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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
#21
CIVIL MINUTES - GENERAL

Case No.	CV 10-2488 PSG (OPx)	Date	November 2, 2010
Title	Libertarian Party of Los Angeles County v. Debra Bowen		

Present:	The Honorable Philip S. Gutierrez, United States District Judge	
Wendy K. Hernandez	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings: **(In Chambers) Order Granting Defendant's Motion for Judgment on the Pleadings**

Pending before the Court is Defendant Debra Bowen's Motion for Judgment on the Pleadings. The Court finds these matters appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15. After considering the moving and opposing papers, the Court GRANTS Defendant's Motion.

I. Background

Plaintiffs Libertarian Party of Los Angeles, Theodore Brown, and Christopher Agrella (collectively, "Plaintiffs") filed suit on April 6, 2010 against Defendant Debra Bowen ("Defendant" or "Secretary of State") in her official capacity as the Secretary of State of California. Plaintiffs are politically active and "would like to support candidates for state offices by circulating nominating papers or petitions in Los Angeles County using circulators who are not residents of Los Angeles County or the state of California." *Compl.* ¶ 3. Preventing Plaintiffs from doing so are California election laws. Defendant is responsible for enforcing those laws. *Id.* ¶ 7.

Plaintiffs challenge the constitutionality of two California statutes establishing residency requirements for circulators of nominating petitions for candidates for political office: (1) Cal. Elec. Code § 8066; and (2) Cal. Elec. Code § 8451. *Id.* ¶ 17. The two provisions both provide that "[c]irculators shall be voters in the district or political subdivision in which the candidate is

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to be voted or and shall serve only in that district or political subdivision," but § 8066 governs primary election nominations while § 8451 governs nominations outside of California's primary election framework. *See* Cal. Elec. Code §§ 8066, 8451. Plaintiffs allege that the two provisions "severely burden [their] political speech and political association rights . . . in violation of the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983." *Compl.* ¶ 17.

On September 9, 2010, the Secretary of State filed a Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c), arguing that Plaintiffs lack standing to bring the lawsuit and that there is no live case or controversy that is ripe for review. *See Mot.* 3:16-20. For the reasons that follow, the Court GRANTS Defendant's Motion for Judgment on the Pleadings.

II. Legal Standard

Federal Rule of Civil Procedure 12(c) provides: "After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Judgment on the pleadings is proper when the defendant clearly establishes that, even if all material facts in the complaint are true, no material issue of fact remains for trial and the defendant is entitled to judgment as a matter of law. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989). The court may not go beyond the pleadings to resolve the motion without converting into a Rule 56 motion for summary judgment. *Id*.

A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) and a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) "are functionally identical." *Pac. West Group, Inc. v. Real Time Solutions, Inc.*, 321 Fed. Appx. 566, 569 (9th Cir. 2008). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal citations omitted). If a plaintiff has failed to satisfy that obligation, "leave to amend should be granted even if no request is made unless amendment would be futile." *Pac. West Group*, 321 Fed. Appx. at 569.

III. Discussion

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Defendant argues that dismissal of Plaintiffs claims under Rule 12(c) is warranted because Plaintiffs lack standing and the lawsuit is not yet ripe for review. *See Mot.* 3:16-20. The Court agrees.[1]

A. Constitutional Standing

Federal courts are courts of limited jurisdiction and can only adjudicate actual "cases" or "controversies." U.S. Const. art. III, § 2, cl. 1; s*ee also Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 947 (1968); *Rivera v. Freeman*, 469 F.2d 1159, 1162-63 (9th Cir. 1972) ("The limited jurisdiction of all federal courts requires, preliminarily, that there be a 'case' or 'controversy' in existence."). At an "irreducible minimum," Article III of the U.S. Constitution requires that (1) the plaintiff has personally suffered a cognizable injury, (2) the injury is fairly traceable to the defendant's alleged unlawful conduct, and (3) the injury is redressable by judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *see also Friends of the Earth v. Laidlaw Envt'l. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed 2d 610 (2000). The party asserting federal court jurisdiction bears the burden of establishing standing. *See Raines v. Byrd*, 521 U.S. 811, 818, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997). In a motion to dismiss, however, a court must still "accept all factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *See Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002) (citation and quotations omitted).

"Unique standing considerations" are presented when First Amendment rights are impacted by state action. *See Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003). "In an effort to avoid the chilling effect of sweeping restrictions, the Supreme Court has endorsed what might be called a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences." *Id.* Simply stated, First Amendment considerations "lower the threshold," *Lopez v. Candaele*, ___ F.3d ___, 2010 WL 3607033, at *1 (9th Cir. Sept. 17, 2010) and "tilt[] dramatically toward a finding of standing," *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir.

[1] Although Defendant argues that dismissal is warranted on both standing and ripeness grounds, the Court treats them as the same in this Order. *See California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1093-94 (9th Cir. 2003) ("Whether we frame our jurisdictional inquiry as one of standing or of ripeness, the analysis is the same.").

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2000). Nevertheless, the "irreducible constitutional minimum of standing"—injury, causation and redressability—must still be met. *Lopez*, ___F.3d___, 2010 WL 3607033, at *1.

1. Injury

The Secretary of State argues that Plaintiffs have not suffered an actual injury because there is no evidence "that the Secretary has enforced or will enforce the challenged statutes." *Mot.* 1:18-19. The Court agrees that Plaintiffs have not met their burden of establishing a realistic threat of prosecution and, thus, standing to bring this case.

There is no doubt that a plaintiff "does not have to await the consummation of threatened injury to obtain preventive relief." *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 143 n.29, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974). But, "when plaintiffs seek to establish standing to challenge a law or regulation that is not presently being enforced against them, they must demonstrate 'a *realistic danger* of sustaining a direct injury as a result of the statute's operation or enforcement.'" *LSO, Ltd.*, 205 F.3d at 1154 (emphasis added) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)). "[N]either the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F. 3d 1134 (9th Cir. 2000). There are a number of related factors a court can consider to determine whether there is "a credible threat of adverse state action sufficient to establish standing" including (1) whether there is a "reasonable likelihood that the government will enforce the challenged law," (2) "whether the plaintiffs have failed to establish, with some degree of concrete detail, that they intend to violate the challenged law," and (3) whether the challenged law is inapplicable to the plaintiffs, either by its terms or as interpreted by the government." *Lopez*, ___ F.3d ___, 2010 WL 3607033, at *5 (applying these factors in a First Amendment case).

The parties do not dispute the second or third factors, instead focusing the Court's inquiry on the first. A reasonable likelihood that the government will enforce the challenged law can be shown by, *inter alia*, "past enforcement," an indictment or arrest of the plaintiffs, a "specific warning or threat to initiate proceedings under the challenged [law]," or a "history of past prosecution or enforcement under the challenged statute." *Id.* at *6.

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The Court recognizes that a plaintiff with the burden to establish standing need only "plead general factual allegations of injury in order to survive a motion to dismiss." *LSO, Ltd.*, 205 F.3d at 1156 (quoting *Lujan*, 504 U.S. at 561). Here, Plaintiffs do not allege a single fact suggesting a credible threat of enforcement, necessarily failing to meet their burden to establish standing. *See generally*, *Complaint* ("*Compl.*"). The Secretary of State rightly points out that "Plaintiffs do not allege that the Secretary has enforced or threatens to enforce Elections Code sections 8066 and 8451 against plaintiffs or anyone else." *Mot.* 6:1-3. Without any mention of enforcement in their Complaint, Plaintiffs ask this Court to find a credible threat of enforcement from their statement in the Opposition to the Motion that "Bowen is charged with enforcing *all* election laws of the State of California and has enforced election laws in the past." *Opp'n* 3-3-5 (emphasis added). Perhaps recognizing that their argument is insufficient for standing purposes, Plaintiffs attempt to clear the standing hurdle by adding that, "[e]ven if Bowen has not enforced the specific statutes in question, this does not remove the chilling effect of the statutes on core political speech by plaintiffs due to possible enforcement and prosecution."[2] *Id.* 3:5-7.

The allegations made for the first time in the Opposition fail to get Plaintiffs' standing argument off the ground. It is well understood that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972). Even general threats of enforcement by an official charged with the administration of the law will not move a claim from the non-justiciable category to the justiciable category. *See United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 88, 67 S. Ct. 556, 91 L. Ed. 754 (1947); *Rincon Band of Mission Indians v. San Diego Cnty.*, 495 F.2d 1, 4 (9th Cir. 1974) (holding that a sheriff's

[2] Plaintiffs apparently misread the cases they cite to in support of their position. In all the First Amendment cases cited to by Plaintiffs, there was a credible threat of enforcement of the statute as evinced by past enforcement or otherwise. *See, e.g.*, *Virginia v. Am. Booksellers Ass'n, Inc*, 484 U.S. 383, 393, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988) ("The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise."); *Am. Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 983-84 (9th Cir. 2004) (where affidavits of plaintiffs and others established that the challenged statute had not only been enforced in the past, but enforced against plaintiffs); *Daien v. Ysursa*, 711 F. Supp. 2d 1215, 1224 (D. Idaho 2010) ("Ysursa does not argue that Daien would not face criminal penalties as a non-resident circulating petitions, and there is evidence in the record that the State recently has prosecuted others for election fraud under [the challenged statute].").

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statement that "all the laws of San Diego, State, Federal and County, will be enforced within our jurisdiction" was insufficient to confer standing). The Court has no reason to doubt the sincerity of the Plaintiffs when they say that the California statutes have chilled their political activity. Nevertheless, Plaintiffs only provide the Court with evidence of self-imposed restraint not prompted by a credible threat of enforcement, a type of injury insufficient to confer standing. *See Ariz. Right to Life Political Action Comm.*, 320 F.3d at 1006 ("it is sufficient for standing purposes that the plaintiff intends to engage in a course of conduct arguably affected with a constitution interest and that there is a *credible threat* that the challenged provision will be invoked against the plaintiff" (emphasis added and citation omitted)). Without providing any factual allegations of past enforcement of the challenged law, a pattern of enforcement of the challenged law, a threat or warning that the law will be applied to them, or any other indication of a credible threat of enforcement, Plaintiffs have not met their burden to establish standing.[3]

IV. Conclusion

For the foregoing reasons, the Court GRANTS Defendant's Motion for Judgment on the Pleadings WITHOUT PREJUDICE. Plaintiffs may file an amended complaint by November 23, 2010. Failure to do so will result in the case being dismissed with prejudice.

IT IS SO ORDERED.

[3] Plaintiffs' suggestion that Defendant's past enforcement of § 18203 establishes their standing is a bit of a red herring that does nothing for their standing argument. *See Opp'n* 5:4-14. That statute provides that a circulator who signs a false declaration of residency can be fined or imprisoned. *See* Cal. Elec. Code § 18203. However, Plaintiffs are not required to violate § 18203 in the pursuit of their desired conduct. Instead, they can truthfully attest that they are out-of-state residents, potentially subjecting them only to the challenged provisions in this case, not the § 18203 false statement provision.