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8
 9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 11
 12

13 **LIBERTARIAN PARTY OF LOS**
 14 **ANGELES COUNTY, THEODORE**
 15 **BROWN, and CHRISTOPHER**
 16 **AGRELLA,**

16 **Plaintiffs,**

17 **v.**

18 **DEBRA BOWEN, in her official**
 19 **capacity as Secretary of State of**
 20 **California,**

21 **Defendant.**

CV10-2488 PSG (OPx)

**NOTICE OF MOTION AND
 MOTION TO DISMISS
 DEFENDANT SECRETARY OF
 STATE DEBRA BOWEN;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT**

[Federal Rules of Civil Procedure, Rules
 12(b)(1) and 12(b)(6)]

Date: July 26, 2010
 Time: 1:30 p.m.
 Court: Room 880
 Judge: The Honorable Philip S.
 Gutierrez

Trial Date
 Action Filed: 4/6/2010

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 26 To plaintiffs Libertarian Party of Los Angeles County, Theodore Brown and
 27 Christopher Agrella and their counsel of record:
 28

1 Please take notice that on July 26, 2010 at 1:30 p.m., or as soon thereafter as
2 the matter may be heard in Courtroom 880 of the above-entitled court, located at
3 255 East Temple Street, Los Angeles, CA 90012, Defendant Debra Bowen,
4 California Secretary of State ("the Secretary"), will move, pursuant to Federal
5 Rules of Civil Procedure 12(b)(1) and 12(b)(6), for an order dismissing the
6 Complaint herein.

7 The Secretary moves to dismiss the Complaint on the ground that this Court
8 lacks jurisdiction over the subject matter because plaintiffs lack standing to bring
9 these claims.

10 The Secretary also moves to dismiss the Complaint on the ground that it fails
11 to state a claim upon which relief may be granted because plaintiffs' claims are not
12 ripe or justiciable.

13 Said motion is based upon this notice of motion and motion, the memorandum
14 of points and authorities filed herewith and pleadings already on file in this action.

15 Dated: June 1, 2010

Respectfully submitted,

16
17 EDMUND G. BROWN JR.
18 Attorney General of California
19 DOUGLAS J. WOODS
20 Supervising Deputy Attorney General


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22 MICHAEL G. WITMER
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24 *Attorneys for Defendant Debra*
25 *Bowen, California Secretary of State*
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1 **INTRODUCTION**

2 In this action, plaintiffs purport to challenge the constitutionality of two
3 California statutes that establish residency requirements for circulators of
4 nominating petitions for candidates for political office. Whatever might be the
5 merits of their arguments in the abstract, there is no ripe controversy here, which is
6 needed to provide a platform for their claims.

7 The Complaint alleges that California Elections Code sections 8066 and 8451
8 require circulators of nominations for candidates to reside in (§ 8066¹) and be
9 voters in (§ 8541) the specific political subdivision for which the proposed
10 candidate is running. The complaint further alleges that plaintiffs were “barred by
11 state law” from circulating petitions in districts other than the ones where they
12 resided or were registered. They contend that these requirements for circulators
13 burden their voting rights, their political speech and political association rights and
14 the right of the Libertarian Party of Los Angeles to name its own spokesmen. They
15 allege, not on the basis of any specific facts but as a matter of law, that the
16 Secretary has deprived them of various constitutional rights because she is charged
17 with enforcing these statutes. Compl. ¶ 3.² None of these allegations has merit,
18 because there is no evidence that the Secretary has enforced or will enforce the
19 challenged statutes, or that plaintiffs have otherwise suffered any harm as a result.

20 In sum, the complaint must be dismissed in its entirety with prejudice.

21 **SUMMARY OF THE COMPLAINT**

22 **I. ALLEGATIONS**

23 According to the complaint, candidates can obtain a place on a ballot for
24 statewide and local elective offices by filing nomination papers or petitions signed
25 by qualified electors. ¶ 8 (citing Elections Code §§ 8060 and 8400). Those same

26 _____
27 ¹ All statutory references are to the Elections Code unless otherwise noted.

28 ² References to the Complaint are abbreviated “Compl. ¶” or simply “¶.”

1 provisions of the Elections Code allegedly bar non-California residents from
2 circulating nomination papers or petitions within the state (¶ 9), and further restrict
3 California residents to circulating nomination papers or petitions only within the
4 district or political subdivision where the circulator resides and where the candidate
5 is running for office. ¶ 10. Circulators must disclose their residence addresses in a
6 declaration attached to the nomination paper or petition when it is submitted to a
7 local election official (§ 104), and a circulator who signs a false declaration is
8 subject to the penalty of perjury. ¶ 12 (citing § 18203).

9 Plaintiff Brown alleges that he is a resident of Los Angeles County and in the
10 last election cycle wanted to circulate nominating petitions in support of candidates
11 for offices in other political districts, but was barred by sections 8066 and 8451. ¶
12 13.

13 Plaintiff Agrella alleges that he is a resident of San Bernardino County, that he
14 was a candidate for the House of Representatives in this last election cycle and that
15 he circulated nominating petitions in his own behalf but failed to obtain sufficient
16 signatures for ballot access. ¶ 14. Plaintiff Agrella also alleges that sections 8066
17 and 8451 barred him from circulating petitions for a state senate candidate whose
18 district overlaps with his, because he does not reside within the state senate district
19 for which that candidate was running. *Id.*

20 Plaintiff LPLAC alleges that it wants to associate with and use non-California
21 and non-Los Angeles residents to circulate nomination papers and petitions in Los
22 Angeles County in support of Libertarian Party candidates but is barred from doing
23 so by sections 8066 and 8451. ¶ 15. Plaintiff LPLAC appears to assert the
24 unconstitutionality of both the state residency requirement as well as the local
25 district residency requirement.

26 **II. CAUSES OF ACTION AND PRAYER FOR RELIEF**

27 The complaint contains a single claim for deprivation of civil rights, asserting
28 that the residency requirement for circulators in sections 8066 and 8451 “severely

1 burdens the political speech and political association rights of Brown, Agrella and
2 the LPLAC, in violation of the First and Fourteenth Amendments to the United
3 States Constitution, and 42 U.S.C. § 1983.” ¶ 17.

4 Plaintiff LPLAC alleges that the residency requirement for circulators
5 “severely burdens the right of the LPLAC to name its own spokesmen.” ¶ 18. All
6 three plaintiffs allege that the requirements severely burden their voting rights,
7 “because unconstitutional ballot access laws diminish the statewide and national
8 viability of the organization whose ballot presence is denied, thereby diminishing
9 the value of votes cast by the harmed parties.” ¶ 19.

10 Thus, argue plaintiffs, “defendant Bowen, acting under color of state law, has
11 deprived plaintiffs of the[ir] rights, privileges and immunities . . . to participate in
12 the democratic process free from unreasonable impediments, undue restraints on
13 core political speech, free and expressive associational rights, and the right to equal
14 protection of the laws.” ¶ 20.

15 ARGUMENT

16 Plaintiffs have alleged no actual injury, much less an injury caused by the
17 Secretary. As a consequence, they lack standing to bring the present action.
18 Additionally, because neither the Secretary nor any other public agency or entity is
19 alleged to have actually enforced or threatened to enforce the challenged provisions
20 against plaintiffs or anyone else, the present controversy is not ripe or justiciable.

21 I. LEGAL STANDARDS APPLICABLE TO RULE 12(B) MOTIONS

22 This motion is brought pursuant to Federal Rules of Civil Procedure 12(b)(1)
23 and 12(b)(6). Rule 12(b)(1) authorizes dismissal for lack of subject matter
24 jurisdiction. Rule 12(b)(6) authorizes dismissal for the failure to state a claim upon
25 which relief can be granted.

26 A. Rule 12(b)(1)

27 Rule 12(b)(1) allows a party to raise the defense that the court lacks
28 “jurisdiction over the subject matter” of a claim. “A motion to dismiss for lack of

1 subject matter jurisdiction may either attack the allegations of the complaint or may
2 be made as a 'speaking motion' attacking the existence of subject matter
3 jurisdiction in fact." *Thornhill Publ'g Co. v. Gen. Tel. & Elecs.*, 594 F.2d 730, 733
4 (9th Cir. 1979) (citations omitted). The instant Rule 12(b)(1) motion attacks the
5 allegations of the complaint. In such cases, and similar to the standards applicable
6 to Rule 12(b)(6) motions, the district court must accept the allegations of the
7 complaint as true. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th
8 Cir. 1994); Schwarzer, Tashima & Wagstaffe, *Rutter Group Practice Guide: Fed.*
9 *Civil Procedure Before Trial*, § 9:84 (The Rutter Group 2009).

10 Where a Rule 12(b)(1) motion is brought, the burden of proof is on the party
11 asserting federal subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of*
12 *Am.*, 511 U.S. 375, 377 (1994); *Thornhill Publ'g Co.*, 594 F.2d at 733.

13 **B. Rule 12(b)(6)**

14 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil
15 Procedure tests the legal sufficiency of the complaint. *N. Star Int'l v. Arizona*
16 *Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). Dismissal of the complaint or
17 of any claim within it "can be based on the lack of a cognizable legal theory or the
18 absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v.*
19 *Pacifica Police Dept*, 901 F.2d 696, 699 (9th Cir. 1990) (citing *Robertson v. Dean*
20 *Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984).

21 In considering a motion to dismiss for failure to state a claim, the court accepts
22 as true all material allegations in the complaint and the reasonable inferences that
23 can be drawn from them. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Love*
24 *v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). However, the court need not
25 accept as true unreasonable inferences, unwarranted deductions of fact, or
26 conclusory legal allegations cast in the form of factual allegations. *W. Mining*
27 *Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). A court generally cannot
28 consider materials outside of the complaint, except for materials submitted as part

1 of the complaint or the contents of which are alleged in the complaint. *Hal Roach*
2 *Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir.
3 1990). The court may also consider matters subject to judicial notice. *Mir v. Little*
4 *Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988).

5 **II. PLAINTIFFS LACK STANDING TO BRING THEIR CLAIMS**

6 To establish a “case or controversy,” it is plaintiffs’ burden to show as an
7 “irreducible minimum” the following three elements: (1) a concrete “injury in
8 fact”; (2) a causal connection between the injury and defendant’s conduct; (3) and a
9 likelihood that the injury will be redressed by a favorable decision. *Lujan v.*
10 *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *United Food & Comm’l*
11 *Workers Union, Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996). These
12 constitutional requirements are “rigorous.” *Valley Forge Christian Coll. v. Ams.*
13 *United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982). “The
14 lack of threatened enforcement . . . also means that the ‘case or controversy’
15 requirement of Article III is not satisfied.” *Long v. Van de Kamp*, 961 F.2d 151,
16 152 (9th Cir. 1992).

17 Here the Court must dismiss plaintiffs’ claims against the Secretary because
18 plaintiffs have not alleged that (a) they were injured, or (b) that any such injuries
19 are the result of the Secretary’s conduct. Neither do they allege any conduct by the
20 Secretary that would cause plaintiffs injury in the future unless restrained.

21 “[T]here must be a connection between the official sued and enforcement of
22 the allegedly unconstitutional statute, *and* there must be a threat of enforcement.”
23 *Long v. Van de Kamp*, 961 F.2d at p. 152 (emphasis added). Plaintiffs do not allege
24 that the Secretary has enforced or threatens to enforce Elections Code sections 8066
25 and 8451 against plaintiffs or anyone else. Thus, any injunction or declaratory
26 relief against the Secretary would not redress plaintiffs’ alleged injury. *See Long*,
27 961 F.2d at 152 (an injunction against attorney general would not forestall future
28 searches of plaintiffs’ property where there was no indication the attorney general

1 intended to pursue such searches, or encourage others to do so); *see also Hodgers-*
2 *Durgin v. De la Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999) (claim for declaratory
3 relief not ripe for adjudication if it rests upon contingent future events that may not
4 occur as anticipated, or may not occur at all).

5 The present case is different from cases where a candidate was removed from
6 the ballot due to violations of the challenged statutes. *See Nader v. Blackwell*, 545
7 F.3d 459, 472 (6th Cir. 2008); *Duke v. Cleland*, 5 F.3d 1399, 1403 n.3 (11th Cir.
8 1993); *Kay v. Austin*, 621 F.2d 809, 812 (6th Cir. 1980). This is not a case where
9 signatures were disqualified. *See Blankenship v. Blackwell*, 341 F. Supp. 2d 911,
10 916 (S.D. Ohio 2004) (candidate kept off ballot where signatures disallowed due to
11 fraudulent residency status left insufficient signatures to qualify). Nor is it a case
12 where a candidate was required to allocate additional campaign resources to gather
13 signatures, or was deprived of the political advocates of his choice. *See Krislov v.*
14 *Rednour*, 226 F.3d 851 (7th Cir. 2000). In short, the plaintiffs in this case have not
15 alleged any injury of the type found sufficient to establish standing in election law
16 challenges.

17 For these reasons, the Court should grant the motion to dismiss for lack of
18 subject matter jurisdiction. Plaintiffs lack the required standing to bring their
19 claims against the Secretary of State.

20 **III. WHETHER THE CHALLENGED PROVISIONS ARE UNCONSTITUTIONAL IS**
21 **NOT JUSTICIABLE SINCE PLAINTIFFS HAVE NOT DEMONSTRATED A**
22 **LIVE CONTROVERSY RIPE FOR RESOLUTION BY THE FEDERAL COURTS**

23 Concerns of justiciability go to the power of the federal courts to entertain
24 disputes, and to the wisdom of their doing so. “We presume that federal courts lack
25 jurisdiction unless the contrary appears affirmatively from the record.” *Bender v.*
26 *Williamsport Area School Dist.*, 475 U.S. 534, 546 (1986) (internal quotes omitted).
27 The complainant bears the responsibility to clearly allege facts demonstrating that
28 he is a proper party to invoke judicial resolution of the dispute *and* the exercise of

1 the federal court's remedial powers. *Id.* Because there is no ripe controversy here,
2 the Court lacks jurisdiction.

3 The Supreme Court addressed issues of justiciability in connection with a
4 California election law in *Renne v. Geary*, 501 U.S. 312 (1991) (*Renne*). There,
5 certain individual voters, party central committees and committee members brought
6 suit challenging a California constitutional provision prohibiting political parties
7 from endorsing candidates for nonpartisan office. The district court held the
8 provision unconstitutional. On appeal, the Ninth Circuit reversed and remanded,
9 but on rehearing en banc held that the statute violated First Amendment rights of
10 political parties and affirmed. The Supreme Court granted review, and held that the
11 question whether the provision violated the First Amendment was not justiciable
12 where challengers did not demonstrate a live controversy ripe for resolution by
13 federal courts. The complaint had alleged that in the past certain of the petitioning
14 government officials “ ‘have deleted all references in candidate's statements for
15 City and County offices to endorsements by political party central committees or
16 officers or members of such committees,’ and that they will continue such deletions
17 in the future unless restrained by court order.” *Id.* at 316. Additionally, the
18 respondent Republican Committee had alleged that it would like to endorse
19 candidates, and have such endorsements publicized in their candidate's statements
20 in the San Francisco voter's pamphlet. *Id.* at 317. Likewise, a respondent
21 Democratic committeeman had stated that for several years, “the Democratic
22 committee has declined to endorse candidates for nonpartisan office solely out of
23 concern that committee members may be criminally or civilly prosecuted for
24 violation of the endorsement ban, and provided two examples of elections in which
25 the word “Democratic” had been deleted from candidate statements, including one
26 involving an endorsement of one of the *Renne* respondents. *Id.* at 317-318.
27 Nonetheless, the Supreme Court held these allegations insufficient to create a ripe
28 controversy. *Id.* at 322.

1 The Supreme Court observed:

2 Justiciability concerns not only the standing of litigants to assert
3 particular claims, but also the appropriate timing of judicial intervention.
4 Respondents have failed to demonstrate a live dispute involving the
5 actual or threatened application of § 6(b) to bar particular speech.
6 Respondents' generalized claim that petitioners have deleted party
7 endorsements from candidate statements in past elections does not
8 demonstrate a live controversy. So far as we can discern from the record,
9 those disputes had become moot by the time respondents filed suit.
10 While the mootness exception for disputes capable of repetition yet
evading review has been applied in the election context, that doctrine will
not revive a dispute which became moot before the action commenced.
Past exposure to illegal conduct does not in itself show a present case or
controversy regarding injunctive relief if unaccompanied by any
continuing, present adverse effects.

11 *Id.* at 320-321 (citations omitted). The plaintiffs here do not allege even the pattern
12 of past enforcement that the *Renne* decision found to be insufficient to establish a
13 controversy.

14 Neither was fear of future prosecution sufficient to establish a live controversy
15 in *Renne*. The allegation that the threat of enforcement had deterred the
16 Democratic committee from endorsing candidates for years “provides insufficient
17 indication of a controversy continuing at the time this litigation began or arising
18 thereafter. The affidavit provides no indication of whom the Democratic committee
19 wished to endorse, for which office, or in what election. Absent a contention that §
20 6(b) prevented a particular endorsement, and that the controversy had not become
21 moot prior to the litigation, this allegation will not support an action in federal
22 court.” *Id.* at 321.

23 The Supreme Court pointedly noted in *Renne* that “[t]he record also contains
24 no evidence of a credible threat that § 6(b) will be enforced, other than against
25 candidates in the context of voter pamphlets. The only instances disclosed by the
26 record in which parties endorsed specific candidates did not, so far as we can tell,
27 result in petitioners taking any enforcement action.”
28

1 Given the lack of any appreciable harm suffered by the *Renne* respondents, the
2 Supreme Court concluded that the case was unripe for adjudication:

3 While petitioners have threatened not to allow candidates to include
4 endorsements by county committees or their members in the voter
5 pamphlets prepared by the government, we do not believe deferring
6 adjudication will impose a substantial hardship on these respondents. In
7 all probability, respondents can learn which candidates have been
8 endorsed by particular parties or committee members through other
9 means. If respondents or their committees do desire to make a particular
10 endorsement in the future, and a candidate wishes to include the
11 endorsement in a voter pamphlet, the constitutionality of petitioners'
12 refusal to publish the endorsement can be litigated in the context of a
concrete dispute. [¶] Postponing consideration of the questions
presented, until a more concrete controversy arises, also has the
advantage of permitting the state courts further opportunity to construe
§ 6(b), and perhaps in the process to “materially alter the question to be
decided.”

13 *Id.* at 322-323. The Court closed by noting that precisely because the free
14 speech questions at issue there “have fundamental and far-reaching
15 import, . . . we cannot decide the case based upon the amorphous and ill-
16 defined factual record presented to us. Rules of justiciability serve to make
17 the judicial process a principled one. Were we to depart from those rules, our
18 disposition of the case would lack the clarity and force which ought to inform
19 the exercise of judicial authority.” *Id.* at 324.

20 Unlike the complainants in *Renne*, where there had actually been a history of
21 enforcing the challenged statute, the plaintiffs here are asking the Court to rule on
22 an abstract proposition, that the residency requirements might be enforced in the
23 future in some unknown way, thereby causing some hypothetical harm. The
24 controversy is simply not ripe for adjudication, and under the principles of
25 justiciability articulated in *Renne*, this Court should dismiss the complaint.

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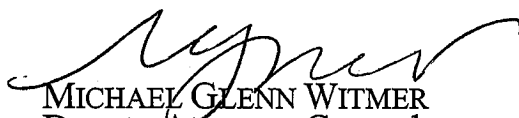
CONCLUSION

For all of these reasons, the Secretary respectfully requests the Court grant the motion to dismiss the complaint in its entirety with prejudice.

Dated: June 1, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DOUGLAS J. WOODS
Supervising Deputy Attorney General



MICHAEL GLENN WITMER
Deputy Attorney General
*Attorneys for Defendant Debra
Bowen, California of Secretary of
State*

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CERTIFICATE OF SERVICE

Case Name: **Libertarian Party of Los Angeles County, et al. v. Debra Bowen**

No. **CV10-2488 PSG (OPx)**

I hereby certify that on June 1, 2010, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

NOTICE OF MOTION AND MOTION TO DISMISS DEFENDANT SECRETARY OF STATE DEBRA BOWEN; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

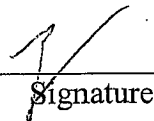
Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. On June 1, 2010, I have mailed the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Robert E. Barnes, Esq.
207 East Buffalo Street, Suite 600
Milwaukee, Wisconsin 53202
Attorney for Plaintiffs

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 1, 2010, at Los Angeles, California.

Lilly Chang
Declarant


Signature