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

Appellants/Appellants,

v.

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

Defendant/Appellee.

On Appeal from the United States District Court
for the Central District of California

No. CV10-2488 PSG (OPx)
The Honorable Philip S. Gutierrez, Judge

APPELLEE'S BRIEF

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INTRODUCTION

As the court below recognized, the jurisdiction of the federal judiciary should be exercised only in matters involving live cases and controversies. Here, Appellants would invoke that power to nullify long dormant acts of the California Legislature even though there has been no threat of enforcement. The provisions in question ostensibly require the circulators of nominating petitions to be registered voters residing within the political subdivision or election district relevant to the office or ballot proposition that is the subject of the petition. But declaratory relief will not be given on the ground that it would be convenient for the plaintiff to have the validity of a statute addressed judicially.

After two attempts, Appellants plainly could not bear their burden to plead facts indicating that they had article III standing to invoke federal jurisdiction. The absence of such allegations manifests that no live controversy exists suitable for adjudication. Thus, the District Court's dismissal of the First Amended Complaint without leave to amend was proper and should be affirmed by this Court.

And while the court below did not reach the issue, principles of ripeness likewise dictate that the adjudication of Appellants' claims be deferred until such time that the challenged statutes are enforced, if ever.

Without at least a threat of enforcement, any opinion on the challenged statutes would be purely advisory in nature.

For these reasons, and as explained in detail below, the Secretary of State respectfully requests that this Court affirm the judgment of the District Court.

I. STATEMENT OF JURISDICTION

As discussed below, the District Court properly concluded that it lacked jurisdiction under article III, section 2, clause 1 of the United States Constitution because Appellants failed to allege that they had suffered a cognizable injury, one of three essential elements needed to establish federal court jurisdiction. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Furthermore, the District Court could have declined jurisdiction under the principle of prudential ripeness.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and rule 4(a) of the Federal Rules of Appellate Procedure.

II. STATEMENT OF ISSUES

The issues before the Court are appropriately framed as follows:

1. Whether the district court properly applied established standards to determine that Appellants' pre-enforcement challenge to California Election Code residence limitations for nominating petition circulators failed to allege facts sufficient to establish article III standing?

2. Whether such a challenge is ripe for adjudication?[1]

III. STATEMENT OF THE CASE

Appellants Theodore Brown, Christopher Agrella, and the Libertarian Party of Los Angeles County (LPLAC) filed this facial challenge to two sections of the California Elections Code which require the circulators of nominating petitions to be registered voters residing within the political subdivision or election district relevant to the office or ballot proposition that is the subject of the petition. Although the challenged statutes have never been enforced, and no government official has ever threatened to enforce them, Appellants sought (1) a judicial declaration that the statutes violate the first and fourteenth amendments of the United States Constitution; and (2) a permanent injunction to enjoin the Secretary and others acting in concert with her from enforcing them.

Before answering the original complaint, the Secretary filed a motion to dismiss pursuant to rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on grounds of standing and ripeness. R. 11,[2] Excerpts of Record ["E.R."] pp. 80-85. Due to a calendaring error, the motion was denied

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[1] These issues were joined below by way of the Secretary's motion for judgment on the pleadings. (Supplemental Excerpts of Record ["S.E.R."], p. 5.)

[2] For the sake of consistency, the Secretary will adopt Appellants' usage and will refer to district court docket items as "R. #."

without prejudice. R. 16 The Secretary invited Appellants to amend their complaint to address the flaws identified in her original motion, but they declined and the Secretary answered. R. 18 Thereafter, the Secretary filed a motion for judgment on the pleadings on the grounds that plaintiffs lacked article III standing and the dispute was unripe. R. 21. The District Court granted that motion without prejudice R. 25, and Appellants filed an amended complaint. R. 28, E.R. pp. 63-73. The Secretary again moved for judgment on the pleadings based on standing and ripeness. R. 29 This time the court below granted the Secretary's motion with prejudice, concluding that:

> The mere existence of a potentially unconstitutional statute does not necessarily create a "case or controversy" under Article III of the United States Constitution . . . . As this Court concluded in its earlier Order, 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.

E.R. p. 8, penultimate paragraph (emphasis added).) This appeal followed.

IV. STATEMENT OF FACTS

A. Allegations of the First Amended Complaint

According to the First Amended Complaint,[3] candidates for political office can obtain a place on the ballot for statewide and local elections by filing nomination papers or petitions signed by qualified electors. ¶ 8 (citing Elections Code §§ 8060 and 8400).[4] Two sections of the Elections Code allegedly bar non-California residents from circulating nomination papers or petitions within the state ¶ 9,[5] and further restrict California residents to circulating nomination papers or petitions only within the district or political subdivision where the circulator resides and where the candidate is running for office. ¶ 10. Circulators must disclose their residence addresses in a declaration attached to the nomination paper or petition when it is submitted to a local election official (§ 104), and a circulator who signs a false declaration commits perjury. ¶ 18 (citing § 18203).

The amended complaint also incorporates certain guidelines published by the Secretary, including a summary of qualifications for candidates which

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[3] All "¶" citations are to the First Amended Complaint. (E.R. pp. 63-73.)

[4] All statutory references are to the California Elections Code unless otherwise specified.

[5] The challenged statutes both provide: "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." Section 8066 pertains to direct primaries; section 8451 to independent nominations.

cites, ostensibly as good law, the rules that Appellants challenge here. ¶ 12. Those guidelines also cite certain provisions that "Bowen . . . believes [are] not enforceable as violative of the United States Constitution." ¶ 13. Thus, alleges the complaint, "Bowen intends to enforce all . . . statutes . . . except for those . . . not specifically excepted in Bowen's Summary of Qualifications." ¶ 14.

Appellant Brown alleges that he is a resident of Los Angeles County and in the last election cycle he "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." ¶ 19. Brown further alleges that he "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 he lives." *Id*.

Appellant Agrella alleges that he is a resident of San Bernardino County, that he was a candidate for the House of Representatives in the last election cycle, and that he circulated nominating petitions in his own behalf but failed to obtain sufficient signatures for ballot access. ¶ 20. Agrella also alleges that he was "barred from circulating petitions for a state senate candidate that overlaps his district because he does not reside within the state senate district for which that candidate was running because he was barred by state law." *Id*. In addition, "Agrella 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 he lives." *Id*.

Appellant LPLAC alleges that it wants to associate with and use non-California and non-Los Angeles residents to circulate nomination papers and petitions in Los Angeles County in support of Libertarian Party candidates but is barred from doing so by sections 8066 and 8451 (quoted at n. 5 above). ¶ 21. Appellant LPLAC appears to assert the unconstitutionality of both the state residency requirement as well as the local district residency requirement. As to LPLAC, the amended complaint added the statement that "LPLAC 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 he lives." *Id.*

B. Claims and Prayer for Relief

The amended complaint contains a single claim for deprivation of civil rights, asserting that the residency requirement for circulators in sections 8066 and 8451 "severely burdens the political speech and political association rights of Brown, Agrella and the LPLAC, in violation of the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983." ¶ 23.

Appellant LPLAC alleges that the residency requirement for circulators "severely burdens the right of the LPLAC to name its own spokesmen." ¶ 24. All three appellants allege that the requirements severely burden their voting rights, because they "diminish the statewide and national viability of the organization whose ballot presence is denied, thereby diminishing the value of votes cast by the harmed parties." ¶ 25.

Thus, conclude Appellants, "defendant Bowen, acting under color of state law, has deprived appellants of the[ir] rights, privileges and immunities . . . to participate in the democratic process free from unreasonable impediments, undue restraints on core political speech, free and expressive associational rights, and the right to equal protection of the laws." ¶ 26. Appellants therefore prayed for (1) a judicial declaration that "that the residency requirement for petition circulators severely limits the speech, associational, and voting rights of supporters of political parties" and violates the First and Fourteenth Amendments to the United States Constitution; and (2) a permanent injunction enjoining the Secretary and "all other persons in active concert and participation with her from implementing and enforcing the residency requirement." E.R. p. 70, ¶¶ A and B.

V. SUMMARY OF ARGUMENT

This case presents a classic separation of powers controversy. Appellants are trying to use the judicial branch to compel the executive

branch to nullify an act of the legislative branch, by means of a purely advisory opinion, based strictly on Appellants' alleged fear that the Secretary might someday enforce sections 8066 and 8451 against them. But no Secretary of State has ever enforced the challenged provisions. Indeed, the only California case that addressed even functionally similar provisions was brought by a private party, not the Secretary or any public entity. That case—which invalidated an ordinance similar to the statutes challenged here—demonstrates both why it is unlikely that the Secretary will ever seek to enforce the challenged statutes, and why this Court should exercise its discretion to abstain on prudential grounds from ruling on the constitutionality of the challenged statues unless and until there is a live controversy.

VI. LEGAL STANDARDS

A. Standards Applicable to Rule 12(c) Motions

The same standards apply to motions to dismiss under rule 12(c) of the Federal Rules of Civil Procedure as apply to motions under rule 12(b)(6). Thus, judgment on the pleadings is appropriate when, even if all material facts in the pleading under attack are true, the moving party is entitled to judgment as a matter of law. *Fleming v. Pickard,* 581 F.3d 922, 925 (9th Cir. 2009) (citations omitted).

A rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint. *N. Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). Dismissal of the complaint or of any claim within it "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (citing *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984)).

In considering a motion to dismiss for failure to state a claim, the court accepts as true all material allegations in the complaint and the reasonable inferences that can be drawn from them. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). However, the court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). A court generally cannot consider materials outside of the complaint, except for materials submitted as part of the complaint or the contents of which are alleged in the complaint. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). The court may also consider matters subject to judicial notice. *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988).

B. Standards of Review

A dismissal for failure to state a claim is reviewed de novo. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005) (applying rule 12(b)(6)); *Dunlap v. Credit Protection Ass'n, L.P.*, 419 F.3d 1011, 1012 n.1 (9th Cir. 2005) (applying rule 12(c)). Again, all factual allegations in the complaint are accepted as true, and the pleadings are construed in the light most favorable to the nonmoving party. *Knievel*, 393 F.3d at 1072.

In contrast, denial of leave to amend is reviewed for abuse of discretion. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). The district court's decision will not be disturbed absent a definite and firm conviction that it committed a clear error of judgment. *Id.*

Finally, a court of appeals may affirm on any ground supported by the record, whether or not the district court decision relied on the same grounds or reasoning adopted by the appellate court. *Atel Fin'l Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003).

ARGUMENT

I. APPELLANTS LACK STANDING

A. This Case Does Not Present an Article III Case or Controversy

Article III standing refers to the constitutional limitations imposed upon the federal court's exercise of subject matter jurisdiction. The various doctrines of justiciability that limit the federal courts' power to adjudicate

disputes—such as ripeness, mootness, and standing—arise from a concern about the separation of powers in the constitutional scheme. *Allen v. Wright*, 468 U.S. 737, 752 (1984). In *Allen*, the United States Supreme Court emphasized that standing requirements, such as injury-in-fact, causation, and redressability, are primarily designed to maintain such separation of powers.

> Typically . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative? These questions and any others relevant to the standing inquiry must be answered by reference to the Art. III notion that *federal courts may exercise power only in the last resort, and as a necessity*, and only when adjudication is consistent with a system of separated powers and the dispute is one traditionally thought to be capable of resolution through the judicial process.

Id. (internal quotation marks and citations omitted) (emphasis added).

Separation of powers concerns are particularly sharp in this case because Appellants are asking the federal court to invalidate long-standing state statutes that have never been enforced.[6] Put another way, even though

[6] Section 8066 was enacted in 1999, derived from former § 6499 which in turn derived from and continued the substance of §6502.5, enacted by Stats. 1969. Section 8451 was enacted in 1999, derived from former

(continued…)

the State has never enforced the challenged statutes against Appellants or anyone else, Appellants are suing to have the federal judicial branch direct the state executive branch to nullify long dormant acts of the state legislative branch.

B. Standing in Pre-Enforcement First Amendment Cases

To compound matters, because this case presents no live controversy, Appellants really seek an improper advisory opinion.[7] Declining jurisdiction in this case preserves comity and recognizes that "federal courts may exercise power only 'in the last resort, and as a necessity.'" *Allen*, 468 U.S. at 752 (citation omitted).

To safeguard these principles, federal courts are courts of limited jurisdiction and can only adjudicate actual "cases" or "controversies." U.S. Const. art. III, § 2, cl. 1; *see also Flast v. Cohen*, 392 U.S. 83, 94-95 (1968); *Rivera v. Freeman*, 469 F.2d 1159, 1162-63 (9th Cir. 1972) ("limited jurisdiction of all federal courts requires, preliminarily, that there be a 'case' or 'controversy' in existence."). At an "irreducible minimum," article III of

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(…continued)
§ 6861, which in turn derived from and continued the substance of §6860.5, enacted by Stats. 1969.

[7] "Our role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Thomas v. Anchorage Equal Rights Com'n*, 220 F.3d 1134, 1138 (9th Cir. 2000)

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*, 504 U.S. at 560; *see also Friends of the Earth v. Laidlaw Envt'l. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). The party asserting federal court jurisdiction bears the burden of establishing standing. *See Raines v. Byrd*, 521 U.S. 811, 818 (1997).

To be sure, "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). To avoid the chilling effect of restrictions on free speech, the Supreme Court has endorsed a "hold your tongue and challenge now" approach rather than forcing litigants to speak first and risk the consequences. *Id.* Consequently First Amendment considerations lower the threshold, and "tilt[] dramatically toward a finding of standing." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000). Nevertheless, a plaintiff must still establish "'the irreducible constitutional minimum of standing' . . . injury in fact, causation, and a likelihood that a favorable decision will redress the plaintiff's alleged injury." *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (citing *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130). The district court in this case focused solely on the injury-in-fact element of this formulation as sufficient to

support its decision, but in fact Appellants here failed to establish *any* of the three required elements.

C. Appellants Cannot Allege an Injury in Fact

"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 (1979)). But "neither 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).

To determine whether the plaintiff has suffered an injury or threat of injury, courts have to assess whether it is credible and not "imaginary or speculative." *Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301. In making that assessment, courts conduct three related inquiries. *Lopez*, 630 F.3d at 786. First, have the pre-enforcement plaintiffs shown "a reasonable likelihood that the government will enforce the challenged law against them"? *Id.* Second, have the plaintiffs established, "with some degree of concrete detail, that they intend to violate the challenged law"? *Id.* Third, is the challenged law actually applicable to the plaintiffs, "either by its terms or as interpreted

by the government?" *Id.* As this Court explained, "inapplicability weighs against both the plaintiffs' claims that they intend to violate the law, and also their claims that the government intends to enforce the law against them." *Id.*

In this case, the court below correctly found that Appellants did not show "a reasonable likelihood that the government will enforce the challenged law against them." The Secretary has never enforced or threatened to enforce the challenged statutes. Indeed, in January 2010, the Secretary reissued a 1980 legal opinion that casts one of the challenged statutes into doubt.[8] This should have provided Appellants with a large measure of assurance that they would not be prosecuted.

Moreover, given how the law in the area of petition-circulator qualifications has developed in recent decades, it is extremely unlikely the Secretary ever would attempt to enforce these statutes. Functionally similar statutes have been declared unconstitutional or called into doubt by the Supreme Court (*see*, *e.g.*, *Buckley v. American Constitutional Law*

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[8] See www.sos.ca.gov/elections/ccrov/pdf/2010/january/10038rd.pdf. That advisory states, in relevant part, "[p]ursuant to the attached legal opinion the Secretary of State's office issued in 1980 . . . signatures on any candidacy paper (which includes nomination documents and signature in lieu of filing fee petitions) should not be marked insufficient solely because the circulator of the candidacy paper is not a registered voter." The Secretary seeks judicial notice of this opinion in a concurrently-filed request.

Foundation (1999) 525 U.S. 182); by the California Court of Appeal (*Preserve Shorecliff Homeowners v. City of San Clemente*, 158 Cal. App. 4th 1427, 1435 (2008)); and even the California Attorney General (82 Ops.Cal.Atty.Gen 250 (1999)).

Nor have Appellants established "with some degree of concrete detail, that they intend to violate the challenged law." *Lopez*, 630 F.3d at 786. In this regard, all Brown and Agrella allege is that they "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 [they] live[]." FAC ¶¶ 19, 20.

These allegations are far closer to the fatally vague plan to violate the law described in *Thomas*, 220 F.3d 1139. There, this Court stated that while "'concrete plan' does not mean cast in stone, the Constitution requires something more than a hypothetical intent to violate the law." *Id*.

> Thomas and Baker claim that they have refused to rent to unmarried couples in the past, yet they cannot say when, to whom, where, or under what circumstances. They pledge their intent to do so in the future, yet again they cannot specify when, to whom, where, or under what circumstances. *A general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan.*

Id. (emphasis added).

Further weighing against a finding that Appellants suffered (or face) any concrete injury in fact is that they never allege what possible consequences they fear might result were they to violate the challenged statutes. The Election Code itself does not identify any penalties for violation of the challenged statutes. And under California law, otherwise valid petitions are not disqualified simply because the circulator may not be qualified. In *Truman v. Royer*, 189 Cal. App. 2d 240 (1961), a private plaintiff challenged the action of a city clerk certifying a referendum petition. The court of appeal upheld the city clerk's decision to accept a referendum petition which was defective in that affidavits from the circulators of the petition failed to state their addresses or that they were voters of that city. The defect was held not to invalidate the petition. *Id*. at 241, 243–244.

Finally it is highly doubtful that the challenged statues would be found to apply to Appellants. In *Preserve Shorecliff Homeowners v. City of San Clemente*, 158 Cal. App. 4th 1427 (2008), opponents of a referendum against a city ordinance brought an action against the city, alleging referendum circulators were not city residents as required by a local ordinance functionally equivalent to the statutes challenged here. Plaintiffs sought a writ of mandate directing the city council not to place referendum on the ballot. The court of appeal found that the ordinances in question were

indeed unconstitutional relying on *Buckley*, 525 U.S. 182, and a California Attorney General opinion. The court observed that:

> [T]he Attorney General's office has already provided a formal opinion on the constitutionality of the functionally identical section 9209, and found that statute's requirement that circulators be a "voter of the city" to be unconstitutional in light of *Buckley*. Said the Attorney General, and the emphasis is his own: "The first question to be resolved is whether the circulator of an initiative petition must be 'a voter of the city' as required under section 9209, or whether such statutory requirement is now unconstitutional in light of the United States Supreme Court's recent decision in *Buckley v. American Constitutional Law Foundation* [citation]. *We conclude that the statutory requirement is unconstitutional under Buckley*."

Preserve Shorecliff Homeowners, 158 Cal. App. 4th at 1435 (citing 82 Ops.Cal.Atty.Gen. at p. 251) (original emphasis). Given the state of the law on residency requirements like the statutes challenged here, it is highly unlikely they would be applied to these appellants.

In sum, all three of the factors courts use to determine whether the plaintiff has suffered an injury or threat of injury confirm there is no such allegation here.

D. Appellants Cannot Allege A Causal Link Between Their "Injuries" and the Secretary's Conduct

The second of the "injury, causality, and redressability" elements required for article III standing is that the injury be fairly traceable to the defendant's alleged unlawful conduct. And here the analysis of the second

element overlaps with the third element, i.e., "the injury is redressable by judicial decision." *Lujan*, 504 U.S. at 560. As noted, the Secretary has never enforced the challenged statutes, and likely never will. Cases addressing petition circulator qualifications are typically brought by private parties politically opposed to whatever the circulators were promoting (e.g., *Truman*, 189 Cal. App. 2d 240, and *Preserve Shorecliff*, 158 Cal. App. 4th 1427), or public advocacy groups (e.g., *Buckley*, 525 U.S. 182.) Thus, any injury to appellant resulting from the "chill" imposed by the challenged statutes is not fairly traceable to the Secretary. The adverse action they claim to fear, if any, would most likely be brought by private actors who would not be subject to the injunction requested in their complaint in any event.[9]

In sum, the "chill" Appellants allege is entirely imaginary, and no injunctive or declaratory relief against the Secretary would redress it.

II. THIS CASE ALSO DOES NOT PRESENT A RIPE CONTROVERSY

Although the court below did not reach the issue, this Court should if necessary affirm the judgment on the ground that this dispute is unripe.[10] Ripeness has both constitutional and prudential components. *See Nat'l Park*

[9] The complaint sought a permanent injunction "restraining Defendant, her servants, agents, employees, and all other persons in active concert" from enforcing the residency requirement. (Prayer, ¶ B.)

[10] Like standing, ripeness can be raised at any time and is not waivable. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58 n.18. (1993).

Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 808 (2003) ("The ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'").

Whereas constitutional ripeness focuses on the plaintiff's concrete plan to violate the law, the threat of prosecution, etc., *Getman,* 328 F.3d at 1094, prudential ripeness involves "two overarching considerations: the fitness of the issues for judicial review and the hardship to the parties of withholding court consideration." *Thomas,* 220 F.3d at 1141 (internal quotation marks omitted).

The Supreme Court addressed ripeness in the context of a California election law in *Renne v. Geary*, 501 U.S. 312 (1991). There, certain individual voters, party central committees, and committee members sued to challenge a California constitutional provision prohibiting political parties from endorsing candidates for nonpartisan office. The district court held the provision unconstitutional. On appeal, the Ninth Circuit reversed and remanded, but on rehearing en banc held that the statute violated the First Amendment rights of political parties and affirmed. The Supreme Court granted certiorari, and held that the challengers had failed to demonstrate a live controversy ripe for resolution by the federal courts.

The Supreme Court acknowledged that the complaint had alleged that in the past the defendant government officials had deleted references to

political party endorsements in candidate's statements for city and county offices, and that they would continue such deletions unless restrained by court order. *Id*. at 316. Additionally, the Republican committee had alleged that it would like to endorse candidates, and have such endorsements publicized in their candidate's statements in the San Francisco voter's pamphlet. *Id*. at 317. Likewise, evidence showed that for several years, the Democratic committee had declined to endorse candidates for nonpartisan office solely out of concern that committee members could be prosecuted for violating the challenged endorsement ban. *Id*. at 317-318. Nonetheless, the Supreme Court held these allegations were insufficient to create a ripe controversy. *Id.* at 322. The Court observed:

> Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention. Respondents have failed to demonstrate a live dispute involving the actual or threatened application of § 6(b) to bar particular speech. Respondents' generalized claim that petitioners have deleted party endorsements from candidate statements in past elections does not demonstrate a live controversy . . . . 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.

Id. at 320-321 (citations omitted).

Here, Appellants' allegations of past injury fall far short of what the Supreme Court held in *Renne* to be insufficient to establish a present

controversy. Neither is Appellants' non-particularized fear of future prosecution sufficient to establish a live controversy under *Renne*. There the Court stated the allegation that the threat of enforcement had deterred the Democratic committee from endorsing candidates "provides insufficient indication of a controversy continuing at the time this litigation began or arising thereafter. The affidavit provides no indication of whom the Democratic committee wished to endorse, for which office, or in what election. Absent a contention that § 6(b) prevented a particular endorsement, and that the controversy had not become moot prior to the litigation, this allegation will not support an action in federal court." *Id*. at 321.

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

Given the lack of any appreciable harm suffered by the respondents in *Renne*, and the lack of any demonstrable hardship to plaintiffs if their challenges were deferred, the Supreme Court held that the case was unripe. *Id.* at 322. In reaching this conclusion, the Court considered alternative means whereby the plaintiffs could achieve their purposes:

> [W]e do not believe deferring adjudication will impose a substantial hardship on these respondents. In all probability, respondents can learn which candidates have been endorsed by particular parties or committee members through other means. If respondents or their committees do desire to make a particular endorsement in the future, and a candidate wishes to include the endorsement in a voter pamphlet, the constitutionality of petitioners' 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."

Id. at 322-323.

Unlike the complainants in *Renne*, where there had actually been a history of enforcing the challenged statute, the plaintiffs here are asking this Court to rule on an abstract proposition, i.e., that the residency requirements might be enforced in the future in some unknown way, thereby causing some hypothetical harm. The controversy is simply not ripe for adjudication, and under these principles, this Court could affirm dismissal of the complaint on this ground alone if need be.

Several additional considerations emerge from *Renne*. Here, as in *Renne*, appellant LPLAC is a party suing on behalf of a potential candidate, and not a candidate suing on his or her own behalf. Likewise, appellant Brown seeks to circulate petitions on behalf of candidates, but is not himself a candidate. *See* ¶ 19. Therefore, his alleged injury is speculative and

derivative of a potential *candidate's* injuries, and is neither particularized, actual, nor imminent. *See Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146 (N.D. Cal. 2008) (where plaintiff is not a candidate, the harm alleged is speculative and derivative of the candidate's injuries, and is neither particularized, actual, nor imminent). Therefore, the alleged injury faced by Brown does not give rise to standing. And while Agrella was once a candidate, the First Amended Complaint does not allege he was injured in that capacity by the challenged statutes, and does not explain how the matter would not be moot. *See* ¶ 20.

Second, appellants can easily achieve their objectives by other means. In *Preserve Shorecliff*, the petition circulators avoided the challenged residency requirements by having each petition signer also sign a separate "Declaration of Circulator" portion of the petition, such that each petition signer became their own "circulator." *Preserve Shorecliff*, 158 Cal. App. 4th at 1431. Indeed the pro-referendum group also submitted evidence that city clerks around the state routinely allowed petition signers to also act as circulators. The court of appeal noted that "in this appeal, both the city and the Orange County Registrar of Voters have filed briefs taking no position on the validity of the process used by the signature gathering company." *Id.* at 1432.

In sum, Appellants have failed to carry their burden to establish article III standing, but should this Court disagree with the district court and find standing, it should still abstain from accepting jurisdiction on ripeness grounds.

CONCLUSION

For all the foregoing reasons, the Secretary of State respectfully requests that the Court affirm the judgment.

Dated: September 21, 2011

Respectfully submitted,

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CV10-2488 PSG (OPx)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LIBERTARIAN PARTY OF LOS ANGELES COUNTY, et al.,

Appellants,

v.

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

Defendants.

STATEMENT OF RELATED CASES

The Secretary of State is unaware of any related cases.

Dated: September 21, 2011

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
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s/ *Michael Glenn Witmer*
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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR CV10-2488 PSG (OPx)

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is

[X] Proportionately spaced, has a typeface of 14 points or more and contains 5785 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

September 21, 2011
Dated

s/ *Michael Glenn Witmer*
Michael Glenn Witmer
Deputy Attorney General

CERTIFICATE OF SERVICE

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

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

I hereby certify that on September 21, 2011, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLEE'S BRIEF

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

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On September 21, 2011, I have caused to be mailed in the Office of the Attorney General's internal mail system, 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:

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The Honorable Philip S. Gutierrez
United States District Court, Central District
Edward R. Roybal Federal Building
255 East Temple Street, Courtroom 880
Los Angeles, CA 90012

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 September 21, 2011, at Los Angeles, California.

Cecilia Apodaca	s/ *Cecilia Apodaca*
Declarant	Signature

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