No. 11-55316

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LIBERTARIAN PARTY OF LOS ANGELES COUNTY, THEODORE BROWN, and CHRISTOPHER AGRELLA,

Plaintiffs – Appellants,

Versus

DEBRA BOWEN, in her official capacity as Secretary of State,

Defendant – Appellee.

On Appeal from the Final Order of the U.S. District Court for the Central District of California, District Judge Philip S. Gutierrez presiding, Case No. 2:10-cv-02488-PSG-OP

OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

JURISDICTIONAL STATEMENT

The Federal District Court for the Central District of California had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343, and 2201. The issues before the district court were federal questions under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution. Relevant facts relating to establishing jurisdiction are that the Complaint alleged that non-residents of California are currently barred from circulating ballot-access petitions within California and California residents residing outside of a particular election district were barred from circulating ballot-access petitions within that particular election district. Furthermore, the Complaint alleges that each of the Plaintiffs-Appellants are barred from associating with non-residents of the state and/or the political district, and are barred themselves (in the case of the natural person Plaintiffs-Appellants) from circulating ballot-access petitions themselves.

The District Court entered an order granting a motion for judgment on the pleadings on February 3, 2011 dismissing the case with prejudice against the Plaintiffs-Appellants. (R. 33, Excerpt p. 1.) No separate Judgment issued in this case, but the order was a final order. Plaintiffs-Appellants timely filed the Notice of Appeal on February 28, 2011. (R. 34, Excerpt p. 9.) The United States Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and Fed. R. App. P. 4(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by holding that plaintiffs may only show an injury-in-fact to establish standing by showing a "credible threat of prosecution" through allegations of a history of past enforcement or explicit, specific threats or warnings of future enforcement, rather than through a reasonable fear of enforcement supported by allegations that the intended political speech is clearly governed by the plain language of a statute that the Secretary of State continues to represent is applicable to all candidates for public office.

This issue was raised in the Plaintiffs-Appellants' Opposition to the Defendant's Motion for Judgment on the Pleadings. (R. 30.)

STATUTORY SCHEME

Under California election law, a candidate may only be placed on the ballot – and thus be considered a legally qualified candidate for purposes of the Federal Election Campaign Act – if nomination papers, or "petitions," are filed with the county elections official. Cal. Elec. Code §§ 8020(a)(1), 8302, § 13 (2008) ("No candidate's name shall be printed on the ballot to be used at the direct primary unless the following nomination documents are delivered for filing to the county elections official…"). In order to qualify the candidate for a place on the ballot, these petitions must be signed by a certain number of qualified electors, *see e.g.*, Cal. Elec. Code §§ 8060, 8400, and may only be circulated by residents of the

district or political subdivision in which the candidate is to be voted on, Cal. Elec. Code §§ 8066, 8451.

Section 8066, governing circulators of nomination papers for candidates in primary elections, and § 8451, governing circulators of petitions for independent nominations, both provide that:

> Circulators shall be voters in the district or political subdivision in which the candidate is to be voted on and shall serve only in that district or political subdivision.

Cal. Elec. Code §§ 8066, 8451 (2008).

These residency requirements effectively bar non-residents from circulating nomination papers within the state, and further prohibit California's own residents from circulating petitions outside of the district in which both the circulator is a resident and the candidate is to be voted on. *See e.g., id*.

STANDARD OF REVIEW

On February 3, 2011, the district court granted the Secretary of State's ("Secretary") motion for judgment on the pleadings holding that Appellants did not allege sufficient facts to establish standing.

The Court reviews the district court's determination of standing *de novo*. *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1124 (9th Cir. 1996). The Court also reviews *de novo* a judgment dismissing a case on the pleadings. *Mendoza v. Zirkle Fruit Co*., 301 F.3d 1163, 1167 (9th Cir. 2002). In

conducting its *de novo* review, the Court must consider the matter independently and accord no deference to the conclusions of the district court. *Salve Regina Coll. V. Russell*, 499 U.S. 225, 238, 111 S. Ct. 1217, 1224, 113 L.Ed.2d 190 (1991).

A motion for judgment on the pleadings tests the legal sufficiency of the complaint, *N. Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983), and faces the same test as a motion under Rule 12(b)(6), *Pac. West Group, Inc. v. Real Time Solutions, Inc.*, 321 Fed. Appx. 566, 569 (9th Cir. 2008). Judgment on the pleadings is proper when there are no issues of material fact, and the moving party is entitled to judgment as a matter of law. *3550 Stevens Creek Associates v. Barclays Bank of California*, 915 F.2d 1355, 1357 (9th Cir. 1990). Thus, the district court's dismissal may be affirmed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 998, 152 L.Ed.2d 1 (2002) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)).

In making its determination, the court must accept all material allegations in the complaint as true; construing all alleged facts and drawing all reasonable inferences in the light most favorable to the plaintiff. *Rennie & Laughlin, Inc. v. Chrysler Corp.*, 242 F.2d 208, 209 (9th Cir. 1957).

STATEMENT OF THE CASE

This case is an election law case challenging California's statute barring persons residing outside of a particular political subdivision or election district from circulating candidate ballot access petitions within that political subdivision or election district. The three Plaintiffs-Appellants are a political party and two of its members. (R. 28, ¶¶ 4-6, Excerpts, p. 65.) A complaint was filed seeking declaratory relief on April 6, 2010. (R. 1.) Debra Bowen, ("Bowen") filed a motion for judgment on the pleadings. (R. 21.) The motion was granted without prejudice and the Plaintiffs-Appellants were granted leave to file an amended complaint. (R. 25.)

An amended complaint seeking declaratory relief was filed on November 22, 2011. (R. 28, Excerpts, p. 63.) Bowen again filed a motion for judgment on the pleadings. (R. 29.) After full briefing, the district court granted the motion for judgment on the pleadings with prejudice. (R. 33, Excerpts, p. 1.) The district court held that the Plaintiffs-Appellants lacked standing. *Id*. Specifically, the district court held the Plaintiffs-Appellants failed to show a cognizable injury. *Id*. A timely notice of appeal was filed. (R. 34, Excerpts, p. 9.)

STATEMENT OF FACTS

This case was dismissed on Bowen's motion for judgment on the pleadings. Therefore, the procedural posture requires that the facts as alleged in the Complaint must be considered true. *See* Standard of Review, *supra*.

The Plaintiffs-Appellants are (1) the Libertarian Party of Los Angeles County ("Libertarian Party"), (2) Theodore Brown ("Brown"), a resident of Los Angeles County, and (3) Christopher Agrella ("Agrella"), a resident of San Bernardino County. (R. 28, ¶¶ 4-6, Excerpts, p. 65.) The Libertarian Party is an active political party in the state of California and both Brown and Agrella are members of that party. *Id*., ¶ 3. Bowen "oversees the [state of California's] electoral process" and "enforces the state laws at issue." *Id*., ¶ 7, Excerpts, p. 66.

Brown is a resident of Los Angeles County and California and in the last election cycle wanted to circulate petitions in support of candidates located in political districts other than the district within which he lives, but was barred by state law. *Id*., ¶ 19, Excerpts, p. 68. Agrella is a resident of San Bernardino County who was a candidate for the House of Representatives and who circulated petitions in his own behalf in this last election cycle, but, pursuant to state law, could not circulate petitions for a state senate candidate that overlapped his district because he does not reside within the state senate district for which that candidate was running. *Id*., ¶ 20, Excerpts, p. 68. Both Brown and Agrella also intend to

continue supporting candidates for ballot access in future elections and intend to circulate petitions in support of those candidates in political districts other than the district within which he lives. *Id*., ¶ 19-20, Excerpts, p. 68.

The Libertarian Party would like to associate with non-resident supporters of the Libertarian Party, both non-residents of Los Angeles county and non-residents of California, and would like to use non-resident supporters to circulate nomination papers on behalf of Libertarian Party candidates. *Id*., ¶ 21, Excerpts, pp. 68-69. The Libertarian Party also intends to continue supporting candidates for ballot access in future elections and intends to circulate petitions in support of those candidates in political districts other than the district within which that candidate lives. *Id*.

Candidates can attain places on ballots by filing nomination papers or petitions signed by qualified electors. *Id*., ¶ 8, Excerpts, p. 66. The State of California bars non-residents from circulating nomination papers or petitions within the state. *Id*., ¶ 9, Excerpts, p. 66. Furthermore, a resident of California may only circulate nomination papers or petitions in the district or political subdivision in which the circulator is a resident and in which the candidate is to be voted on. *Id*., ¶ 10, Excerpts, p. 66. To protect this requirement, circulators must attach and sign a declaration to the nomination paper or petition setting forth the circulator's residence address. *Id*., ¶ 17, Excerpts, p. 68. A circulator who signs an

incorrect declaration can be punished by fine or imprisonment. *Id*., ¶ 18, Excerpts, p. 68.

Bowen enforces the election laws in this state. *Id*., ¶ 7, Excerpts, p. 66. To fulfill this duty, Bowen provides written notice to all candidates that ballot access petition circulators may only circulate petitions in political districts from which the circulator resides and that this is a requirement for a candidate seeking a nomination by petition. *Id*., ¶ 11, Excerpts, p. 66. Bowen published a "Summary of Qualifications and Requirements for Partisan Nomination for the Offices of STATE SENATOR [and] MEMBER OF THE ASSEMBLY" which reads in part: "Circulators shall be voters in the district or political subdivision in which the candidate is to be voted on and shall serve only in that district or political subdivision. *Id*., ¶ 12, Excerpts, p. 66-67.

In Bowen's Summary of Qualifications, Bowen identified candidate qualifications and requirements that are required by statute or constitutional clause that Bowen also believes is not enforceable as violative of the United States Constitution. *Id*., ¶ 13, Excerpts, p. 67. Bowen intends to enforce all qualifications and requirements set forth in California statutes and in the California Constitution except for those qualifications and requirements not specifically excepted in Bowen's Summary of Qualifications. *Id*., ¶ 14, Excerpts, p. 67.

Bowen also published a document entitled: "Information Sheet –

Qualifications and Requirements – Member of the State Senate, 1st District Special Election." *Id*., ¶ 15, Excerpts, p. 67. This document was published during the coarse of this litigation and related to a special election then pending in California. *Id*., ¶¶ 15-16, Excerpts, p. 67 and Exhibit B. Bowen continued to notice all candidates that the residency requirement for petition circulators was a requirement for candidates for state office. *Id*.

SUMMARY OF ARGUMENT

Simply put, a plaintiff in a First Amendment challenge faces the credible threat of enforcement, and thus shows an injury-in-fact sufficient to establish standing, where the plaintiff alleges an intent to engage in conduct regulated by the challenged statute. *See e.g.*, *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002, 1007 (9th Cir. 2003).

Based upon unambiguous Ninth Circuit precedent, Appellants have more than met the low threshold needed to establish standing to challenge the residency requirements on ballot-access petition circulators by (1) alleging a concrete intent to engage to circulate ballot-access petitions as non-residents - conduct regulated directly by the challenged statutes, and (2) by further alleging that the Secretary of State has not only not disavowed the residency requirements, but continues to affirmatively represent that the requirements must be met by all candidates for office. (R. 28, ¶¶ 12-13, 19-21, Excerpts, pp. 66-69.)

To find, as the district court did, that Appellants lack standing because they did not allege a history of past enforcement or explicit, actual threats, (R. 33, p. 8, Excerpts, p. 8), "would turn respect for the law on its head … Rather, [Appellants'] decision to comply demonstrates a commendable respect for the rule of law, and should not preclude [them] from challenging the statute." *Bayless*, 320 F.3d at 1007.

ARGUMENT

Article III of the Constitution limits federal court jurisdiction to actual "cases" and controversies." *See* U.S. Const. Art. III § 1; *see also Allen v. Wright*, 468 U.S. 737, 750 (1984); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009). To satisfy this case or controversy requirement, a plaintiff must establish standing by showing, among other things, that it has suffered a constitutionally cognizable injury-in-fact. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (the "irreducible constitutional minimum of standing contains three elements": (1) an injury-in-fact, (2) causation, and (3) a likelihood that favorable decision will redress plaintiff's injury.).

To establish an injury-in-fact sufficient to challenge a law or regulation that is not presently being enforced against a plaintiff, "[i]t is sufficient for standing purposes that the plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest and that there is a credible threat that the

challenged provision will be invoked against the plaintiff." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1152 (9th Cir. 2000) ("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.") (internal quotations and citations omitted).

Here, the district court held that Appellants failed to demonstrate a credible threat of enforcement sufficient to establish standing because they did not allege a history of past enforcement of the challenged statute, nor any explicit "threat or warning that the law will be applied to them." (R. 33, p. 8, Excerpts, p. 8.) In so doing, however, the district court attempts to "overrule years of Ninth Circuit and Supreme Court precedent recognizing the validity of pre-enforcement challenges to statutes infringing upon constitutional rights." *See California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1093 (9th Cir. 2003).

In fact, having specifically altered their First and Fourteenth Amendment protected political speech and associations due to the clear applicability of Cal. Elec. Code §§ 8066 and 8451 to their intended actions, Appellants have done precisely what the Ninth Circuit has long encouraged – they've brought an action for declaratory and injunctive relief challenging the residency requirements of the

California Election Code, while complying with the challenged law. *See Bayless*, 320 F.3d at 1007.

The district court's dismissal of Appellants' claims for declaratory and injunctive relief on the ground that Appellants lacked standing contravenes established law from both the Supreme Court and the Ninth Circuit and, as a result, must be reversed.

I. HAVING MODIFIED THEIR BEHAVIOR TO COMPLY WITH THE CHALLENGED STATUTES, APPELLANTS HAVE SHOWN AN INJURY-IN-FACT BY ALLEGING FACTS THAT SUPPORT A REASONABLE FEAR THAT THE SECRETARY INTENDS TO ENFORCE THE STATUTE BARRING NON-RESIDENTS FROM CIRCULATING BALLOT ACCESS PETITIONS.

As set forth in their First Amended Complaint, Appellants have refrained from engaging in political speech and political associations relating to the circulation of ballot-access petitions because, under California law, a candidate's name will not be placed on an election ballot if the candidate's nomination papers are circulated by a non-resident of the voting district or political subdivision in which the candidate is to be voted on. (R. 28, ¶¶ 19-21, Excerpts, pp. 68-69.)

Appellants also alleged, specifically, that the residency requirements of §§ 8066 and 8451 that effectively prohibit all non-residents from circulating nomination papers have not only *not* been disavowed by the Secretary of State and the State of California, but also continue to be identified by Defendant as

requirements for all candidates for state office. (R. 28, ¶¶ 7, 12-16 and Exs. A and B, Excerpts, pp. 66-68) ("Bowen continues to notice all candidates that the residency requirement for petition circulators is a requirement for candidates for state office."). Notably, the Secretary – who is *required* to administer and enforce the provisions and laws of the Elections Code – has identified certain statutory candidate qualifications and requirements that she believes are unconstitutional and not enforceable, while maintaining that the residency requirements of §§ 8066 and 8451 are required of all candidates. (R. 28, Exhibit A., p. 1, fn. 1, Excerpts, p. 63.) Through these allegations, Appellants have established standing by demonstrating an injury-in-fact based on a reasonable fear that the Secretary intends to enforce the residency requirements imposed by §§ 8066 and 8451.

A. Appellants' Alleged a Reasonable fear of Enforcement Sufficient to Show an Injury-In-Fact and Establish Standing.

Under the law of both the Ninth Circuit and the Supreme Court, these allegations clearly demonstrate a constitutional injury-in-fact of self-censorship – or, perhaps, "muting" – sufficient to establish standing.

Realizing that self-censorship is an injury-in-fact sufficient to establish standing, this Circuit has routinely recognized the validity of pre-enforcement challenges to statutes infringing upon First Amendment rights based upon similar allegations and facts. *See e.g., Bayless*, 320 F.3d at 1006 ("[plaintiff] faced actual harm from the operation of the statute because the alleged danger is, in large

measure, one of self-censorship; a harm that can be realized even without an actual prosecution.") (internal quotation and citation omitted). The *Bayless* Court found that a plaintiff that modified its speech and behavior to comply with a statute showed an injury sufficient to establish standing where the intended speech fell within the parameters of the challenged statute, and had neither been disavowed by the state, nor "fallen into desuetude." *Id*. at 1006-07.

Citing the Supreme Court, this Court concluded that, because the State of Arizona had not previously suggested that the challenged statute would not be enforced, the plaintiff's belief that the statute would be administered to curtail its First Amendment rights was reasonable and sufficient to establish standing. *Id*. (citing *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (concluding that plaintiffs have standing where the "State has not suggested that the newly enacted law will not be enforced and we see no reason to assume otherwise") and *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (noting the government's failure to state that it would not prosecute parties like plaintiffs and concluding that plaintiffs "are thus not without some reason for fearing prosecution")).

Similarly, in *Getman*, a plaintiff corporation alleged that it refrained from engaging in protected issue advocacy communications during a general election because it feared the communications fell within the regulatory ambit of the

challenged statute. 328 F.3d at 1093 (A party who "refrain[s] from engaging in planned communications and associated expenditures based upon a reasonable fear of enforcement of the enacted statute [establishes] sufficient injury to create a justiciable case or controversy."). The *Getman* Court once again found that the plaintiff's feared enforcement was reasonable, and thus suffered an injury sufficient to establish standing, because the plain language of the statute appeared to regulate plaintiff's intended communications. *Id*. at 1095 ("We therefore hold that CPLC suffered the constitutionally recognized injury of self-censorship.") (citation omitted).

While the Ninth Circuit cautions that a plaintiff may not "challenge the constitutionality of a statute on First Amendment grounds by nakedly asserting that his or her speech was chilled by the statute," a fear of enforcement will "inure if the plaintiff's intended speech arguably falls within the statute's reach." *Id*. (citing *Am. Booksellers Ass'n*, 484 U.S. at 392, 108 S.Ct. 636 (finding that plaintiffs suffered self-censorship where the statute was "aimed directly at plaintiffs")); *Bayless*, 320 F.3d at 1006 (internal quotation and citation omitted); *see also Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (in referring to standing to challenge a statute imposing criminal violations: "A plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; the threat is

latent in the statute."); *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996) (the First Circuit concluded from its review of Supreme Court precedents that "[t]he preceding cases make clear that when dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence.").

Like the plaintiffs in *Bayless*, 320 F.3d 1006, and *Getman*, 328 F.3d 1088, Appellants have censored their political speech and associations – refraining from circulating petitions and engaging non-resident petition circulators – based upon the well-founded fear that the Secretary will enforce the residency mandates of §§ 8066 and 8451. *See generally* Cal. Gov. Code § 12172.5 (2007) ("The Secretary of State … shall administer the provisions of the Elections Code" and "shall see that … state election laws are enforced.").

Based upon allegations of the Secretary's lack of any act repudiating the residency requirements of §§ 8066 and 8451, and the Secretary's continued representation that the residency requirements must be met by all candidates, Appellants reasonably believe that the Secretary is likely to enforce the residency requirements and mute their First Amendment protected political speech and associations by denying a place on all ballots any candidate nominated by a

petition circulated by a non-resident. (R. 28, ¶¶ 7, 12-16, Excerpts, pp. 66-68.) Despite wishing to act as, and associate with, non-resident circulators in past elections and intending to do so in future elections, Appellants have refrained from doing so for fear that that petitions circulated by plaintiffs outside of their political districts or petitions circulated by non-resident circulators hired by plaintiffs will be disregarded by the Secretary – muting Appellants political speech after the expense of great effort, time, and money. (R. 28, ¶¶ 19-21, Excerpts, p. 68.)

By altering their political speech and associations to comply with the residency requirements of Cal. Elec. Code §§ 8066 and 8451, Appellants have demonstrated a concrete injury-in-fact sufficient to establish standing and, as a result, the district court's order of dismissal must be reversed.

B. The District Court Erred by Requiring Allegations of Affirmative Acts of Past Enforcement or Explicit, Specific Threats of Future Enforcement in order to Show a Credible Threat of Enforcement.

The district court dismissed Appellants' challenge to the unconstitutional residency requirements of §§ 8066 and 8451 finding that:

> Without providing any factual allegations of past enforcement of the challenged law by the Secretary of State, a pattern of enforcement of the challenged law, a credible and specific threat or warning that the law will be applied to them, or any other indication of a credible threat of enforcement, Appellants have not met their burden to establish standing.

(R. 33, p. 8, Excerpts, p. 8.) Relying on the maxim that "neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or

controversy' requirement," the district court asserts that plaintiffs may only establish standing by showing a credible threat of enforcement by alleging a history of past enforcement of the statute, or explicit, specific threats that the statute will enforced against them in the future. (R. 33, pp. 4, 8, Excerpts, pp. 4, 8) (citing *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134 (9th Cir. 2000)).

That is not the law. Rather, the finding of the district court places an impermissibly high burden on First Amendment challenges and is directly contrary to Supreme Court and Ninth Circuit precedent that has repeatedly stated that a plaintiff establishes Article III standing where the plaintiff expresses an intent to engage in behavior that is likely prohibited by a challenged law, of which the defendant has not affirmatively disavowed an intention to enforce. *Babbitt*, 442 U.S. at 301-02 (Explicitly rejecting the state's claim there was no actual controversy because the law's criminal penalty provisions had not been applied and might not be applied in the future because the government had not disavowed any intention of enforcing the ordinance and because the language of the provision itself applied to anyone who violated it.); *Bayless*, 320 F.3d at 1006; *Getman*, 328 F.3d at 1088 (overturning a similar district court's ruling that implied that a non-profit corporation lacked standing for its First Amendment challenge because it

could not possibly have suffered an injury-in-fact absent a specific threat or warning from the state that enforcement was possible).

While not noted by the district court, this Court has again recently explicitly acknowledged the slight showing necessary to establish standing in a First Amendment Challenge:

> In [previous cases], we held that [a plaintiff] can establish injury in fact sufficient for pre-enforcement standing merely by showing that it altered its expressive activities to comply with the statutes at issue and alleging its apprehension that the relevant statutes would be enforced against it.

Lopez v. Candaele, 630 F.3d 775, 791 (9th Cir. 2010) (citing *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006) and *Bayless*, 320 F.3d at 1006) (finding that plaintiff lacked standing because the challenged rule could not be construed to apply to the alleged intended conduct)).

These opinions are consistent with established doctrine in First Amendment challenges, under which the Supreme Court has endorsed the "hold your tongue and challenge now" approach and the Ninth Circuit has concluded that where an election law statute implicates First Amendment rights, "the inquiry tilts dramatically toward a finding of standing." *Bayless*, 320 F.2d at 1006-7 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1985); *Stroh*, 205 F.3d at 1155).

As an indication of the low threshold a plaintiff must meet to establish standing in First Amendment challenges, the district court only points to one Ninth

Circuit case in which the plaintiff's challenge was insufficient to establish standing. (R. 33, p. 8, Excerpts, p. 8) (citing *Rincon Band of Mission Indians v. San Diego County*, 495 F.2d 1, 4 (9th Cir. 1974). However, as noted by this Court, even this case can be distinguished because the challenged statute did not implicate the First Amendment. *San Diego County Gun Rights Committee*, 98 F.3d at 1129 ("Because plaintiffs' attack on the Crime Control Act does not implicate First Amendment concerns, their reliance on *Epperson v. Arkansas* is misplaced" … "While conceding that *Epperson* could not be distinguished, we suggested in *Rincon Band* that [p]erhaps [*Epperson*] is a special case involving First Amendment issues that makes it sui generis.") (internal quotation and citation omitted).[1]

Rather than apply the appropriate "credible threat of enforcement" threshold that recognizes that, at least with respect to challenges involving protected speech, a challenged statute's "credible threat of enforcement" is inherent in the statute itself, the district court instead chooses to focus on the use of buzzwords like "threat" and "prosecution" in order to impose a substantial burden requiring

[1] The district court also cites *Thomas*, a case in which the Ninth Circuit found the plaintiffs lacked standing. (R. 33, p. 4, Excerpts, p. 4.) However, the *Thomas* Court based its finding in part on the plaintiffs' inability to articulate a past or future concrete intent to violate the challenged statute. Further, this Court has reversed a decision of a district court that relied on *Thomas* to find that a plaintiff did not face a credible threat of prosecution absent any threat or warning from the state that the statute would be enforced. *Getman*, 328 F.3d at 1093.

allegations of an affirmative act on behalf of the state in order to support a "credible threat of prosecution." However, the threat of future enforcement needs merely to be "credible," as opposed to "imaginary or speculative," *Thomas*, 220 F.3d at 1139, and may be shown simply through an allegation of intent to engage in conduct expressly regulated by the challenged statute, *Bayless*, 320 F.3d at 1006. No allegations of affirmative acts on behalf of the defendant – whether allegations of past enforcement or actual, specific threats – are required.

Because §§ 8066 and 8451 of the California Elections Code (1) have not only not been disavowed, but continue to be affirmatively represented by the Secretary as requirements of all candidates, for office, and (2) apply directly to Appellants' intended political speech, it is exceedingly reasonable for Appellants to believe that the statutes will be enforced against them to disregard any nomination papers circulated by non-residents. Based upon the unambiguous precedent of this Court, Appellants have clearly established a constitutionally sufficient injury-in-fact to establish standing, and the district court's dismissal must be reversed.

CONCLUSION

While it may be true that the "mere existence of a proscriptive statute" does not confer standing necessary to satisfy the case or controversy requirement of Article III, it is well established that a Plaintiff establishes standing to challenge a

statute under the First Amendment so long as a plaintiff intends to engage in activity that would violate the challenged statute, the controversy is real unless the defendant has explicitly disavowed any intention to enforce law.

Through allegations of specifically modifying their political speech and associations in order to comply with the residency requirements §§ 8066 and 8451, Plaintiff's have alleged a well-founded fear that the statute will be enforced against them to disregard any nomination petitions circulated by non-residents. Because Appellants have more than met the minimum threshold to show the "credible threat of enforcement" and the injury-in-fact the district court found lacking, reversal and remand for further proceedings is required.

STATEMENT OF RELATED CASES

There are no related cases.

Dated at Milwaukee, Wisconsin, on this the 8th day of August, 2011.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF COMPLIANCE

The following is hereby certified by the undersigned below:

1. All fonts are Times, in 14-point type. (Footnotes are in 14-point type).

2. This brief contains 5,047 words, exclusive of the table of contents, table of authorities, this certificate of compliance, and the certificate of service. This word count was performed with the Macintosh "Microsoft Word X" word count tool.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 8, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I hereby certify that four (4) copies of the Records of Excerpts were served this day on the Ninth Circuit Court of Appeals by mailing same via first-class mail to the Clerk of Court. Furthermore, one (1) copy of the Record Excerpts were mailed via first class mail to the following addresses:

Michael Glenn Witmer, Deputy Attorney General
California Attorney General's Office
300 South Spring Street, Suite 1702
Los Angeles, California 90013

Dated on August 8, 2011.

/s/ Daniel J. Treuden
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