

Exit Polling in Nevada

ABC v. Heller (Philip M. Pro, D. Nev. 2:06-cv-1268)

Four weeks before the 2006 general election, news media sought federal-court enforcement of their constitutional right to conduct exit polls within one hundred feet of polling places. The court granted the media the relief that they sought.

Subject: Polling-place activities. *Topics:* Exit polls; news media; attorney fees.

Four weeks before the 2006 general election, six news media companies filed a federal action challenging the constitutionality of Nevada's inconsistently enforced statute proscribing conversations with voters within one hundred feet of a polling place.¹ The plaintiffs sought a preliminary injunction permitting them to conduct exit polls.² The court assigned the case to Judge Philip M. Pro,³ who ordered a hearing on the motion for three weeks later.⁴

In setting the hearing date, Judge Pro had several factors in mind: (1) the extent to which the plaintiffs created their own emergency by filing their action so close to the election, (2) the value of careful and thorough briefing, (3) an opportunity for the parties to engage in extrajudicial conversations, and (4) the amount of time required for appellate review if necessary.⁵

At the October 31 hearing, Judge Pro said that he was inclined to grant the preliminary injunction,⁶ and he did so on the following day, six days before the election.⁷ On November 2, Nevada's deputy secretary of state for elections notified the state's county clerks and registrars of voters that they should ensure compliance with Judge Pro's injunction.⁸

1. Complaint, *ABC, Inc. v. Heller*, No. 2:06-cv-1268 (D. Nev. Oct. 10, 2006), D.E. 1; *ABC, Inc. v. Miller*, 550 F.3d 786, 787 (9th Cir. 2008); see Nev. Rev. Stat. § 293.740 (1997); see also *Exit Polling Ban*, Las Vegas Rev.-J., Oct. 13, 2006, at 8B; Sam Skolnik, *Exit Polling at Center of State*, *National Debate*, Las Vegas Sun, Oct. 15, 2006, at A1.

2. Preliminary-Injunction Motion, *ABC, Inc.*, No. 2:06-cv-1268 (D. Nev. Oct. 11, 2006), D.E. 2.

3. Docket Sheet, *id.* (Oct. 10, 2006).

Tim Reagan interviewed Judge Pro for this report by telephone on May 17, 2012. Judge Pro retired on January 23, 2015. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

4. Order, *ABC, Inc.*, No. 2:06-cv-1268 (D. Nev. Oct. 11, 2006), D.E. 4; see Abby Goodnough, *Judge Voids Measure to Bar News Exit Polls*, N.Y. Times, Oct. 26, 2006, at A15.

5. Interview with Hon. Philip M. Pro, May 17, 2012.

6. Transcript at 48–50, *ABC, Inc.*, No. 2:06-cv-1268 (D. Nev. Oct. 31, 2006, filed Mar. 12, 2007), D.E. 37.

7. Preliminary Injunction, *id.* (Nov. 1, 2006), D.E. 20, 2006 WL 3149365; *ABC, Inc. v. Miller*, 550 F.3d 786, 787 (9th Cir. 2008).

8. Memorandum, *filed as Letters* at 16, *ABC, Inc.*, No. 2:06-cv-1268 (D. Nev. Nov. 9, 2006), D.E. 21.

On November 20, the parties stipulated a permanent injunction against application of the statute to exit polling.⁹ Judge Pro issued a permanent injunction two days later.¹⁰

On January 19, 2007, Judge Pro denied the plaintiffs attorney fees,¹¹ but the court of appeals reversed the denial.¹² On remand, the attorney-fee matter settled.¹³

9. Stipulation, *id.* (Nov. 20, 2006), D.E. 23.

10. Permanent Injunction, *id.* (Nov. 22, 2006), D.E. 25.

11. Order, *id.* (Jan. 19, 2007), D.E. 31.

12. *ABC, Inc.*, 550 F.3d 786.

13. Order, *ABC, Inc.*, No. 2:06-cv-1268 (D. Nev. July 1, 2009), D.E. 56.