

on Friday, October 20, 2006, Defendant has now filed a motion for an enlargement of time asking this Court to permit his papers to be filed in accordance with the provisions of Local Rule 7-2. Under the schedule proposed by Defendant, his papers would be due on Friday, October 27, 2006, four days before the hearing scheduled by the Court. Plaintiffs respectfully urge that the Defendant's motion should be denied.

Secretary Heller seeks no relief other than an enlargement of his time to file papers in opposition and offers no objection to the date scheduled for the hearing on Plaintiffs' motion. Nor could he. Defendant learned of the institution of this action on October 11, 2006; the preliminary injunction hearing is scheduled for October 31, 2006, one day shy of three weeks later.¹ It would not be credible for the Attorney General's Office to suggest that it has insufficient time to prepare for the hearing. In *Family Trust Foundation of Kentucky, Inc. v. Wolnitzek*, 345 F. Supp. 2d 672, 698 n.9 (E.D. Ky 2004), the district court rejected just such an argument:

The Defendants also complained that they were "ambushed" by the expedited handling of the preliminary injunction hearing. Preliminary injunctions, by their very nature, require expedited consideration. At the September 28th hearing [held four days after the institution of the action] the Court gave the parties two and a half weeks to prepare for the October 15th hearing — a lifetime by preliminary injunction standards. In addition, Defendants are represented by a cadre of competent attorneys. If a party seeking to defeat a preliminary injunction motion could simply argue that they did not have sufficient time to respond in order to defeat the motion, preliminary injunctions would never be granted. Parties opposing such motions are protected by the heightened standard a party must meet in order to obtain preliminary relief.

¹ Defendant also neglects to allude to the fact that as early as September 21, 2006, his Deputy Secretary of Elections began discussions with Plaintiffs' representative concerning the Defendant's position on Plaintiffs' exit polling activities planned for November 7, 2006. Those discussions were ultimately unproductive. See Affidavit of John W. Zucker filed in support of Plaintiffs' motion, at ¶ 2. That Plaintiffs' representatives also sought to persuade Secretary Heller of the unreasonableness of his position before the 2004 election does nothing to diminish Plaintiffs' right to vindicate their First Amendment rights now. Indeed, Plaintiffs' experience in attempting to conduct exit polls in 2004 provided evidence of the unreasonableness of the restriction. See Affidavit of Joseph W. Lenski at ¶ 9.

See also Telecommunications of Key West, Inc. v. United States, 580 F. Supp. 11, 12 n.1 (D.D.C. 1983) (noting that, although plaintiff seeking preliminary injunction on First Amendment and other grounds had delayed several months before filing suit, two weeks from filing of suit to the hearing on the preliminary injunction motion “allow[ed] the government sufficient time to respond to plaintiffs’ motion”), *rev’d in part on other grounds*, 757 F.2d 1330 (D.C. Cir. 1985).

Having offered no objection to the hearing date on Plaintiffs’ motion, Defendant is reduced to claiming that he requires more time to file his papers in opposition and accusing Plaintiffs of “deliberately” seeking to prevent him from “having a full and fair opportunity to respond to the allegations of the complaint” (Emergency Motion at 2) and “attempt[ing] to rush this case to judgment.” (*Id.* at 2-3.) The suggestion is incorrect and in any event misperceives the purpose of preliminary injunction motions. Defendant will have ample time, should he choose to do so, to “respond to the allegations of the complaint” and to litigate this case to final judgment. The issue before the Court on October 31, 2006 is simply whether Defendant is permitted to prohibit Plaintiffs from conducting their exit polls within 100 feet of a total of 20 selected precincts in the State of Nevada on November 7, 2006 consistent with the First Amendment. Controlling authority in this Circuit and numerous and unanimous decisions of federal courts outside this Circuit demonstrate that the Secretary should be precluded from doing so.

Defendant’s accusations aside, he suggests two reasons why he cannot prepare his papers in accordance with the reasonable schedule established by the court. First, Defendant urges that “at the very least Plaintiffs’ must provide evidence that exit polling cannot reliably be conducted within 100’ of a polling place, and the Secretary of State must have a reasonable amount of time to rebut that evidence.” (Emergency Motion at 3.) But Plaintiffs have submitted just such evidence. *See* Affidavit of Joseph W. Lenski. And two federal district courts have pre-

viously concluded that 100-foot restrictions unconstitutionally impair Plaintiffs' First Amendment rights in the context of preliminary injunction motions brought on even more quickly than the schedule allowed Defendant here. See *American Broadcasting Cos. v. Blackwell*, No. 1:04cv750 (S.D. Ohio Nov. 1, 2004) (granting temporary restraining order enjoining Ohio's 100-foot restriction on exit polling the very day the action was instituted); *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 in connection with the November 1988 national election after a hearing held 13 days after the institution of the action).

Defendant also complains that Plaintiffs' motion contains "voluminous" exhibits, a "mountain" of material that he cannot respond to within the schedule established by this Court. (Emergency Motion at 2-3.) Of course, most of the "voluminous exhibits" are copies of some of the voluminous (and unanimous) authorities, in this Circuit and elsewhere, holding that exit polling is protected by the First Amendment and that states' efforts to prohibit exit polling at polling places are unconstitutional whether those restrictions be 100 feet,² 150 feet,³ 200 feet,⁴ 250 feet,⁵ or 300 feet.⁶ The other detailed exhibits submitted, attached to the Affidavit of Professor Shapiro, are articles from scholarly journals relying on data gathered from Plaintiffs' exit polls in

² *American Broadcasting Co. v. Blackwell*, Case No. 1:04cv0750 (S.D. Ohio Sept. 26, 2006); *CBS Inc. v. Growe*, 15 Med. L. Rep. [BNA] 2275 (D. Minn. 1988).

³ *CBS Inc. v. Smith*, 681 F. Supp. 794 (S.D. Fla. 1988).

⁴ *National Broadcasting Co. v. Colberg*, 699 F. Supp. 241 (D. Mont. 1988).

⁵ *National Broadcasting Co. v. Cleland*, 697 F. Supp. 1204 (N.D. Ga 1988).

⁶ *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988); *National Broadcasting Co. v. Karpan*, No. C88-0320 (D. Wyo. Oct. 21, 1988).

CERTIFICATE OF SERVICE

I, Wade Rabenhorst, hereby certify that I served copies of the foregoing “Response to Defendant’s Emergency Motion for Enlargement of Time Pursuant to FRCP 6(b)” by electronic filing, by U. S. Mail and by facsimile this 16th day of October, 2006 on:

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