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,

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

SECRETARY OF STATE DEBRA BOWEN'S PETITION FOR REHEARING *EN BANC*

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INTRODUCTION

California Secretary of State Debra Bowen petitions the Ninth Circuit for a rehearing *en banc* of the panel decision issued March 6, 2013. The panel decision involves questions of exceptional importance, with significant implications for government agencies throughout the Ninth Circuit. Because the panel decision permits a suit against a state official where the official has not enforced—and indeed cannot enforce—the challenged statute, it may dramatically increase the right to sue officials over statutes that they do not enforce, including civil statutes that carry no penalty for a violation.

Moreover, because the panel decision suggests that a government agency may be subject to a federal lawsuit for opining on one statute but not another, it will discourage agencies from publicly opining on any statute within their purview. If this significant expansion of jurisdiction is to occur at all, it merits review *en banc*.

The panel decision also conflicts with long-standing Ninth Circuit authorities holding that, in a pre-enforcement, First Amendment challenge to a statute, neither the mere existence of the statute, nor a generalized threat of prosecution can satisfy the Article III "case or controversy" requirement for standing. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir.2000) (*en banc*). Under those authorities, a plaintiff must show "the prosecuting authorities have communicated a specific warning or threat to initiate proceedings." *Id.* at 1139.

In this case, the panel decision focused on a Secretary of State Web publication that summarizes the statutory qualifications for various actors in the election process. The panel noted that, in her Web summary of the requirements for legislative candidates, the Secretary opines that the *candidate's* residency requirement is unenforceable. In contrast, her summary elsewhere for the *petition circulator's* residency requirement at issue in this case has no such disclaimer. Through these contrasting treatments, the panel found that "Defendant has communicated a specific warning or threat of enforcement" with respect to the circulator requirement. The panel found this implied "threat" justified Appellants' self-censorship and constituted an injury-in-fact even though (1) the Secretary has no authority to enforce the challenged statutes; (2) the state constitution no longer allows the Secretary to declare a statute unconstitutional; (3) there is no record of enforcement in the 40-year history of the challenged statutes; and (4) a violation of the challenged statutes carries no penalty or adverse consequence.

The panel's conclusion guts several standards articulated in *Thomas* and elsewhere, i.e., that to meet the injury and causation requirements for a case or controversy, there must be a *specific* warning or threat of enforcement action, which has been made by *prosecuting* authorities, causing plaintiff a *well-founded fear* that the law will be enforced against him. The panel decision therefore conflicts with existing authorities within this Circuit, and consideration by the full court is necessary to secure and maintain uniformity of the court's decisions.

PETITION FOR REHEARING *EN BANC*

I. THE PANEL DECISION AFFECTS QUESTIONS OF EXCEPTIONAL IMPORTANCE BY EXPANDING STANDING TO SUE GOVERNMENT OFFICIALS WHO MERELY PUBLISH STATUTORY INFORMATION

Until now, to satisfy the standing requirement in a pre-enforcement First Amendment challenge, plaintiffs have had to show that "the prosecuting authorities have communicated a specific warning or threat to initiate proceedings." *Thomas,* 220 F.3d at 1139; *Stormans, Inc. v. Selecky,* 586 F.3d 1109, 1125 (9th Cir.2009). This limitation makes sense because for a threat to be credible, it must come from someone equipped to carry it out. As explained below, the Secretary has no authority to enforce the statutes challenged by appellants.[1]

The Supreme Court has long held that a "claim of injury cannot support standing [unless] the injury alleged is . . . fairly traceable to the government conduct challenge[d] as unlawful." *Allen v. Wright*, 468 U.S. 737, 757 (1984). The panel decision expands the meaning of "fairly traceable" in this requirement. First, the only allegedly unlawful government conduct in this case is the publication of statutory requirements. Second, as shown below, any harm the Appellants might avoid through self-censorship can only come from private action,

[1] At issue here are California Elections Code sections 8066 and 8451, which mandate that nominating petition "[c]irculators 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." All further unspecified statutory references are to the Elections Code.

because the statute provides no penalty for a violation, and case law nullifies any other potential adverse consequence, such as the invalidation of a petition.

The panel decision adds risk to the Secretary's performance of her duty to make available information on statewide candidates and ballot initiatives. Cal. Gov. Code § 12173. Indeed, it creates a risk for any agency that seeks to educate the public on the laws it oversees. Because the panel decision has the potential to chill such communications, it raises issues of exceptional importance.

II. THE PANEL DECISION CONFLICTS WITH WELL ESTABLISHED AUTHORITY IN THIS CIRCUIT

A. Standing in Pre-Enforcement, First Amendment Challenges

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. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). Unique standing considerations are presented when, as here, First Amendment rights are allegedly impacted by state action. *See Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003). In such cases, "to avoid the chilling effect of sweeping restrictions," the Supreme Court has endorsed a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences. *Ibid.* Thus, "when the threatened enforcement effort implicates First Amendment

rights, the inquiry tilts dramatically toward a finding of standing." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000).

Even so, 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). Thus, to show standing, a plaintiff's exercise of free speech must have been chilled by "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Thomas,* 220 F.3d at 1139 (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). And, "neither the mere existence of a proscriptive statute nor a *generalized* threat of prosecution satisfies the "case or controversy" requirement. *Ibid.* (emphasis added) (citing *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir.1996)).

B. The Panel Decision Implies a "Specific Threat of Enforcement" from Agency Publications Summarizing the Law

To assess how realistic is the danger of prosecution, *Thomas* articulated a three-prong test: "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question; whether the *prosecuting authorities* have communicated a *specific warning* or *threat* to initiate proceedings; and the history of past prosecution or enforcement under the challenged statute." *Id.* at 1139 (emphasis added). In this case, the panel decision acknowledges the *Thomas* standards (Panel

Decision ("P.D.") 5), but then eviscerates them. To satisfy the "specific warning" requirement, the decision parses a Secretary of State publication that summarizes the "Qualifications and Requirements for State Senator and Member of the Assembly." Excerpts of Record ("E.R.") 74. According to the panel, "The Secretary has exercised her discretion to include [the challenged residency] requirement in her instructions to candidates and to frame the requirement in absolute terms." P.D. at 6-7. In contrast, it continues, where the Secretary lists the qualifications for actual candidates, she *omits* the residency requirement, even though it is specified in the California Constitution, with a footnote that "'it is the legal opinion of this office that these provisions violate the U.S. Constitution and are *unenforceable*.' No similar disclaimer appears in connection with the challenged criterion." *Id.* at 7 (original emphasis).

On this basis, the panel concludes, "Defendant has communicated a specific warning or threat of enforcement." P.D. 6. In other words, the panel decision implies a threat from the lack of a disclaimer in connection with the challenged residency requirement, because the Secretary affirmatively opines on a different residency requirement.

C. The Panel Assumes the Secretary Has Powers that She Lacks.

The panel's reasoning has three fundamental flaws: First, the fact that the Secretary of State has publicly announced that one election law provision is unconstitutional and will not be enforced cannot support the inference that all the

other provisions will be enforced. The law changes continuously and the weight of authority may favor non-enforcement in practice long before an appellate court with jurisdiction in California declares some provision to be unenforceable.

The second flaw in the panel decision is its incorrect assumption that the Secretary has the power to enforce the challenged statutes if she chooses, and has the power to declare a statute unconstitutional. She lacks both these powers. The Secretary's "non-enforceability opinion" cited by the panel dates back to a formal written opinion issued by Secretary in 1976 and discussed in a 1979 Attorney General Opinion. *See* 62 Op. Cal. Att'y Gen. 365, p. 1. The Attorney General Opinion addressed the Secretary's question, "In view of the [recently enacted] provisions of article III, section 3.5 of the California Constitution,[2] is the Secretary of State required to enforce [the legislator residency requirement] where said provision has never been determined by an appellate court to be unconstitutional?" *Ibid.* After analyzing California Government Code § 12172.5, the Attorney General concluded that the Secretary is *not authorized to enforce election laws,*[3] *including residency requirements* for membership in the Legislature, and the recent

[2] Cal. Const., Art. III, §3.5, adopted in 1978, forbids state officials from declaring a statute to be unconstitutional or refusing to enforce a statue on constitutional grounds unless an appellate court first makes that determination.

[3] Instead, if the Secretary concludes that state election laws are not being enforced, she must call the violation to the attention of a district attorney or the Attorney General. Gov. Code, § 12172.5, second par.

amendment of the Constitution did not change the picture. Thus, the Attorney General did not reach the Secretary's question. *Id.* at 2-4.

While the 1978 amendment of the Constitution ended the Secretary's practice of rendering opinions on the enforceability of statutes, her continued publication of the widely acknowledged (but never legislated) view that the state Constitution's legislator residency requirement is unenforceable is a valuable public service. That does not mean she can issue a similar determination today regarding any other statute. Perversely, by publishing that footnote for all these years, under the logic of the panel decision, the Secretary could be sued for *removing* that footnote, because a potential candidate could be "chilled" from running for office by a "specific threat of enforcement" implied from the removal.

The third fundamental flaw in the panel's finding of a threat is that such threat is at worst *implicit*, and is not *directed* to anyone in particular. The idea that a published informational summary of the law can constitute a "specific warning or threat of enforcement" contravenes many cases that have examined what level of specificity—in both the message and the target—is needed to create a realistic fear of prosecution. *See, e.g., Thomas,* 220 F.3d at 1140 (noting the absence of any threat—generalized or specific—directed toward Thomas); *Stormans, Inc. v. Selecky,* 586 F.3d at 1125 (state human rights commission's opinion letter to pharmacy board and posted on the internet was at most a generalized threat, not a specific warning to individual pharmacists); *San Diego County Gun Rights Commit-*

tee v. Reno, 98 F.3d 1121, 1127 -1128 (9th Cir.1996) ("flaw in plaintiffs' threat-of-prosecution argument was absence of any government threat to prosecute them"); and *Stoianoff v. State of Mont*. 695 F.2d 1214, 1223 (9th Cir.1983) ("plaintiff must demonstrate a genuine threat that the . . . law is about to be enforced against him").

Similarly, where threats have been found sufficiently specific, they were *directed to* the plaintiff or someone economically tied to plaintiff. *See, e.g., Steffel v. Thompson,* 415 U.S. 452, 459 (1974) (police warnings made to plaintiff personally, including likelihood of prosecution]; *see also LSO, Ltd. v. Stroh,* 205 F.3d 1146 (9th Cir.2000) (Alcoholic Beverage Control officials personally warned convention hotels that ABC would take action against their liquor licenses if they hosted plaintiff's erotic art exhibition); and *see Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 62–64 (1963) (obscenity commission's notices sent to specific distributors listing books to be removed, warning of criminal prosecution; police followed up.)

The panel decision clashes with *Stormans, supra.* In *Stormans*, pharmacists sued the Washington Human Rights Commission (HRC), an agency responsible for enforcing the Washington Law Against Discrimination (WLAD). Plaintiffs based their challenge on a blunt letter the HRC sent to the state Pharmacy Board, advising the Board that it would be "illegal and bad policy to permit pharmacists to deny services to women based on the individual pharmacists' religious or moral beliefs," and that to decline to dispense "Plan B" medication for any reason would constitute sex discrimination under laws overseen by the HRC. The letter was also

posted on HRC's website. 586 F.3d at 1124. The Pharmacy Board then adopted rules reflecting HRC's views, which plaintiffs sought to challenge. Based on these facts, as well as HRC's history in "aggressively pursuing violators of the WLAD," the district court concluded that plaintiffs' claims against HRC were ripe for judicial review.[4] *Ibid.* The Ninth Circuit reversed, noting that "*HRC has no authority to enforce the Board rules and therefore cannot bring an enforcement action* under the new rules or revoke a pharmacist's license." *Id*. at 1125 (emphasis added). The Ninth Circuit also noted that HRC also lacked authority to discipline WLAD violators or to issue penalties and that any determination of discrimination would be made by an independent tribunal. *Ibid.* Most importantly, the Ninth Circuit noted that the HRC's blunt opinion letter "*was not a specific warning to Appellees* and *binds no one*. Even if the letter—which was not directed to Appellees or any other specified pharmacy or pharmacist—could be construed to be a threat of enforcement, *it is nothing more than a generalized threat*." *Id.* at 1125 (emphasis added). In finding a specific threat of enforcement in the Secretary's publication, the panel decision here effectively abrogates the above holding of *Stormans*.

[4] Standing and ripeness analyses are virtually identical in this context. 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").

D. The Challenged Statutes Unenforced in their 40 Year History

Versions of the two challenged statutes were first enacted in 1969, and apparently have never been enforced by anyone. While Appellants have never disputed this fact, the panel decision found it "not dispositive." P.D. 8-9, citing *Babbitt,* 442 U.S. at 302 and *Wolfson v. Brammer,* 616 F.3d 1045, 1060 (9th Cir. 2010). But *Babbitt* and *Wolfson*, the cases relied on by the panel, both involved recently enacted statutes. *See United Farm Workers Nat. Union v. Babbitt,* 449 F.Supp. 449, 450 (D.C.Ariz.,1978) (statute enacted in 1972, suit was filed and growers granted intervention by November 1973); and *Wolfson,* 616 F.3d at 1060 (past enforcement given "little weight" because statute is "relatively new" with no record of enforcement or interpretation).

Further, the panel decision suggests that a history of non-enforcement is irrelevant unless the challenged provisions have been "commonly and notoriously violated." *Ibid.,* (citing *S.F. Cnty. Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 822 & n.15 (9th Cir. 1987)). But *Eu* involved a *criminal* statute, as did the two cases on which it relied, *Babbitt,* 442 U.S. at 302-03 and *Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968). Significantly, *Thomas* relied on the history of non-*prosecution* even while it acknowledged a history of civil enforcement. 220 F.3d at 1141 ("record of past enforcement is limited, was civil only, not criminal" and only precipitated by complaints of potential tenants).

In view of the significance *Thomas* placed on a 25-year history of no prosecution, the panel's disregard of a 40-year history of no criminal or civil enforcement here effectively makes the history factor irrelevant to show the absence of a threat. To that extent, the panel decision would abrogate *Thomas*.

E. There is no Adverse Consequence to Candidates or Petition Circulators From Violating the Challenged Statutes

Federal courts lower the bar for standing to bring First Amendment challenges so as "to avoid the chilling effect of sweeping restrictions" and avoid requiring litigants to "violate the restrictions and take their chances with the consequences." *Ariz. Right to Life Political Action Comm.*, 320 F.3d at 1006. But where a violation of the challenged restriction has no adverse consequence, there is little reason to lower the threshold or tilt dramatically toward a finding of standing.

The statutes Appellants challenge carry no civil or criminal penalty for violation. The only theoretically adverse consequence of a violation might be the invalidation of petition signatures gathered by a non-qualified circulator. But California authorities—including a Secretary of State memorandum quoted in the panel decision—have uniformly held that petition signatures may not be invalidated because the petition circulator failed to meet residency requirements. *See Preserve Shorecliff Homeowners v. City of San Clemente*, 158 Cal. App. 4th 1427, 1454 (2008) (citing *Assembly v. Deukmejian*, 30 Cal.3d 638, 652 (1982)) and *Costa v. Superior Court,* 37 Cal.4th 986, 1028–1030 (2006); *see also* 82 Op. Cal.

Att'y Gen. 251 (quoted in *Preserve Shorecliff*); and *see Truman v. Royer*, 189 Cal. App. 2d 240 241, 243–244 (1961); and the Secretary's CC/ROV Memorandum #10038 (2010) (signatures on any candidacy paper, nomination documents, or signature petitions, should not be marked insufficient solely because circulator is not a registered voter). [5]

The District Court order below noted that Appellants cannot be subjected to criminal penalties or fines (E.R. 8), and while it acknowledged the theoretical possibility of private enforcement action, the court said that it would still be insufficient to satisfy the causation component of standing.[6] The Secretary's brief on appeal (Aple.'s Br. 18-19) went further and showed, as she has here, that even a private action based on non-qualified circulators would not result in the invalidation of signatures they collected.

The panel decision, however, embraced Appellant's argument that they faced prosecution under section 18203 if they were to declare falsely that they meet the

[5] See www.sos.ca.gov/elections/ccrov/pdf/2010/january/10038rd.pdf. The panel granted judicial notice of this document and discussed it at P.D. 7.

[6] "Even assuming . . . a private party in a future lawsuit will cause an injury to Plaintiffs, their argument must nevertheless fail . . . as the standing doctrine requires a *causal connection* between the injury suffered by a plaintiff and *a defendant's challenged action*. E.R. 7 (citing *Lujan*, 504 U.S. at 561) (emphasis added).

statutory residency requirements. The panel decision quotes from an advisory the Secretary sent to county clerks and registrars of voters:

> "a circulator who completes a false affidavit is subject to criminal prosecution for perjury or, where applicable, violating Elections Code § 29780 [now 18023], and *suspected violators should be reported by local elections officials to the proper authorities*."

P.D. 7-8 (original emphasis, quoting the Secretary's CC/ROV Memorandum #10038, (cited in n. 6)). From this, the panel concludes:

> Far from assuaging Plaintiffs' fears, however, the memorandum's concluding paragraph reinforces those fears. [¶] . . . [¶] In sum, Defendant has promulgated instructions for candidates that describe the mandatory qualifications of circulators, and she has advised them that *any person filing a false affidavit* should be reported to authorities for criminal investigation. In these circumstances, we hold that Defendant has communicated a specific warning or threat of enforcement.

Ibid. (emphasis added). As this passage shows, the panel decision seems to confuse a penalty imposed for a different violation[7]—the knowing submission of a false declaration—with a possible consequence flowing from a violation of the *challenged* statutes. The statutory form for the Circulator's Affidavit does not require circulators to verify that they live in the district. *See* § 8409. All that is required is that they truthfully state where they live. A truthful circulator will never be prosecuted, regardless of where they live. An untruthful circulator could be prosecuted for perjury, *not* for violating the challenged statutes.

[7] Section 18203 criminalizes the filing of a paper or declaration *knowing* that it or any part of it has been made *falsely*.

Worse, the panel failed to take note of the fact—evident from the very passage it quotes—that the Secretary lacks direct enforcement authority over petition circulators; or of the fact that there is no evidence of harm to anyone for an alleged violation of the challenged residency requirements.

Because Appellants have not shown any adverse consequence that might result from for violating the challenged statutes, their exercise of free speech cannot have been chilled by "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Thomas*, 220 F.3d at 1139.

CONCLUSION

The Secretary provides important information to the public about electoral procedures, but the panel's decision leaves her open to suit for fulfilling this function. A violation of the challenged statutes carries no penalty or other adverse consequence. This, along with the fact that she has no direct authority to enforce the provisions challenged here, warrants *en banc* rehearing of the panel decision.

Additionally, because the panel decision would effectively negate rulings from several Ninth Circuit cases, consideration by the full court is necessary to secure and maintain uniformity of the court's decisions.

Dated: March 20, 2013

Respectfully submitted,

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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 Petition is

[X] Proportionately spaced, has a typeface of 14 points or more and contains 3,760 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).

[X] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a7)(B) because

[X] This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

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March 20, 2013
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** No. **CV10-2488 PSG (OPx)**

I hereby certify that on March 20, 2013, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

SECRETARY OF STATE DEBRA BOWEN'S PETITION FOR REHEARING *EN BANC*

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 March 20, 2013, 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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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 March 20, 2013, at Los Angeles, California.

Angela Artiga	s/ Angela Artiga
Declarant	Signature

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