicks and
23 Christopher G. Nielsen, and files this Motion to Dismiss and Opposition to Plaintiffs' Motion for
24 Preliminary Injunctive Relief. This Motion and Opposition is based on the following points and
25 authorities, the attached exhibits, and all papers and pleadings on file herein.

26 **BACKGROUND**

27 The Nevada Legislature has made it unlawful for "any person to solicit a vote or speak
28 to a voter on the subject of marking his ballot" within 100 feet of the entrance to a building

1 housing a polling place. NRS 293.740(1)(a).¹ Plaintiffs describe exit polling as “asking voters
 2 to fill out a short, anonymous questionnaire as they leave the polling place . . .” (Plaintiffs’
 3 Motion, 3). The sample questionnaire provided by Plaintiffs makes it clear that voters are
 4 directly asked, among other things, about who they voted for and why. (Lenski Affidavit,
 5 Exhibit A). Accordingly, exit polling is a type of activity that falls within the scope of
 6 “speak[ing] to a voter on the subject of marking his ballot” for purposes of NRS 293.740(1)(a).

7 The relevant portion of NRS 293.740(1)(a) was enacted in 1997.² For almost ten
 8 years, the statute has helped create a 100 foot buffer zone around entrances to polling places
 9 where voters are not to be molested. (Exhibit A). Now, on the eve of the 2006 general
 10 election, Plaintiffs have filed suit claiming that the application of NRS 293.740(1)(a) to exit
 11 polling violates the First Amendment.³

12 Plaintiffs provide an affidavit from one witness to support their assertion that
 13 conducting exit polling outside of 100 feet from a polling place is unduly burdensome. (Lenski
 14 Affidavit).⁴ Mr. Lenski states that exit polling more than 25 feet from a polling place is
 15 burdensome because: (1) voters more than 25 feet away might get into their car and drive
 16 away or otherwise disperse; (2) it becomes hard to tell voters from non-voters when pollsters
 17 stand more than 25 feet away from the polling place; and (3) it somehow “becomes
 18 impossible” to interview in a pattern (i.e. “every fourth voter, every fifth voter, etc.”) when the
 19 pollster stands more than 25 feet away from the polling place. (Lenski Affidavit, ¶ 8).

20
 21 _____
 22 ¹ Excluded from the 100 foot prohibition is conduct in a private residence, or on commercial or residential
 property. NRS 293.740(2). Accordingly, activities such as exit polling may occur within 100 feet of a polling
 place, if it occurs in a private residence, or on commercial or residential property (and assuming the property
 owner gives permission).

23 ² NRS 293.740 itself was originally enacted in 1963. Prior to 1997, NRS 293.740(1) made it unlawful to
 24 speak to a person on the subject of marking his ballot or to electioneer inside a polling place. Assembly Bill 18
 (1997) extended the prohibition to 100 feet from the entrance to a building where a polling place is located.

25 ³ The Secretary of State renews his objection to the expedited briefing and hearing schedule in this case.
 26 As noted in the Secretary’s Motion for an Enlargement of Time, filed herein on October 13, 2006, Plaintiffs have
 27 deliberately chosen to file this action shortly before the election in an obvious attempt to prevent the Secretary of
 State from having a full and fair opportunity to respond. In the short time frame to respond to Plaintiffs’ Motion,
 the Secretary of State has not been able to speak to all potential witnesses and gather all supporting evidence.

28 ⁴ Due to the short time frame the Secretary of State has had to respond to Plaintiffs’ motion, the
 Secretary of State has been unable to depose any of Plaintiffs’ witnesses, including Mr. Lenski.

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1 Curiously, Mr. Lenski does not identify any specific polling place in Nevada where exit polling
2 would be burdened, but does admit that “a distance restriction will have a different impact on
3 exit polling at any particular precinct depending on the particular layout of the area – for
4 example, how close the parking lot is to the polling place.” (Id.)⁵

5 There are several polling places that will be used both during early voting and on
6 election day, where the parking lot is located more than 100 feet from the entrance to the
7 building housing the polling place, and where voters are thereby prevented from becoming
8 widely dispersed upon exiting the polling place. (Exhibit B; Exhibit C). Whether these polling
9 places are the same polling places referred to by Plaintiffs is unknown due to Plaintiffs’ failure
10 to provide specifics.

11 Against this murky backdrop the Court is asked to determine whether
12 NRS 293.740(1)(a), as applied to exit polling, runs afoul of the First Amendment. For the
13 reasons set forth below, and based on the evidence provided to date, the case should be
14 dismissed, or alternatively, the statute should withstand constitutional challenge and injunctive
15 relief should not issue.

16 **DISCUSSION**

17 A. Standard for a Motion to Dismiss.

18 A motion to dismiss brought pursuant to FRCP 12(b)(6) may be granted only if “it
19 appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which
20 would entitle him to relief.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001) (citations
21 omitted). Dismissal is appropriate “only where there is no cognizable legal theory or an
22 absence of sufficient facts alleged to support a cognizable legal theory.” *Id.* (citation omitted).

23 B. This Case is Not Ripe for Adjudication.

24 Plaintiffs’ complaint for declaratory and injunctive relief presents a threshold question
25 of ripeness. The doctrine of ripeness “is drawn both from Article III limitations on judicial
26

27 ⁵ Plaintiffs, and Mr. Lenski, claim that they would like to conduct exit polling at “approximately 20
28 precincts in Nevada . . .” (Lenski Affidavit, ¶ 19). As an initial matter, many polling places accept voters from
more than one precinct, so it is unclear whether Mr. Lenski meant that he would like to conduct exit polling at 20
polling places, or whether he meant something else. Regardless, none of the 20 “precincts” are specifically
identified, except that it appears they are all somewhere in Nevada.

1 power and from prudential reasons for refusing to exercise jurisdiction.” *Reno v. Catholic*
2 *Soc. Servs., Inc.*, 509 U.S. 43, 57 n. 18, 113 S.Ct. 2485 (1993). Ripeness is a question of
3 timing designed to “prevent the courts, through avoidance of premature adjudication, from
4 entangling themselves in abstract disagreements.” *Abbott Laboratories v. Gardner*, 387 U.S.
5 136, 148, 87 S.Ct. 1507 (1967).

6 The doctrine of ripeness and the constitutional requirement of standing are often
7 blurred and treated “under the rubric of standing, and, in many cases, ripeness coincides
8 squarely with standing’s injury in fact prong.” *Thomas v. Anchorage Equal Rights Com’n*, 220
9 F.3d 1134, 1138 (9th Cir. 2000).⁶

10 In *Thomas*, the en banc Ninth Circuit considered whether a pre-enforcement, First
11 Amendment challenge to a statute and an ordinance prohibiting marital status discrimination
12 in rental decisions was ripe for review. In doing so, the *Thomas* Court stated that regardless
13 of whether the question is viewed as one of standing or ripeness, the issue is “whether the
14 plaintiffs face ‘a realistic danger of sustaining a direct injury as a result of the statute’s
15 operation or enforcement.’” *Id.* at 1139 (quoting *Babbitt v. United Farm Workers Nat’l Union*,
16 442 U.S. 289, 298, 99 S.Ct. 2301 (1979)).

17 The *Thomas* Court refined the ripeness and standing rules for pre-enforcement
18 challenges on constitutional grounds, and particularly on First Amendment grounds.
19 Specifically, the Court held that for a case to satisfy the ripeness/standing threshold, a court
20 must determine whether “the plaintiffs have articulated a ‘concrete plan’ to violate the law in
21 question, whether the prosecuting authorities have communicated a specific warning or threat
22 to initiate proceedings, and the history of past prosecution or enforcement under the
23 challenged statute.” *Id.* (citation omitted). The difficulty in satisfying this test in a pre-
24 enforcement context was succinctly described by Justice O’Scannlain in his concurring
25 opinion:

26
27 ⁶ The requirement of “standing” contains three elements: (1) injury in fact; (2) causation; and (3)
28 likelihood that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112
S.Ct. 2130 (1992).

1 The new rule of ripeness and standing promulgated today boils
2 down to this: ***potential litigants aggrieved by existing law . . .***
3 ***will be virtually unable to bring pre-enforcement challenges in***
4 ***this circuit even in the most sensitive First Amendment***
5 ***context where the laws allegedly burden their freedom of***
6 ***speech and the free exercise of their religion.*** A pre-
7 enforcement challenge is no longer available despite averments of
8 having broken the law in the past and explicit intent to violate the
9 law in the future.

10 *Id.* at 1143 (O’Scannlain, J., concurring) (emphasis added).

11 Here, as in *Thomas*, Plaintiffs cannot pass the ripeness hurdle. In *Thomas*, the
12 Plaintiffs were landlords who challenged an Alaska law prohibiting discrimination in rental
13 housing based on marital status. The landlords did not want to rent housing to unmarried
14 cohabitants. The Ninth Circuit found that the landlords had not articulated a “concrete plan”
15 to violate the law, because the landlords “claim that they have refused to rent to unmarried
16 couples in the past, yet they cannot say when, and to whom, where, or under what
17 circumstances.” *Id.* at 1139. And despite the landlord’s claim that they would refuse to rent
18 to unmarried couples in the future, “again they cannot specify when, to whom, where, or
19 under what circumstances.” *Id.* In sum, the Ninth Circuit held that “[a] general intent to
20 violate a statute at some unknown date in the future does not rise to the level of an
21 articulated, concrete plan.” *Id.*

22 The situation in this case is identical to *Thomas*. Plaintiffs claim to have violated
23 NRS 293.740(1)(a) in the past, yet they have not identified where, when, or under what
24 circumstances such violations occurred. As for the future, Plaintiffs have not even claimed
25 that they will violate NRS 293.740(1)(a) at the upcoming election, or at any future time. While
26 Plaintiffs have stated that they would like to conduct exit polls at approximately 20 different
27 polling places in the upcoming election, they have not identified the specific locations, when,
28 or the circumstances of the exit polling. As in *Thomas*, Plaintiffs have not articulated a
29 “concrete plan” to violate NRS 293.740(1)(a).

30 Similarly, there is no specific threat to initiate proceedings. Plaintiffs will likely claim
31 that such a threat was made in the Secretary of State’s letter of October 15, 2004, where the
32 Secretary of State said that he “decline[s] to allow exit polling within the 100 foot mark

1 established by our State Legislature to protect voters from possible harassment and
2 intimidation.” (Exhibit D). However, Plaintiffs acknowledge that they ignored this statement
3 and did in fact conduct exit polls within 100 feet in the 2004 general election, and were not
4 prosecuted or penalized whatsoever for such conduct. (Complaint, ¶ 17; Lenski Affidavit,
5 ¶ 21). Moreover, the 2004 letter was written to apply to the 2004 general election. The
6 October 15, 2004 letter therefore does not establish any realistic threat to initiate proceedings.

7 Plaintiffs also claim that the Secretary of State’s office stated, in a telephone
8 conversation on September 29, 2006, that it “would prohibit exit polling within 100 feet of the
9 polling place on election day, November 7, 2006 . . .” (Zucker Affidavit, ¶ 4). As an initial
10 matter, this particular statement, and most of the Zucker affidavit, is inadmissible hearsay.
11 Regardless, it is inaccurate and demonstrates Plaintiffs misconception of the Secretary of
12 State’s authority. Violations of NRS 293.740(1)(a) are both civil and criminal. See
13 NRS 293.740(3) (making violations a gross misdemeanor); NRS 293.840 (making violations
14 of Title 24 subject to civil fines). The Secretary of State has no authority to actually prosecute
15 either violation. Criminal violations are prosecuted by District Attorneys or the Attorney
16 General. NRS 228.120 (Attorney General); NRS 252.080 (District Attorney). Civil fines are
17 enforced by the District Attorney or Attorney General. NRS 293.840(1). At most, the
18 Secretary of State has authority to refer violations of NRS 293.740 to the appropriate
19 prosecutor. Accordingly, there is no specific threat to initiate civil or criminal proceedings in
20 this case.

21 Even if there were a specific threat, the Plaintiffs would not be the entities prosecuted.
22 The exit polls desired by Plaintiffs would be conducted by Edison Media Research (“Edison”)
23 and Mitofsky International, Inc. (“Mitofsky”). (Lensky Affidavit, ¶ 1); (Complaint, ¶ 11). There
24 is nothing to suggest that any of the specific Plaintiffs would actually conduct exit polls.
25 Accordingly, if anyone were to be prosecuted for violations of NRS 293.740, it would be either
26 Edison or Mitofsky employees. Neither Edison nor Mitofsky, nor any of their individual
27 employees, are parties to this lawsuit. For this additional reason as well, there is no specific
28 threat to initiate civil or criminal proceedings against the *Plaintiffs* in this case.

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1 Finally, there is no history of past prosecution or enforcement. Plaintiffs admit they
2 have violated the statute in the past and have not been penalized. (Complaint, ¶ 17; Lenski
3 Affidavit, ¶ 21). Moreover, the Secretary of State has no history of pursuing violations of
4 NRS 293.740, and in particular no history of pursuing violations pertaining to exit polling.
5 (Exhibit E). There is therefore no history of past prosecution or enforcement.

6 This case is identical to *Thomas*. The en banc Ninth Circuit has limited the
7 circumstances in which pre-enforcement review of First Amendment challenges are available.
8 Plaintiffs have not articulated a concrete plan to violate the law, have not demonstrated a
9 specific threat that proceedings will be initiated against them, and have not demonstrated a
10 history of past enforcement. Accordingly, this case is not ripe for adjudication and must be
11 dismissed.

12 C. The Secretary of State Is Entitled to Immunity Pursuant to the Eleventh
13 Amendment.

14 Pursuant to the Eleventh Amendment:

15 The Judicial power of the United States shall not be construed to
16 extend to any suit in law or equity, commenced or prosecuted
17 against one of the United States by Citizens of another State, or by
18 Citizens or subjects of any Foreign State.

19 As a general rule, the Eleventh Amendment provides State officials with immunity from
20 lawsuits “which seek either damages or injunctive relief against a state, an ‘arm of the state,’
21 its instrumentalities, or its agencies.” See *Fireman’s Fund Ins. Co. v. City of Lodi, California*,
22 302 F.3d 928, 957 (9th Cir. 2002) (citations omitted).

23 The United States Supreme Court has carved out an exception to Eleventh
24 Amendment immunity for “actions seeking only prospective declaratory or injunctive relief
25 against state officers in their official capacities.” See *Los Angeles County Bar Assoc. v. Eu*,
26 979 F.2d 697, 704 (9th Cir. 1992) (citing to *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441
27 (1908)). However, and as described above, the Secretary of State does not actually enforce
28 violations of NRS 293.740(1)(a). This is a critical point for purposes of an Eleventh
Amendment analysis because the *Ex Parte Young* exception only applies where the
Secretary of State has “some connection with the enforcement of the Act.” *Ex Parte Young*,

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1 209 U.S. at 157.

2 While Plaintiffs seek prospective injunctive and declaratory relief, they do not challenge
3 the Secretary of State's conduct – they challenge the constitutionality of NRS 293.740(1)(a).
4 The District Court of Ohio, in its recent opinion much lauded by Plaintiffs, addressed an
5 Eleventh Amendment defense raised by the Ohio Secretary of State. In rejecting that
6 defense, the District Court noted that the Secretary orally directed exit pollsters to be
7 excluded from 100 feet from polling places, and while the constitutionality of that directive was
8 the basis for the lawsuit, the underlying constitutionality of the Ohio law that was the basis for
9 the Secretary's directive was not challenged. *American Broadcasting Company Inc. v.*
10 *Blackwell*, Case No. 1:04cv0750, slip.op. at 23-24 (S.D.Ohio Sept. 26, 2006). The exact
11 opposite situation exists in this case. Here, the constitutionality of NRS 293.740(1)(a) is
12 challenged, but the conduct of the Secretary of State is not. And because the Secretary of
13 State does not have authority to actually enforce violations of NRS 293.740(1)(a), the *Ex*
14 *Parte Young* exception does not apply, and the Secretary of State is entitled to Eleventh
15 Amendment immunity.

16 D. Preliminary Injunction Standard.

17 While the Secretary of State does not agree that a preliminary injunction should be
18 issued, he does agree that the first paragraph of Section I of Plaintiffs' brief accurately sets
19 forth the standard by which this Court must decide whether to issue a preliminary injunction.

20 E. The Unreliable and Insufficient Evidence Provided by Plaintiffs Eliminates the
21 Possibility of Probable Success on the Merits.

22 The seminal case on the constitutionality of exit polling in the Ninth Circuit is the three
23 judge panel opinion in *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988) ("*Daily Herald*
24 *II*"). In that opinion, the Ninth Circuit struck down a Washington law banning exit polling within
25 300 feet of a polling place on First Amendment grounds. However, the history of the *Daily*
26 *Herald* case makes it clear that a constitutional determination of exit polling restrictions is not
27 as simple as Plaintiffs would have this Court believe.

28 ///

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1 The *Daily Herald* case began in 1983 when several media Plaintiffs, including some
2 of the same Plaintiffs as in this case, filed a First Amendment challenge to a Washington
3 statute prohibiting exit polling within 300 feet of a polling place.⁷ The District Court entered
4 summary judgment in favor of the Washington Secretary of State. The media Plaintiffs
5 appealed to the Ninth Circuit, and the case was reversed and remanded. See *Daily Herald*
6 *Co. v. Munro*, 758 F.2d 350 (9th Cir. 1984) (“*Daily Herald I*”).

7 The Ninth Circuit decided that a remand was necessary to identify certain material
8 facts. *Id.* 758 F.2d at 351-352. Specifically, the Ninth Circuit directed factual findings be
9 made by the District Court as to the following questions:

- 10 1. “What is an exit poll as that term is used in the statute?”
- 11 2. “Assuming an exit poll is limited to the random handing out
12 of questionnaires as voters *leave* the polls, is such conduct
disruptive to peace, order and decorum . . .?”
- 13 3. “Can statistically reliable polls be conducted outside a 300-
14 foot radius?”
- 15 4. “What is the minimum area around a polling place in which
to ensure that potential voters are not disrupted . . .?”
- 16 5. “Does the presence of clusters of media pollsters . . .
17 accosting exiting voters – discourage *other* persons from casting
their ballots?”
- 18 6. “Did the State of Washington, in enacting its ban on exit
19 polls, intend to remedy disruption in and around polling places or
was its true motive the prevention of the projection and predication
20 of election results prior to the closing of the polls?”
- 21 7. “Does the alleged ‘under inclusiveness’ of the statute cast
22 a doubt concerning the evil Washington is seeking to remedy?
Which was the primary purpose of the regulation – disruption of
23 peace, order, and decorum in and around polling places to prevent
harassment of potential voters – or suppression of the content of
the expression?”

24 ///

25 ///

26 ///

27

28 ⁷ The Washington law was enacted in 1983, and challenged shortly thereafter, unlike the situation in Nevada, where almost 10 years have elapsed between enactment and challenge.

1 8. “If the State’s true motive . . . was to prevent disruption in
2 and around polling places, could it have done so through
3 regulations that are less intrusive upon activities protected by the
first amendment?”

4 *Id.* (emphasis in original).

5 After making its factual findings, the District Court entered judgment for the media
6 Plaintiffs. *Daily Herald II*, 838 F.2d at 383. Specifically, the District Court found that:

7 [T]he media plaintiffs conducted their exit polling in a “systematic
8 and statistically reliable manner”; that information obtained from
9 exit polling could not be obtained by other methods; that the 300-
10 foot limit precluded exit polling; and that exit polling was not *per se*
disruptive to the polling place.

11 *Id.* (emphasis in original).

12 Here, some of the factual findings the Ninth Circuit ordered in *Daily Herald I* are
13 irrelevant because they go to allegations not raised by Plaintiffs – such as questions of
14 whether the State actually intended to prevent the broadcast of election results prior to the
15 closing of the polls. However, the other mandates of the case are applicable here.
16 Accordingly, this Court must determine whether sufficient evidence exists on other factual
17 questions to say that Plaintiffs have a probable likelihood of success. As discussed below,
18 the evidence provided is insufficient.

19 For example, the evidence provided by Plaintiffs does not show that exit polling in
20 Nevada would be conducted in a “systematic and statistically reliable manner.” In fact, the
21 evidence suggests exit polls may well be conducted in exactly the opposite fashion.

22 As proof that exit polling outside a 100 foot barrier results in statistically unreliable
23 polls, Plaintiffs state that “in Nevada, our error rate was triple the national average error rate
24 and in 2004 it was almost double the national average error rate.” (Lensky Affidavit, ¶ 9).
25 However, Mr. Lensky also states that “[o]ur polling reporters were permitted to conduct exit
26 polls immediately outside the exit of buildings in which polling places were located in a few
27 Nevada polling locations during the 2004 general election and 2004 presidential primary
28 election . . .” (Lensky Affidavit, ¶ 21). Plaintiffs, in their complaint, also state that:

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1 Plaintiffs have jointly conducted exit poll within 100 feet of polling
2 places in the State of Nevada as part of their coverage of past
3 elections. As recently as the November 2004 election, Plaintiffs
4 were permitted to conduct exit polls at some Nevada polling places
within 100 feet of polling places. These polls were conducted
without incident and without any complaint by the Secretary of
State or any other election official.

5 (Complaint, ¶ 17).⁸

6 It is unclear whether the error rate identified by Mr. Lensky was only for polls
7 conducted outside of the 100 foot limit, or whether it included polls conducted within the 100
8 foot limit. Given the late date this lawsuit was filed, and the fact that there has been no
9 discovery whatsoever, this critical question remains unknown and unexplored.

10 In addition to the lack of clarity in Plaintiffs' evidence, there are well-publicized
11 incidents that call into question the reliability and accuracy of exit polling. For example, in the
12 2000 presidential race, the over-zealous use of inaccurate and unreliable exit polling has
13 been roundly criticized. One hour before polls closed in Florida, and three hours before the
14 polls closed in the western United States, major media networks declared Florida for Al Gore.
15 Two hours later, the declaration was retracted. Four hours later, Fox declared Florida for
16 George Bush. Another two hours later, that declaration was retracted. See Seager, Susan E.
17 and Handman, Laura R., *Congress, the Networks and Exit Polls*, Communications Lawyer,
18 Winter 2001, 3 (18-WTR Comm. Law. 1); see also Morant, Blake D., *Electoral Integrity:
19 Media, Democracy, and the Value of Self-Restraint*, Alabama Law Review, Fall 2003, 6-15
20 (55 Ala.L.Rev. 1) (discussing over 50 years of erroneous election predictions by the media).
21 Incidents such as this demonstrate that exit polling certainly can be inaccurate, unreliable,
22 and can cause a considerable amount of confusion among the electorate.

23 Regardless, the evidence in this case suggests that Plaintiffs' exit polling is anything
24 but reliable. By their own admission, Plaintiffs conducted exit polls in Nevada in 2004 and
25 prior elections within the 100 foot barrier, but have not clarified whether those exit polls were
26

27 ⁸ Plaintiffs do not specify the precise number of polling places where exit polls were conducted within the
28 100 foot limit in prior elections. Nonetheless, as Plaintiffs have stated that they intend to conduct exit polls at
approximately 20 polling places in 2006, it would seem that a significant number of exit polls conducted by
Plaintiffs in prior elections were conducted within the 100 foot limit. See footnote 5, supra.

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1 responsible for the error rates double or even triple that of the national average error rate. It
2 is significant to note that Mr. Lensky's affidavit is the *only* evidence Plaintiffs have provided
3 that goes to the reliability and accuracy of exit polling. As the only evidence before this Court
4 fails to establish that exit polling in Nevada is statistically reliable, Plaintiffs are unlikely to
5 succeed on the merits of their constitutional challenge.

6 Other evidence provided by Plaintiffs is insufficient as well. As noted above, Plaintiffs
7 have not identified any specific polling places where they intend to conduct exit polling on
8 election day. However, Plaintiffs have conceded that the effectiveness of exit polling at any
9 particular polling place is dependent on "the particular layout of the area." (Lensky Affidavit, ¶
10 8). Accordingly, if a polling place is situated so that exiting voters travel along one path before
11 getting into their vehicles or otherwise dispersing, it seems that exit polling would be just as
12 effective at 100 feet from the entrance to the polling place as if it were conducted just outside
13 of the entrance to the polling place. Moreover, there are several such polling places in both
14 Washoe and Clark Counties. (Exhibits B & C). Of course, whether such polling places are
15 places Plaintiffs intend to conduct polls remains a mystery.

16 Furthermore, whether sidewalks and parking lots outside of polling places are public
17 forums for constitutional purposes is an open question. See *Burson v. Freeman*, 504 U.S.
18 191, 216, 112 S.Ct. 1846, 1860 (1992) (Scalia, J. concurring) ("Streets and sidewalks' are not
19 public forums in all places . . . and the long usage of our people demonstrates that the
20 portions of streets and sidewalks adjacent to polling places are not public forums *at all times*
21 either) (emphasis in original) (citation omitted); *United Food & Commercial Workers Local*
22 *1099 v. City of Sidney*, 364 F.3d 738, 750 (6th Cir. 2004) (determining that parking lots and
23 walkways outside of polling places located at public schools, a YMCA, and a church were
24 non-public forums); c.f. *Daily Herald II*, 838 F.2d at 384-385 (stating, without discussion, that
25 'public areas' within 300 feet of polling places are public forums). In Nevada, as in *City of*
26 *Sidney*, polling places are often located inside schools, recreation centers, and churches.

27 Again, without an identification of specific polling places by Plaintiffs, it is impossible for
28 this Court to determine whether the areas outside such polling places are in fact public

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1 forums. The identification is critical because if the areas outside a polling place are not public
2 forums, regulations prohibiting speech in that area will be upheld if reasonable and viewpoint
3 neutral. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800, 105 S.Ct.
4 3439, 3448 (1985) (citation omitted).

5 Unless and until Plaintiffs identify specific polling places where they intend to conduct
6 exit polling, and unless and until the geographic layout of those polling places is examined, it
7 is simply impossible for this Court to make a factual determination that the 100 foot limit
8 burdens Plaintiffs in any meaningful way, and it is impossible for this Court to know what type
9 of constitutional test should be applied to NRS 293.740(1)(a). Because such evidence has
10 not been provided, the Plaintiffs have failed to establish a probability of success on the
11 merits.⁹

12 There are other factual determinations to be made as well, such as whether
13 information obtained from exit polling could be effectively obtained from another method, and
14 whether exit polling is disruptive to the voting process. Ideally, the Secretary of State would
15 have adequate time to conduct discovery to look into these issues. For example, *Daily*
16 *Herald II* came out in 1988, before the widespread use of email and the internet. These could
17 be potentially effective methods to poll voters that were not available in 1988. The Secretary
18 of State would also like to have adequate time to speak to poll workers and polling place
19 managers, people who are on the front line during an election, to gather eyewitness testimony
20 as to whether exit polling is disruptive or not. Of course, Plaintiffs have filed this lawsuit
21 immediately before an election and have demanded emergency review. Such tactics have
22 effectively, and deliberately in the Secretary's opinion, prevented the Secretary of State from
23 having adequate time to explore issues and gather evidence. There certainly has been no
24 formal discovery in this case. Nonetheless, the evidence that has been provided to this Court
25 shows that there are serious factual questions to be developed, including whether Plaintiffs
26 would be burdened in Nevada even if they complied with the 100 foot limit, and whether

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28 ⁹ Plaintiffs cite to several cases, including apparently unpublished orders, from other districts. However, in each of those cases, the factual record had been developed to a much greater degree than in this case.

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1 Plaintiffs can even conduct a reliable exit poll in Nevada. The lack of answers to these
2 questions makes it extremely unlikely that Plaintiffs can succeed on the merits. Plaintiffs'
3 request for a preliminary injunction should accordingly be denied.

4 F. Notwithstanding Plaintiffs' Lack of Sufficient Evidence, a 100 Foot Limit on Exit
5 Polling is Narrowly Drawn to Accomplish a Compelling State Interest.

6 Assuming that Plaintiffs' have established sufficient evidence to show a likelihood of
7 success on the merits, and assuming the areas outside the yet to be specified polling places
8 are public forums, thus triggering a strict scrutiny review per *Daily Herald II*, the statute should
9 survive challenge.

10 The Ninth Circuit has recognized that "States have an interest in maintaining peace,
11 order and decorum at the polls and 'preserving the integrity of their electoral processes.'" *Daily Herald II*, 838 F.2d at 385 (citing to: *Brown v. Hartlage*, 456 U.S. 45, 52, 102 S.Ct. 1523,
12 1528 (1982); *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1436 (1966); and Note,
13 *Exit Polls and the First Amendment*, 98 Harv.L.Rev. 1927, 1933 (1985)). The United States
14 Supreme Court has recognized that First Amendment rights must be balanced against equally
15 fundamental rights of voters to vote. *Burson*, 504 U.S. at 199, 112 S.Ct. at 1851 ("[n]o right is
16 more precious in a free country than that of having a voice in the election of those who make
17 the laws under which, as good citizens, we must live. Other rights, even the most basic, are
18 illusory if the right to vote is undermined." (quoting from *Wesberry v. Sanders*, 376 U.S. 1, 17,
19 84 S.Ct. 526, 535 (1964)).

21 It is no secret that despite the fundamental voting right that belongs to every eligible
22 voter, voter turnout is often discouragingly low.¹⁰ Voters are dissuaded from the polls for a
23 variety of reasons, including long lines and voter harassment at polling places. Subjecting
24 oneself to exit polling may well be a disruptive and major factor in low voter turnout.
25 (Exhibit A).

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27 _____
28 ¹⁰ As of the 2006 primary election, there were 1,205,750 registered voters in Nevada.
(http://sos.state.nv.us/nvelection/voter_reg/2006/0706maint.htm). 287,994 of them voted in the 2006 primary
election. (<http://sos.state.nv.us/nvelection/2006StateWidePrimary/VoterTurnout.htm>).

1 In *Daily Herald II*, the Ninth Circuit panel agreed that the prevention of harassment and
2 disruption in and around polling places was a compelling state interest. *Daily Herald II*, 838
3 F.2d at 385. Accordingly, there doesn't seem to be any dispute that the first part of a strict
4 scrutiny analysis is satisfied in Nevada as well.

5 The *Daily Herald II* Court ultimately struck down Washington's 300 foot ban on exit
6 polling because the ban was not narrowly tailored to prevent disruptions at a polling place. *Id.*
7 The panel reasoned that: (1) the ban did not prohibit non-disruptive exit polling; and (2)
8 Washington had another law that prevented disruptive conduct at polling places. *Id.*

9 Here, *Daily Herald II* is distinguishable because exit polling, in the immediate 100 foot
10 vicinity outside a polling place (instead of the 300 foot area), is both inherently harassing,
11 disruptive and leads to decreased voter turnout. (Exhibit A). The *Daily Herald II* Court even
12 recognized that Washington could possibly have cured the constitutional defect in its exit
13 polling restriction by "reducing the size of the restricted area." *Id.* Such a reduction in size is
14 precisely the scenario in Nevada.

15 Moreover, it "takes approximately 15 seconds to walk 75 feet." *Burson*, 504 U.S. at
16 210, 112 S.Ct. at 1857 (quoting from *Freeman v. Burson*, 802 S.W.2d 210, 215 (Tenn.
17 1990)). Certainly, it doesn't take much more time to walk an additional 25 feet. Subjecting an
18 exiting voter to questioning by the media almost before he can catch his breath after leaving
19 the polling place is harassing to voters and discourages voter turnout. (Exhibit A). Moreover,
20 voters showing up at the polling place may well be dissuaded from voting if they witness
21 exiting voters immediately being accosted. (*Id.*) Finally, assuming exit polling was allowed
22 within 100 feet, it would be difficult for polling place workers to know whether someone within
23 that limit is there to conduct exit polling, or whether they are there for some nefarious
24 purpose. Requiring poll workers to constantly be taken away from their voting duties in order
25 to preserve decorum outside the polling place, and to decide who is legitimately within the
26 100 foot barrier and who is not, is incredibly disruptive to the integrity of the voting process.
27 (*Id.*) Allowing exit polling would almost certainly encourage other people who are not
28 conducting exit polls to violate the 100 foot barrier, causing further chaos and confusion. (*Id.*)

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1 The Washington statute struck down in *Daily Herald II* covered a large area – 300 feet
2 from a polling place. The statute was not narrowly tailored to prevent disruption in such a
3 large area. In Nevada, however, NRS 293.740(1)(a) only prevents exit polling within 100 feet
4 – one third of Washington’s limit – and is narrowly drawn not only to prevent disruption, but to
5 prevent decreased voter turnout and to allow poll workers to focus on their work inside the
6 polling place instead of dealing with distractions outside of the polling place. The 100 foot
7 buffer zone preserves decorum outside a polling place and protects against voter
8 harassment. Accordingly, NRS 293.740(1)(a) should survive a strict scrutiny analysis.

9 Assuming that the areas where Plaintiffs want to conduct exit polls are not public
10 forums, NRS 293.740(1)(a) also survives constitutional challenge. In this scenario, the
11 statute is constitutional if it is viewpoint neutral and reasonable in light of the purpose served
12 by the particular forum. *Cornelius*, 473 U.S. at 800, 105 S.Ct. at 3448.

13 A 100 foot prohibition on speaking to voters about who they voted for and why is
14 viewpoint neutral. It does not apply only to persons who want to speak about voting for
15 particular parties or candidates, it simply applies to any conversation regarding the casting of
16 the voter’s confidential ballot. See *City of Sidney*, 364 F.3d at 751 (holding that a prohibition
17 on gathering petition signatures within 100 feet of a polling place was a viewpoint neutral law).

18 The 100 foot limit is also completely reasonable in light of the purpose served by the
19 polling place. Polling places are locations where voters should be able to exercise their
20 fundamental right to vote, and to vote unmolested and in a confidential manner. See
21 NRS 293.2546(3) (providing that voter’s have a right to vote without intimidation);
22 NRS 293.2696. That right is undermined as non-voters are allowed to make contact with
23 voters inside and immediately outside polling places, and question voters on how they voted
24 and why.

25 For all of the above reasons, Plaintiffs have failed to establish a likelihood of success
26 on the merits, and their request for a preliminary injunction should therefore be denied.

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1 G. Plaintiffs Have Not Established the Possibility of Irreparable Injury.

2 Plaintiffs argue that if they cannot conduct exit polls within 100 feet, the information

3 gathered from such polls would be “forever lost.” (Plaintiffs’ Motion, 20). As an initial matter,

4 Plaintiffs have admitted to taking exit polls outside of the 100 foot limit in prior elections, so

5 the information would clearly not be “forever lost.” To the extent that Plaintiffs assert that exit

6 polling outside of 100 feet results in unreliable information, Plaintiffs have admitted that their

7 exit polls in prior Nevada elections were wildly inaccurate, and it is unclear whether the

8 inaccuracies came from exit polls conducted within 100 feet of a polling place. See Section

9 IE, supra. Unless and until Plaintiffs provide clear evidence that exit polling more than 100

10 feet from the entrance to specific Nevada polling places will result in unreliable information, it

11 cannot be said that Plaintiffs have established the possibility of irreparable injury.

12 H. The Balance of Hardships Tips in the Secretary of State’s Favor.

13 As noted above, allowing exit polling within 100 feet is harassing to voters, disruptive,

14 discourages voter turnout, and takes poll workers away from important duties. Given the

15 fundamental right to vote, and the State’s duty to protect and preserve the fairness and

16 integrity of elections, allowing such conduct within 100 feet will undoubtedly create serious

17 hardships for election officials.

18 On the other hand, Plaintiffs face no serious hardships. As noted earlier,

19 NRS 293.740(1)(a) has been law for almost 10 years. Plaintiffs have conducted exit polls in

20 prior elections. Plaintiffs have disregarded the 100 foot limit in the past and have not been

21 prosecuted.

22 For all of these reasons, the balance of hardships in this case tips decidedly in the

23 Secretary of State’s favor.

24 I. If a Preliminary Injunction is Granted, It Should Be Limited in Scope.

25 Should this Court enter a preliminary injunction as requested by Plaintiffs, the

26 Secretary of State requests that reasonable limits be placed on the order. First, the injunction

27 should be limited to specific polling places identified by Plaintiffs. This would allow the

28 Secretary of State to inform poll workers at those polling places about the presence of exit

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1 pollsters, and also allow those poll workers to be as vigilant as possible against encroachment
2 by non exit-pollsters.

3 Second, exit polling should continue to be prohibited within twenty-five feet of the
4 entrance to a polling place. Plaintiffs have stated that exit polls taken more than twenty-five
5 feet from the entrance to a polling place are unreliable. (Lensky Affidavit, ¶ 8). Limiting exit
6 polls to twenty-five feet from the entrance to a polling place therefore impliedly allows for
7 reliable exit polling and allows for at least some preservation of the Secretary of State's
8 interest in protecting the decorum and integrity of the polling place. See *NBC Inc. v. Cleland*,
9 697 F.Supp. 1204, 1215 (N.D.Ga. 1988) (stating that a prohibition on exit polling within 25
10 feet from the exit to a polling place "would likely satisfy even the most rigorous constitutional
11 scrutiny.").

12 **CONCLUSION**

13 Plaintiffs' case should be dismissed and/or injunctive relief should be denied for a
14 myriad of reasons. This case is not ripe for adjudication, and Plaintiffs do not have standing,
15 because of the lack of a concrete plan to violate a statute, the lack of a specific warning to
16 initiate proceedings, and the lack of a history of enforcement. Even if standing and ripeness
17 concerns were satisfied, the evidence provided by Plaintiffs, evidence Plaintiffs have had
18 years to prepare, is insufficient. Plaintiffs have not even identified the specific polling places
19 they intend to poll at the upcoming election, let alone provided any evidence that they would
20 be burdened by a 100 foot limit at those particular polling places.

21 Even if such evidence were provided, the State has a compelling interest in preserving
22 integrity and decorum at polling places. The 100 foot limit is narrowly and reasonably drawn
23 to protect that interest while still recognizing and preserving the important right of the press to
24 cover elections.

25 Finally, should this Court find it appropriate to enter a preliminary injunction, the
26 Secretary of State requests that such an injunction be made applicable only to the specific
27 polling places where Plaintiffs intend to conduct exit polls, preclude exit polling within 25 feet
28 of the entrance to a polling place, and require Plaintiffs to notify the Secretary of State of

