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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAN PORTER; PATRICK KERR; STEVEN LEWIS; SCOTT W. TENLEY; WILLIAM J.
DAVIS; DEMOCRATIC LAW STUDENTS ASSOCIATION AT UCLA,

Plaintiffs, vs. BILL JONES,
in his unofficial capacity, and in his official and capacity as
California Secretary of State; Defendant.

Case No. 00-11700 RJK (Mcx)

FIRST AMENDED COMPLAINT

Class Action

Demand for Jury Trial

First Amendment to the United States Constitution; Fourteenth Amendment to the United States Constitution; 42 U.S.C. § 1983

JURISDICTION AND VENUE

1. This case concerns an unconstitutional effort by the Secretary of State of California to interfere, by use of threats of severe criminal penalties, with the rights of political speech and association guaranteed by the First Amendment. Jurisdiction is conferred by 28 U.S.C. § 1331 and by 28 U.S.C. § 1343(a)3 & (a)4, as this action is brought under 42 U.S.C. § 1983 and under the First Amendment and Fourteenth Amendments to the United States Constitution and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. Jurisdiction is also conferred by 28 U.S.C. § 1367(a) with respect to the state constitutional claims. Plaintiffs seek to redress the violation by defendants, acting under color of state law, of plaintiffs' rights, privileges, and immunities secured by the First and Fourteenth Amendments to the United States Constitution.

2. Venue is properly laid in the Central District of California under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to this complaint occurred in this district.

FACTUAL ALLEGATIONS

3. During the week of October 23, 2000, a number of Internet web sites were registered and established to promote and facilitate communication among like-minded individuals concerning the electoral process, the value of third parties in elections, support for particular candidates, and election strategies. These web sites generally served as sources of information, advocated political action, and allowed interested persons to submit their e-mail addresses for inclusion in a database that would link persons for individual communication. On these web sites, software programs would scan the database to match citizens with compatible voting agendas. Each person for whom the software generated a match would receive the e-mail address of a matched partner.

4. Any discussion or action taken by matched parties would take place entirely out of the purview or control of such web sites. Any understanding reached between matched parties

would be entirely nonbinding, unenforceable, and unverifiable.

5. On October 30, 2000, defendant Bill Jones, the Secretary of State of California, sent e-mail correspondence to Messrs. Jim Cody and Ted Johnson, the founders of a website known as “voteswap2000.com” threatening criminal prosecution under the California Elections and Penal Codes and demanding that Messrs. Cody and Johnson “end [the website’s] activity immediately.” On that same day, Mr. Jones sent similar correspondence, with similar threats of prosecution, to the General Counsels of Yahoo! Incorporated and Register.com, voteswap2000.com’s respective e-mail service provider and domain registrar.

6. As a direct result of these threats, Messrs. Cody and Johnson discontinued the software programs that matched parties on the voteswap2000.com database. They posted an announcement of the threat of prosecution on their website and effectively discontinued all activities that assisted persons in communicating with like-minded citizens around the country.

7. On October 23, 2000, Plaintiff Alan Porter decided to help create a web site entitled votexchange2000.com as a forum to allow individuals around the country to contact one another and discuss their political beliefs and strategies for the upcoming presidential election. Mr. Porter had observed that many citizens in so-called “swing states” around the country shared a commitment to the policies advocated by third-party presidential candidates but remain concerned that a vote cast for such candidates would amount to a vote cast for the major-party candidate whom they strongly oppose. Many such third-party voters in swing states felt that they could happily cast a vote for the major-party candidate whom they preferred if they knew that other voters from so-called “safe” states would be willing to cast votes for the third-party candidate in question. Sympathetic voters in safe-states recognized that they too could vote in accordance with their conscience by casting their votes for a third-party candidate, if they believed that the major-party candidate they preferred would gain support from third-party voters in swing states.

8. Mr. Porter created votexchange2000.com to educate site visitors about the electoral college system and to assist site visitors in communication concerning the importance of the vote and regarding strategies for concerted political action. Mr. Porter’s web site advocated that visitors to the site “Just vote.” In addition, votexchange2000.com explicitly “does [or did, when it was operational] not seek to endorse any candidate or political party.” Instead, votexchange2000.com set out to encourage voting in general and to achieve cyberspace meetings between site visitors who wish to talk to each other about voting strategies.

9. On October 26, 2000, the votexchange2000.com site became functional. The votexchange2000.com website contained six informational pages. These pages included links to government sites that described the electoral college and to news and general sites concerning election predictions and voting in general. In addition, the pages described the privacy policy of votexchange2000.com, answered frequently asked questions about the web site, and described the

goals of the web site. The web site also provided an information page designed to inform curious voters about the possibility of exchanging information about voting intentions and a questionnaire page designed to facilitate the exchange of such information by creating a database of e-mail addresses of interested voters. Visitors to the website were invited to answer three questions about their voting preferences: their states of residence, their preferred candidates, and their preferred major-party candidates. The pull down menu of preferred candidates included the names of Al Gore and George Bush as well as Ralph Nader, Pat Buchanan, and other third-party candidates. The program would inform voters about whether their states were considered “safe” or “swing.” The website then invited visitors who wished to contact compatible voters to enter their e-mail addresses. Voters’ preferences and e-mail addresses were then stored in a database. A software program matched up citizens with complementary preferences and sent out e-mail addresses to each party. From there on, further discussion or action by any two voters matched by the votexchange2000 software was conducted directly between those parties on an entirely voluntary basis.

10. The votexchange2000.com website did not monitor, review, or seek to enforce any agreement that may have been reached by visitors to the web site who were linked for discussion with each other through the web site. The service provided by votexchange2000.com merely facilitated cyberspace connections between persons who share political commitments and facilitated persons’ discussion of their respective voting intentions. In fact, the web site repeatedly warned site visitors that if persons connected through the web site made agreements with each other concerning how they might vote, those persons would have no guarantee that the other persons would in fact fulfill their promises. First, the web site explained in its frequently asked questions page that “[t]here is no way to be absolutely definitely certainly 100% sure [that another person actually voted for a candidate]. That’s the point of the *secret* ballot. We’re working on the honor system here.” The web site continued to note that “there could be some people who abuse the system” of agreeing to vote for another candidate. And the web site explicitly recommended, on its privacy page, that site visitors create fictitious identities when they used the web site. The site stated that “we expect that you do what we do when required to give out our email address (when we shop online, for instance). We create a new one at Yahoo or Hotmail or name your favorite free web email provider here. We supply bogus information about ourselves when we create that account, and use it for just that one purpose. . . . We suggest that you do the same. Indeed, we might be disappointed if you gave us your primary email address.” Finally, the web site told site visitors that if the visitors “get a creepy feeling about this person I’m corresponding with” after being linked to another site visitor through the web site, then the visitors should “[c]all the deal off. Come right back to votexchange2000.com and re-register. We’ll put you in touch with another person. Do it till you’re satisfied.”

11. On October 30, 2000, Mr. Porter learned that the “voteswap2000.com” website, which offered similar information and services as votexchange2000.com, had shut itself down under threat of prosecution by Bill Jones, the California Secretary of State. Mr. Porter learned that Mr. Jones had threatened the founders of “voteswap2000.com” with prosecution for violations of the California elections code and conspiracy. Though he firmly believed that the services and information provided by votexchange2000.com were a proper exercise of his rights, he was deeply afraid of the power of state prosecutors. Mr. Porter knew that continuing to operate votexchange2000.com could subject him to possible imprisonment or financial ruin. In consultation with colleagues, he decided to suspend the operation of the votexchange2000.com database on October 31, 2000.

PARTIES

12. Plaintiff Alan Porter is a co-founder of a website registered as “votexchange2000.com.” Mr. Porter a registered voter in the State of California who resides in San Francisco.

13. Plaintiff Patrick Kerr is a resident of Los Angeles, California, and is registered as a Democrat to vote in Los Angeles County. Though in the weeks prior to the election, Plaintiff Patrick Kerr intended to cast his vote for Ralph Nader in the presidential election, Mr. Kerr was deeply concerned that George W. Bush might win the electoral votes from the state of California. Of the two major-party candidates, he would have much preferred Al Gore as president and did not wish to contribute by default to the election of Mr. Bush. In late October, Mr. Kerr became aware of the existence of websites that facilitated communication between voters in different states. He had hoped to access such websites to make contact with a voter who shares his political concerns. On November 1, 2000, Mr. Kerr learned that the California Secretary of State had threatened to prosecute one such website, voteswap2000.com, for conspiracy and violations of the elections laws. Mr. Kerr also learned that the Secretary of State believed that the communication and concerted political action in which he wanted to engage are a violation of the election laws. Although Mr. Kerr believed and continues to believe that such communication and concerted action is well within his constitutional rights of association and free speech, he was afraid of prosecution by the state. He did not wish to risk prosecution or the expense of defending himself against criminal charges. Mr. Jones’ threats kept Mr. Kerr from exercising his political speech and associational rights.

14. Plaintiff Steven Lewis is a registered voter in Massachusetts who was very interested in the results of the November 7, 2000 presidential election. Mr. Lewis wished to communicate via the Internet to access websites that appeared prior to the election connecting voters in different states who were supportive of Mr. Nader’s candidacy but who also did not want to see Mr. Bush win election. Mr. Lewis discovered from newspaper reports that the California Secretary of State’s office threatened the founders of one of these websites with criminal prosecution, effectively

shutting down the website. As a result of these reports, Mr. Lewis feared that he might be subject to criminal prosecution by the California Secretary of State's office if he engaged in the communication described above. The recent action of the California Secretary of State's office chilled Mr. Lewis' free speech rights and associational rights in the political process.

15. Plaintiff Scott W. Tenley is a registered Democratic voter in Los Angeles, California. He intended to vote in November 7, 2000 election, and supported both the policies of Vice President Al Gore and the candidacy of Green Party candidate Ralph Nader. Mr. Tenley wanted to be able to communicate with like-minded voters in other states about their voting plans. In particular, he wanted to be able to communicate with like-minded voters in states where polls showed close races between Mr. Gore and Mr. Bush in order to develop a concerted plan of action which furthered his goal of defeating Mr. Bush and sending a message to the Democratic Party that it must return to their liberal roots by voting for Mr. Nader. Mr. Tenley wanted to engage in this communication via the Internet. Mr. Tenley knew and understood that the most that would result from such communications was the vigorous exchange of political ideas and strategies. It was clear to him that if he communicated with someone in another state who is willing to vote for Mr. Nader, that Mr. Tenley would feel more comfortable voting for Mr. Gore in California. Mr. Tenley also knows that even if he had communicated via the Internet with someone who said he shared Mr. Tenley's goals and who purported to be from another state there was no way he would ever know how that other person voted, or even whether or not the other person voted at all. What was important to Mr. Tenley was engaging in political discussion and exploring new voting strategies with voters from around the country who were similarly situated in terms of wanting to support Mr. Nader without hurting Mr. Gore. Mr. Tenley learned from newspaper reports that the California Secretary of State's office threatened the founders of one of these websites with criminal prosecution, effectively shutting down the website. As a result of these reports, Mr. Tenley feared that he may be subject to criminal prosecution by the California Secretary of State's office if he engaged in the communication described above. This fear of prosecution and the fact that some websites have been shut down prevented Mr. Tenley from engaging in the political debate and exchange of ideas he was anticipating before voting on November 7, 2000. The action of the California Secretary of State's office chilled Mr. Tenley's free speech rights and associational rights in the political process.

16. Plaintiff William J. Davis is a registered Democratic voter in Malibu, California. He intended to vote on November 7, 2000, and supported of the candidacy of Green Party candidate Ralph Nader. Mr. Davis wished to be able to have access to like-minded voters in other states to communicate about their voting plans. He was particularly interested in speaking with voters in states where polls showed that election results appeared to be a foregone conclusion not only to speak to them about the importance of voting for the Nader candidacy, but also to converse with

others about their voting strategies. Mr. Davis wished to facilitate his conversations with voters in other states by using the Internet. In using the Internet, he wished to access websites such as those that connect voters in different states who supported of Mr. Nader's candidacy but who also did not want to see Mr. Bush win election. Mr. Davis knew and understood that the most that could result from such communications would have been the vigorous exchange of political ideas and strategies. Mr. Davis preferred to vote for Mr. Nader, however he would have voted for Mr. Gore in California if he had a reason to hope that another voter in another state was willing to vote for Mr. Nader. Mr. Davis knew that he would never find out how another person actually voted, or whether or not he or she voted at all. Nonetheless, it was important to Mr. Davis that such communication not be strangled before it could take place. He believed and continues to believe he has a First Amendment right to engage in political discussion and explore new voting strategies with voters from around the country who were similarly situated in terms of wanting to support Mr. Nader without hurting Mr. Gore. Mr. Davis understands from newspaper reports that the California Secretary of State's office threatened the founders of one of these web sites with criminal prosecution, effectively shutting down the website. As a result of these reports, Mr. Davis feared that his logging on to such a site or attempting to establish contact with any person for the purpose of encouraging them to vote for Mr. Nader would be considered a criminal act and make him subject to criminal prosecution by the California Secretary of State's office.

17. Plaintiff Democratic Law Students Association at UCLA ("the Association") is an organization comprised of UCLA law students. On Wednesday, October 31, 2000, the Association's President, Ur Jaddou, forwarded an email to the Association's membership directing them to a website called nadertrader.com where they could engage in political dialogue with voters from around the country with the intention of discussing ways in which Democrats can support Mr. Nader in the election without hurting Mr. Gore's chances of winning the presidential election. Ms. Jaddou and other members of the Association were concerned that the race between Mr. Gore and Mr. Bush is close in California. As a result, the Association was concerned that if its members, and other voters like them, voted for Mr. Nader in order to express their support for Mr. Nader's candidacy, then their votes would tip the race in favor of Mr. Bush. The Association and its members wanted to be able to communicate through the Internet with like-minded voters in other states about their voting plans. In particular, the Association and its members wished to be able to communicate with like-minded voters in states where polls showed closer races between Mr. Gore and Mr. Bush in order to discuss the political issues and implications of voting for Mr. Nader and Mr. Gore. In using the Internet, they wished to access websites which appeared shortly before the election connecting voters in different states who were supportive of Mr. Nader's candidacy but who also did not want to see Mr. Bush win election. The Association and its members knew and

understood that the most that could result from such communications is the vigorous exchange of political ideas and strategies. It was clear to them that if they communicated with someone in another state who was willing to vote for Mr. Nader, that they might have felt more comfortable voting for Mr. Gore in California. They also knew that there was no way they would ever have known how that other person voted, or even whether or not the other person voted at all. What was and is important to the Association and its members is engaging in political discussion and exploring new voting strategies with voters from around the country who were similarly situated in terms of wanting to support Mr. Nader without hurting Mr. Gore. The Association and its members learned from newspaper reports that the California Secretary of State's office has threatened the founders of one of these web sites with criminal prosecution, effectively shutting down the website. As a result of these reports, the Association and its members fear that they would be subject to criminal prosecution by the California Secretary of State's office if they had engaged in the communication described above. This fear of prosecution and the fact that the website was effectively shut down prevented the Association and its members from engaging in the political debate and exchange of ideas they were anticipating before voting on November 7, 2000. The recent action of the California Secretary of State's office chilled the Association and its members' free speech rights and associational rights in the political process.

18. Defendant Bill Jones is the Secretary of State for the State of California. He is sued here in his official capacity and in his unofficial capacity.

19. All plaintiffs have been injured by the restriction on their First Amendment rights of speech and association concerning the presidential election.

CONTINUING CONTROVERSY

20. Third-party candidates such as George Wallace, John Anderson, Ross Perot, and Ralph Nader regularly run in Presidential elections.

21. The Presidential Election Match Fund Program Parties provides funds for parties that received 5% or more of the popular vote in the previous presidential election. These funds create a strong incentive for third-party candidates to remain in a presidential race, even if it appears that they have little chance of winning and even if the major party most closely aligned with the third party's platform may be adversely affected

22. If Mr. Porter did not face the threat of criminal prosecution, he would set up a web site similar to the votexchange2000.com in 2004.

23. All plaintiffs face a real threat of future injury to their First Amendment rights of speech and association because of the likelihood in the future that they will be opposed to the Republican candidate for President but also be interested in and supportive of a progressive third-party candidate's either winning the election or obtaining 5% of the vote.

CLASS ALLEGATIONS

24. Named plaintiffs seek injunctive and declaratory relief on their own behalf and on behalf of all other persons similarly situated, pursuant to Fed. R. Civ. P. Rule 23(b). The class is composed of (1) all persons who intend to set up web sites concerning the 2004 presidential election that will contain information about the electoral college, third-party candidates and facilitate e-mail communications between persons who are interested in communicating about a concerted voting strategy that involves a pledge to vote for a particular candidate in exchange for another person's pledge to vote for another candidate; and (2) all persons who are interested in using such web sites in order to enable them to communicate with a person or persons about a concerted voting strategy that involves a pledge to vote for a particular candidate in exchange for another person's pledge to vote for another candidate.

25. Plaintiffs are informed and believe, and on that basis allege, that the class defined in the foregoing paragraph exceeds 5,000 persons.

26. Questions of law and fact common to the members of the plaintiff class predominate over issues affecting only individual members. These common questions include:

a. whether web sites that facilitate e-mail communications between persons who are interested in communicating about a concerted voting strategy that involves a pledge to vote for a particular candidate in exchange for another person's pledge to vote for another candidate are protected by the First Amendment, as incorporated by the Fourteenth Amendment;

b. whether applying California Elections Code to prohibit web sites that facilitate e-mail communications between persons who are interested in communicating about a concerted voting strategy that involves a pledge to vote for a particular candidate in exchange for another person's pledge to vote for another candidate constitutes an unconstitutional restriction on speech under the First Amendment, as incorporated by the Fourteenth Amendment;

c. whether applying California Elections Code to prohibit web sites that facilitate e-mail communications between persons who are interested in communicating about a concerted voting strategy that involves a pledge to vote for a particular candidate in exchange for another person's pledge to vote for another candidate constitutes an unconstitutional discrimination against certain speech on the basis of its content under the Fourteenth Amendment;

d. whether applying California Elections Code 18521 & 18522 and Criminal Code § 182 to prohibit web sites that facilitate e-mail communications between persons who are interested in communicating about a concerted voting strategy that involves a pledge to vote for a particular candidate in exchange for another person's pledge to vote for another candidate violates plaintiffs' right to political association guaranteed by the First Amendment as incorporated by the Fourteenth Amendment.

27. The claims of the named plaintiffs are typical of the claims of the class members.

27. The named plaintiffs will fairly and adequately protect the interests of the class.

28. The named plaintiffs have no interest that is now or may be potentially antagonistic to the interests of the class.

29. The attorneys representing the plaintiffs are experienced civil rights attorneys with specific experience in case involving persons with disabilities. Attorneys representing plaintiffs are also considered able practitioners in statutory adjudication and federal court litigation.

30. Defendant has acted and threatens to continue to act on grounds generally applicable to the class, thereby making final injunctive and declaratory relief appropriate to the class as a whole.

COUNT 1

FIRST AMENDMENT (42 U.S.C. § 1983)

31. Plaintiffs repeat and re-allege as if fully set forth herein the foregoing paragraphs.

32. Defendant's actions have denied Plaintiffs their rights to freedom of speech and freedom of association as guaranteed by the First Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment of the United States Constitution. Defendant's actions have had a chilling effect on the free exercise of Plaintiffs' First Amendment rights to engage in speech and association with respect to the electoral process.

COUNT II

FOURTEENTH AMENDMENT (42 U.S.C. § 1983)

33. Plaintiffs repeat and re-allege as if fully set forth herein the foregoing paragraphs.

34. Defendant's actions have denied Plaintiffs their right to be free from content-based restrictions on speech protected by the Fourteenth Amendment.

REQUEST FOR RELIEF

Plaintiffs respectfully request the following relief:

1. The issuance of a declaratory judgment that the activities described herein are protected by the First Amendment and Fourteenth Amendment to the United States Constitution and interference with those activities, through prosecution or threat of prosecution would violate Plaintiffs' rights under the First and Fourteenth Amendments.

2. The issuance of a permanent injunction ordering Defendant to refrain from prosecuting, threatening to prosecute, or taking any other enforcement action against Plaintiffs for any expressive activities in connection with the November 7, 2000 presidential election as well as any future presidential election, including expression conducted on web sites or through other electronic means.

3. Damages according to proof at trial;

3. An award of costs, disbursements, and reasonable attorneys' fees and expenses pursuant to 42 U.S.C. § 1988, and any other applicable provision of law.

4. Such other relief as this Court may deem just and proper.

DATED: November 13, 2000

Respectfully submitted,
ACLU FOUNDATION OF SOUTHERN
CALIFORNIA
NATIONAL VOTING RIGHTS
INSTITUTE
ACLU OF SAN DIEGO AND
IMPERIAL COUNTIES
JAMIN RASKIN
LAURENCE H. TRIBE, of counsel

By: _____
PETER J. ELIASBERG
MARK D. ROSENBAUM
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DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure and Rule 3.4.10.1, Local Rules, United States District Court, Central District of California, Plaintiffs demand trial by jury for all the issues so triable plead herein.

DATED: November 13, 2000

Respectfully submitted,

ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
NATIONAL VOTING RIGHTS
INSTITUTE

ACLU OF SAN DIEGO AND
IMPERIAL COUNTIES

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