No. 01-55585, No. 01-56480 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

BILL JONES, in his official capacity as California Secretary of State,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
Case No. 00-11700 RJK (MCX)
The Honorable Robert J. Kelleher

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I. JURISDICTION

The district court had jurisdiction over this matter, alleging state and federal constitutional claims, pursuant to 28 U.S.C. §§ 1331 and 1343, the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and 28 U.S.C. § 1367(a) (supplemental jurisdiction). The district court entered an order granting Defendants' motion to dismiss Plaintiffs' claims for damages with leave to amend and staying their claims for prospective relief under Pullman abstention on February 16, 2001. (CR 35; ER 43-62). [1] On March 16, 2001, Plaintiffs timely appealed the abstention and stay portion of the order, over which this Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1). (CR 37; ER 63-85). See FRAP 4(a)(notice of appeal must be filed with 30 days after order appealed from is entered); Confederated Salish v. Simonich, 29 F.3d 1398, 1407 (9th Cir. 1994) (This Court "has jurisdiction to hear an interlocutory appeal of a district court's order granting a stay pursuant to the Pullman abstention doctrine.").

Plaintiffs informed the district court that they did not intend to amend their complaint in response to the order dismissing their claims for damages. (CR 39). Lopez v. City of Needles, 95 F.3d 20, 22 (9th Cir. 1996)(order dismissing complaint with leave to amend not appealable unless Plaintiff files written notice of intent not to file an amended complaint). Plaintiffs subsequently requested that the district court enter partial judgment under FRCP 54(b) with respect to their claims for damages. (CR 43 & 48). On July 16, 2001 the district court entered an amended judgment under FRCP 54(b) with respect to Plaintiffs' claim for damages. (CR 50; 89-92). Plaintiffs timely appealed that 54(b) judgment on August 10, 2001. (CR 54; ER 93-98). See FRAP 4(a). A FRCP 54(b) judgment is appealable under 28 U.S.C. § 1291. The two appeals were subsequently consolidated by this

[1] All CR references are to the number of the entry on the clerk's record, which appears as Tab 12 in the Excerpts of Record. All ER references are to page numbers in the Excerpts of Record.

Court. (CR 59).

II. STATEMENT OF THE ISSUES

A. Did the district court err in applying the Pullman abstention doctrine to Plaintiffs' First Amendment claims when the guarantee of free expression is an area of particular federal concern and there is a substantial risk that abstention will prevent full adjudication of the claims in this case prior to the November 2004 presidential election?

B. Did the district court err by abstaining under the Pullman abstention doctrine when there is no possibility that resolution of state law issues will terminate this controversy?

C. Did the district court err by dismissing the Plaintiffs' damages claims because this Court's heightened pleading standard does not survive the United States Supreme Court decision in Crawford-El v. Britton?

D. Did the district court err by dismissing the Plaintiffs' damages claims because the allegations in the complaint satisfy both the heightened pleading standard and the traditional pleading standard?

III. STATEMENT OF THE CASE

A. BACKGROUND

This is a case about expression that is at the heart of the guarantees of the First Amendment -- expression and association with respect to the election of the President of the United States. On the eve of the closely contested 2000 presidential election, the Secretary of State of California directly and substantially interfered with Plaintiffs' right to engage in speech and political association by threatening prosecution of operators and users of websites who were discussing political beliefs and voting strategies. The affected websites were established during the latter part of October 2000, as interest in the presidential race intensified and citizens increasingly turned to the Internet for quick, accessible political information.

Plaintiff Alan Porter set up one such website on October 23, 2000, registered as "votexchange2000.com." "Votexchange2000.com" was created as a forum to allow individuals around the country to contact one another and discuss their political beliefs and strategies for the presidential election. The website allowed voters who supported any of the major party candidates or any of the third-party candidates to be put in touch with like-minded voters throughout the country. Like other similar websites established during the same time period, "votexchange2000.com"served as an information source, 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. Through these websites, persons with particular political goals – for example, persons in closely contested states who wished to support the third-party candidacy of Ralph Nader without helping to deliver the election to Republican candidate George Bush – could link with persons who had compatible political goals in states that appeared to be "safe" for Democratic candidate Al Gore. The websites allowed such persons to contact each other and, on a strictly voluntary and informal basis, discuss their voting intentions – for example, whether the "safe-state" voter would vote for Nader while the "swing-state" voter would vote for Gore. Of course, by the very nature of the voting process (made clear by explicit disclaimers on the websites) such informal agreements were entirely non-binding and unenforceable, because the ballot is secret and participants remained free at all times to vote in any way they desired. "Votexchange2000.com" and similar websites also had the goal of encouraging voting in general, providing information about the electoral college system, and generally facilitating political communication and association.

This vital new forum for political expression was quickly extinguished when Bill Jones, the Republican Secretary of State of California, sent correspondence threatening criminal prosecution to the operators of one of these websites, "voteswap2000.com," and similar correspondence to the General Counsels of

Yahoo! Incorporated and Register.com, the e-mail service provider and domain registrar, respectively, of "voteswap2000.com." In direct response to these threats, Plaintiff Alan Porter shut down "votexchange2000.com"on October 31, 2000, realizing that there was no functional difference between his website and that of "voteswap2000.com," and that defendant Jones' threats subjected him to the possibility of imprisonment and financial ruin.

B. PROCEEDINGS BELOW

Porter, together with several registered voters whose political speech and association were chilled by the defendant Jones' threats and the shutting down of the website, filed this lawsuit on November 2, 2000 almost a week before the presidential election, seeking declaratory and injunctive relief against Jones' threats of prosecution under the California Criminal and Elections Codes. (CR 1). The following day, Plaintiffs filed an application for a Temporary Restraining Order to allow them to engage in their speech and association activity before the November 9, 2000 election. (CR 3). The district court did not enter the order denying the application until November 7, 2001 and the denial was not transmitted to the parties until November 8, the day before the election. (ER 111-12).

Plaintiffs filed their First Amended Complaint (FAC) on November 27, 2000. (CR 18; ER 1-12). That complaint included claims for damages for defendant's actions prior to November 9, 2001, as well as claims for declaratory and injunctive relief. Plaintiffs alleged that the application of the state codes to their activities was inconsistent with the state and federal constitutions and that Secretary Jones' threats of prosecution constituted an illegal prior restraint. Jones moved to dismiss the complaint under FRCP 12(b)(1) and 12(b)(6), or, in the alternative to stay the case under Pullman abstention on January 17, 2001. (CR 24). The district court heard the motion on February 12, 2001. On February 16, 2001, the district court entered an order granting Defendants' motion to dismiss Plaintiffs' claims for damages with leave to amend, on the ground that Plaintiffs had not satisfied a heightened pleading

standard and staying their claims for prospective relief under Pullman abstention on February 26, 2001. (CR 35; ER 43-62). Plaintiffs filed a notice of appeal of the abstention order on March 16, 2001. (CR 37; ER 63-85).

After informing the district court that they did not intend to amend their complaint, (CR 39), Plaintiffs moved for partial judgment under FRCP 54(b) with respect to their damages claims. (CR 43). The court entered a 54(b) judgment on June 7, 2001. (CR 46). Plaintiffs moved for reconsideration, or in the alternative, to amend the judgment under FRCP 60(a). (CR 48). The district court granted the motion to amend the judgment on July 13, 2001, (CR 51; ER 88), which allowed Plaintiffs to proceed on the appeal of the abstention order as well as appeal the dismissal of their damages claims. (ER 90). The amended Rule 54(b) judgment was entered on July 13, 2001. (CR 52; ER 89-92).

C. STATEMENT OF FACTS [1]

1. Parties

Plaintiff-Appellant Alan Porter co-founded a website registered as "votexchange2000.com." Mr. Porter is a registered voter in the State of California who resides in San Francisco. (ER 5).

Plaintiffs-Appellants Steven Lewis, Patrick Kerr, and William J. Davis all wanted to use internet sites such as voteswap2000.com and "votexchange2000.com"to communicate with voters in other states who were considering voting for Ralph Nader but were also concerned that voting for Nader might increase the likelihood that the major party candidate whom they most disliked would be elected. Each of them wanted to discuss their voting plans with

[2] The facts come from the complaint and from documents referred to in the complaint, the authenticity of which are undisputed. See Mendocino Environmental Center v. Mendocino County, 14 F.3d 457, 463 n. 3 (9th Cir. 1994)(The Court may consider documents specifically referred to in the complaint, even if those documents are not attached to the complaint, if the defendant does not challenge their authenticity).

voters in other states. Each of them also understood that the most that could result from such communications would have been the exchange of political ideas and strategies and that he would never find out how the people with whom he communicated actually voted or whether or not those people actually voted at all. Each understood that his communication could not have resulted in a binding contract, or one that was enforceable, legally or practically. At the time of filing of the complaint, Messrs. Davis and Kerr were registered to vote in California; Mr. Lewis was registered in Massachusetts. (ER 5-7).

Plaintiff-Appellant Democratic Law Students Association at UCLA is an organization of UCLA law students whose members wanted to be able to communicate through the Internet in a manner similar to Davis, Kerr, and Lewis. (ER 7-8).

Defendant Bill Jones is the Secretary of State for the State of California. He is sued in his official capacity and in his unofficial capacity. (ER 8).

2. Votexchange2000.com

On October 23, 2000, Plaintiff Porter decided to help create a website 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 remained concerned that a vote cast for such candidates would amount to a vote cast for the major-party candidate whom they strongly opposed. 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 believed 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. (ER 3).

Mr. Porter created "votexchange2000.com" to educate site visitors about the electoral college system and to assist site visitors in discussing the importance of the vote and strategies for concerted political action. Mr. Porter's website advocated that visitors to the site "Just vote." In addition, "votexchange2000.com" explicitly did "not seek to endorse any candidate or political party."[3] Instead, "votexchange2000.com" set out to encourage voting in general and to help arrange cyberspace meetings between site visitors who wish to talk to each other about voting strategies. (ER 3-4).

The "votexchange2000.com" website did not monitor, review, endorse, guarantee, or seek to enforce any agreement that may have been reached by visitors to the website who were linked for discussion with each other through the website. The service provided by "votexchange2000.com" merely facilitated cyberspace connections between persons who shared political commitments and facilitated persons' discussing their respective voting intentions. In fact, the website repeatedly warned site visitors that if persons connected through the website 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. The website 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." (ER 5).

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 "votexchange2000.com"'s privacy policy, answered frequently asked questions about the website, and described the websites's goals. (ER 4). The website 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 interested voters' e-mail addresses. 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

[3] Indeed, as set forth below, voters who supported third-party candidate Pat Buchanan, or any other third-party candidate, but did not want Al Gore to be elected could use the web site. (ER 4).

down menu of preferred candidates included the names 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. (ER 4).

Persons using these sites were engaging in political discussion, strategizing, and association in order to further mutually held political goals. Use of the website did not establish any binding, enforceable or verifiable contract and the website did not facilitate any binding, enforceable or verifiable contract. None of the Plaintiffs in this case entered into any binding, enforceable or verifiable contract concerning their vote. (ER 2).

3. Secretary Jones's Threats Of Prosecution

On October 30, 2000, Defendant-Appellee Bill Jones, the Secretary of State of California, sent e-mail correspondence to Messers Jim Cody and Ted Johnson, who founded the website "voteswap2000.com," threatening them with criminal prosecution. (ER 3). The letter stated in pertinent part that "[y]our website specifically offers to broker the exchange of votes throughout the United States of America. This activity is corruption of the voting process in violation under the [California] Elections Code sections 18521 and 18522[4] as well as and Penal Code section 182, criminal conspiracy." The letter demanded that Cody and Johnson "end [the website's] activity immediately." (ER 13-14). That letter, while addressed to Messrs. Cody and Johnson, stated that "[a]ny person or entity that tries to exchange votes or brokers the exchange of votes will be pursued with the utmost vigor." (Id.). 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. (ER 3).

These threats caused Cody and Johnson to discontinue the software programs that matched parties on the "voteswap2000.com" database. They posted an

[4] These code sections are attached hereto as Exhibit 1.

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. (ER 2). News of the Secretary's threats appeared in newspapers, and was read by Plaintiffs. (ER 6-8).

"Votexchange2000.com" was functionally identical to "voteswap2000.com". (ER 4). Both sites contained information about the electoral college; both sites contained links to other websites; both sites hosted a database of email addresses of people who had expressed an interest in communicating with voters in other states; and both sites sent to participants e-mail addresses of like-minded voters in other states. (Id.).

On October 30, 2000, Mr. Porter learned that the "voteswap2000.com" website had shut itself down under threat of prosecution for violations of the California Elections Code and conspiracy by Jones. Though Mr. Porter 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 30, 2000. (ER 5).

The other Plaintiffs also learned of Secretary Jones' threats and decided not to communicate via Internet with other like-minded voters to discuss voting strategies and intentions because they were afraid of prosecution. (ER 6-9).

4. Continuing Controversy After The November 2000 Election

The November 2000 election has passed, but Secretary of State Jones has not disclaimed an intention to enforce the Elections Code against persons that set up websites that facilitate what he believes constitutes illegal trading of votes. If Mr. Porter and others did not face the threat of criminal prosecution, he would set up a website similar to the "votexchange2000.com" in 2004. Mr. Porter has already

registered the domain name "votexchange2004.com." (ER 8-9). Mr. Porter is, however, unwilling to proceed with those plans in the absence of a court judgment protecting him from prosecution. In addition, Mr. Porter and the other Plaintiffs seek damages for the violation of their rights to political speech and association during the 2000 presidential election process. (ER 11).

Third-party candidates such as George Wallace, John Anderson, Ross Perot, and Ralph Nader have regularly run in Presidential elections. The Presidential Election Matching Fund Program 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. (ER 8-9).

The other Plaintiffs also face a real threat of future injury to their First Amendment rights of speech and association because of the future likelihood 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. (ER 8-9).

IV. SUMMARY OF ARGUMENT

Although this case presents important constitutional law issues, the district court has not addressed the merits of these issues. Instead, the court declined to address Plaintiffs' claims for prospective relief by staying those claims under Pullman abstention. As a result, unless this Court reverses, Plaintiffs must file in state court and follow the extremely time consuming process of having the state court adjudicate the meaning of the California Elections Codes before they can return to federal court – their chosen forum – for adjudication of their federal claims. Full adjudication of those claims is unlikely before the November 2004 election. The district court also dismissed Plaintiffs' claims for damages in their entirety because the court concluded that Plaintiffs had failed to satisfy this Court's

heightened pleading standard.

Both the stay of the claims for prospective relief under Pullman and the dismissal of the damages claims were in error. Pullman abstention was inappropriate for two reasons. First, this case involves First Amendment claims, which almost never are appropriate for abstention because "the guarantee of free expression is *always* an area of particular federal concern." Ripplinger v. Collins, 868 F.2d 1043, 1048 (9th Cir. 1989) (emphasis added). This presumption against abstention in First Amendment cases applies with particular force here, where there is a clear risk of chilling Plaintiffs' First Amendment activities. In this case, Plaintiffs are concerned about exercising their right to speech and political association prior to the 2004 presidential election, and as shown below, the court's abstention makes it highly unlikely that their claims will be finally adjudicated by then.

Second, even if the state law issue that the district court concluded was unclear is resolved in Plaintiffs' favor in state court, there will still be a need to adjudicate at least one federal constitutional question – the question of whether Jones' conduct constituted an unlawful prior restraint under the First Amendment. In other words, Pullman abstention cannot achieve its fundamental purpose – possible termination of the controversy while avoiding constitutional adjudication. For both these reasons, the district court's abstention order should be reversed.

Dismissing the claims for damages was error for three reasons. First, the district court applied a heightened pleading standard to all of Plaintiffs' causes of action. That standard has been overruled by the United States Supreme Court's decision in Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998). Second, even if that standard were still viable, it would not apply to all of Plaintiffs' causes of action. Plaintiffs' commerce clause cause of action requires no proof of intent, therefore the heightened pleading standard is inapplicable. Yet the district court dismissed all the causes of action for damages because it

concluded that none of them satisfied the heightened pleading standard. Finally, even if the heightened pleading standard were still viable, the cause of action to which it would apply was pled with sufficient specificity to satisfy the standard. Accordingly, this Court should reverse the district court's order staying the claims for prospective relief and dismissing the claims for damages so that the important constitutional claims presented can be resolved in a timely fashion.

V. STANDARD OF REVIEW

This Court reviews *de novo* an order granting a motion to dismiss under FRCP 12(b)(6). Stone v. Travelers Corp., 58 F.3d 434, 436-37 (9th Cir 1995). This Court also reviews *de novo* whether this case meets the requirements of the Pullman abstention doctrine. Fireman's Fund Ins. Co. v. City of Lodi, 2001 US App. LEXIS, at *20 (9th Cir. Oct. 30, 2001). "The district court has no discretion to abstain in cases that do not meet the requirements of the abstention doctrine being invoked." Id. If the requirements for Pullman abstention are satisfied, the Court reviews for an abuse of discretion the district court's decision to abstain from deciding the state law question. Id. Review of certification for an appeal under Rule 54(b) is for abuse of discretion. See Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 797 (9th Cir. 1991).

VI. ARGUMENT

A. THE DISTRICT COURT PROPERLY ENTERED JUDGMENT ON PLAINTIFFS' CLAIMS FOR DAMAGES UNDER FRCP 54(b), THEREBY RENDERING THIS MATTER APPEALABLE

The district court properly entered a Rule 54(b) judgment[5] on Plaintiffs' damages claims because the order created no danger of piecemeal or duplicative litigation. The purpose of Rule 54(b) "is to avoid the possible injustice of delay in

[5] Rule 54(b) states in pertinent part that "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

entering judgment on a distinctly separate claim . . . until the final adjudication of the entire case by making an immediate appeal available." Oklahoma Turnpike Authority v. Bruner, 259 F.3d 1236, 1242 (10th Cir. 2001)(citing 10 Charles A. Wright, et al., Federal Practice and Procedure: Civil 2d § 2654 at 33 (1982)). In making its Rule 54(b) determination, the district court must first address judicial concerns, such as the interrelationship of the appealed claim to the claim or claims remaining in district court and efficient judicial administration. See Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 798 (9th Cir. 1991); Gregorian v. Izvestia, 871 F.2d 1515, 1519 (9th Cir. 1989). Second, the court examines the equities. Gregorian, 871 F.2d at 1519. "The Rule 54(b) claims do not have to be separate and independent from the remaining claims," where the judgment will "streamline the litigation." Ponsoldt, 939 F.2d at 797-98. The principal purpose of this Court's review of Rule 54(b) judgments is to "prevent piecemeal appeals in cases which should be reviewed only as single units." McIntyre v. United States, 789 F.2d 1408, 1410 (9th Cir. 1986)(quoting Curtiss-Wright Corp. v. General Electric Corp., 446 U.S. 1, 10, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980)).

In this case, as the district court explained, entry of judgment was proper. (ER 89-92). There is no interrelationship between the 54(b) claims and the claims remaining in district court because the non-54(b) claims for injunctive relief are also on appeal to this Court from the district court's abstention order. (ER 89-91). Thus, the concern with avoiding improper "piecemeal appeals" is not present, as the district court correctly found. (Id.) Moreover, the claims for damages and those for injunctive relief are considered "different claims" because different recoveries are sought. See, e.g., Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 580-81, 100 S. Ct. 800, 63 L. Ed. 2d 36 (1980).

The district court correctly assessed the equities and found that there was "no just reason" to delay the appeal. (ER 90). Once Plaintiffs had announced their intention not to amend the complaint, denial of the 54(b) judgment threatened them

with hardship because, without it, they might not have been able to appeal the abstention order, an order that is ordinarily appealable. See Confederated Salish v. Simonich, 29 F.3d 1398, 1407 (9th Cir. 1994). Indeed, after Plaintiffs had filed their notice of appeal of the abstention order, but prior to the entry of the 54(b) judgment, this Court had issued an order to show cause stating that it "may lack jurisdiction over the appeal because the order challenged does not dispose of all claims as to all parties." (ER 86). After the 54(b) judgment issued, this Court discharged the order to show cause. (ER 90). In other words, there was no just reason to prohibit Plaintiffs from appealing the abstention order simply because of the damages claims, especially because those claims had been dismissed, and Plaintiffs had announced that they did not intend to amend their complaint.

B. THE DISTRICT COURT ERRED IN ITS APPLICATION OF THE *PULLMAN* ABSTENTION DOCTRINE TO PLAINTIFFS' CLAIMS FOR PROSPECTIVE RELIEF.

The district court erred in abstaining from exercising its jurisdiction to hear this matter because the elements that allow a court to invoke the Pullman abstention doctrine were not present. See Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941). The Pullman abstention doctrine allows a district court to decline or postpone its exercise of jurisdiction when a "federal constitutional issue might be mooted or presented in a different posture by a state court determination of pertinent state law." Cinema Arts, Inc. v. County of Clark, 722 F.2d 579, 580 (9th Cir. 1983). A three-prong test set forth in Canton v. Spokane School Dist. No. 81, 498 F.2d 840 (9th Cir. 1974), governs the propriety of Pullman abstention in this Circuit. The Canton test requires that:

> (1) The complaint must touch a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open;
>
> (2) Constitutional adjudication plainly can be avoided if a definitive ruling on

the state issue will terminate the controversy.

(3) The possibly determinative issue of state law is doubtful.

Canton, 498 F.2d at 845. A federal court has the discretion to abstain only when all three of the Canton prongs are satisfied. Cinema Arts, 722 F.2d at 580; C-Y Development Co. v. City of Redlands, 703 F.2d 375, 377 (9th Cir. 1983). A federal court may not abstain simply because it is confronted with a potentially ambiguous state law or local ordinance. Cinema Arts, 722 F.2d at 581.

The Pullman abstention doctrine is "an extraordinary and narrow exception" to a federal court's "unflagging" duty to hear cases properly before it, justified only in "exceptional circumstances." Fireman's Fund Ins, 2001 U.S. App. LEXIS 23855, at *32; Cinema Arts, 722 F.2d at 582; Canton, 498 F.2d at 845. "[T]here is no discretion to abstain in cases that do not meet the requirements of the abstention doctrine being invoked." Fireman's Fund Ins. Co., 2001 U.S. App. LEXIS, at *20 (reversing district court because first and third Canton prongs not satisfied); see also Privitera v. California Bd. of Medical Quality Assurance, 926 F.2d 890 (9th Cir. 1991) (reversing district court because first Canton prong not satisfied); Cinema Arts, 722 F.2d at 581-582 (reversing district court because second Canton prong not satisfied). Because the case before this court does not satisfy the first or second prong of the Canton test, the district court abused its discretion in ordering abstention.

1. The District Court Erred Because the Complaint Does Not Touch a Sensitive Area of Social Policy Upon Which the Federal Courts Ought Not to Enter.

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The district court erred by invoking the Pullman abstention doctrine because the complaint does not "touch a sensitive area of social policy upon which the federal courts ought not to intrude," as required by the first prong of the Canton test. In this case, the Plaintiffs allege that Jones violated, and continues to violate, their rights pursuant to the First Amendment of the U.S. Constitution. Specifically, the

Plaintiffs allege that California Elections Code §§ 18521 and 18522 are unconstitutional as applied both to the website's content and to those Plaintiffs who wished to engage in the concerted political action facilitated by the website, and also that the defendant's threat of criminal prosecution, directed at the operator of a website functionally identical to the one created by one of the Plaintiffs, was an impermissible prior restraint of the Plaintiffs' speech. The Plaintiffs assert that the defendant's actions have had and continue to have a chilling effect on the free exercise of their First Amendment rights to engage in speech and association concerning the electoral process. (ER 8,9).

In a First Amendment challenge like this one, the complaint will almost never "touch a sensitive area of social policy" because "the guarantee of free expression is *always* an area of particular federal concern." Ripplinger v. Collins, 868 F.2d 1043, 1048 (9th Cir. 1989) (emphasis added); see also J-R Distribs. V. Eikenberry, 725 F.2d 482, 488 (9th Cir. 1984), rev'd on other grounds sub nom. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985). For that reason, the Supreme Court has repeatedly rejected motions to abstain under Pullman where the Plaintiff's claims are based on the First Amendment. Procunier v. Martinez, 416 U.S. 396, 404, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974)("[W]e are mindful of the high cost of abstention when the federal constitutional challenge concerns facial repugnance to the First Amendment."); Zwickler v. Koota, 389 U.S. 241, 251-252, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967) (holding that district court erred in applying Pullman abstention doctrine in First Amendment overbreadth challenge to New York Penal Law § 781--b); Baggett v. Bullitt, 377 U.S. 360, 379, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964) (holding Pullman abstention inappropriate in First Amendment vagueness challenge to Washington's oath statute); see also Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980) (reaching merits of prior restraint case over dissent seeking Pullman abstention). The guarantee of free

expression is of particular federal concern whether the challenge is facial or "as applied." See Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965) ("We hold the abstention doctrine is inappropriate in cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression, *or as applied*, for the purpose of discouraging protected activities."); Sable Communications of California, Inc. v. Pacific Telephone & Telegraph Co., 890 F.2d 184, 187, 190-191 (9th Cir. 1989) (affirming district court's rejection of Pullman abstention as "inappropriate where First Amendment rights are implicated" in "as applied" First Amendment challenge).

Abstention is usually inappropriate in a First Amendment challenge because it forces "the plaintiff who has commenced a federal action to suffer the delay of state court proceedings and effect[s] the impermissible chilling of the very constitutional right" sought to be protected. Zwickler, 389 U.S. at 252 (1967); Ripplinger, 868 F.2d at 1048; Sable Communications of California, 890 F.2d at 191 (quoting Houston v. Hill, 482 U.S. 45, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987)); see also Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 532 (9th Cir. 1984) ("Pullman abstention would almost never be appropriate in first amendment cases because such cases involve strong federal interests and because abstention could result in the suppression of free speech"), rev'd on other grounds, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). When a "statute deters constitutionally protected conduct, the free dissemination of ideas may be the loser." Baggett, 377 U.S. at 379. Indeed, here, the Plaintiffs' communication regarding concerted political action was chilled, and will continue to be chilled, until this matter is adjudicated. (ER 5-10; First Am. Compl. at ¶¶15, 17-20, 25, 28, 38). The delay in full adjudication if this court affirms the abstention or certifies a question to the California Supreme Court, as suggested by the district court, (ER 77 n.7), will be years.

If this Court affirms the district court's abstention or alternatively certifies

this case to the California Supreme Court, it is unlikely that there will be any final adjudication prior to the next presidential election. In either of these situations, it is possible that there will be no available date for argument of this appeal until more than a year following the filing of the notice of appeal. See, e.g., Bacus v. Palo Verde Unified School Dist. Bd. Of Education, No. 99-57020 (9th Cir.) (one year and seven months between filing of Notice of Appeal and first scheduled oral argument) (court records submitted as Exhibit 3 to Plaintiffs'-Appellants' Motion to Take Judicial Notice of Court Records and Administrative Reports). Of course, further time will elapse between the date of argument and opinion's issuance. An examination of reported decisions in civil cases during the first week of June 2001, for example, shows a range of two months to 18 months in the time between oral argument and issuance of the decision. Compare In re Cypernetic Services, Inc. v. Matsco, Inc., 252 F.3d 1039 (9th Cir. 2001) (two months), with Ronconi v. Larkin, 253 F.3d 423 (9th Cir. 2001) (18 months). Thus, it is possible that disposition of this appeal alone may require close to three years.

Then, if the Court affirms the district court's abstention, the Plaintiffs will have to pursue, from the very beginning, an action to challenge the scope of the election laws in state court. Once the state case makes its way through the trial court, intermediate appellate review, and possibly review by the California Supreme Court, the Plaintiffs will have to come back to federal court for a full adjudication and possible appeal of the remainder of their claims. A typical case filed in state court in Los Angeles county takes two years and three months to proceed from the complaint's filing to a determination from the intermediate appellate court. See Judicial Council of California, 2001 Annual Report, at 6 (60% of civil cases disposed of within twelve months, 83% disposed of within eighteen months, and 92% disposed of within 24 months in Los Angeles County Superior Court) (attached as Exhibit 1 to Motion to Take Judicial Notice); Judicial Council of California, Court Statistics Report: 2001 Annual Report, at 17, 27-28 (median time

from appeal to filing opinion for civil appeals in Second District is 458 days; the 90th percentile time is 737 days) (attached as Exhibit 2 to Motion to Take Judicial Notice). Moreover, although the Plaintiffs were unable to locate statistics regarding the average time to proceed to a final determination in the California Supreme Court, recent case dispositions suggest that the time between the granting a petition for review and the issuance of the California Supreme Court's opinion can range from eleven months to nearly five years.[6] Thus, a final adjudication in this matter is unlikely to occur before the November, 2004 presidential election if this Court affirms the district court's abstention order. Such delay, and the consequent chill on First Amendment freedoms, is precisely why Pullman abstention is almost never granted in First Amendment cases.

Alternatively, if this court certifies a state law question to the California Supreme Court, the Plaintiffs are still unlikely to have a final adjudication prior to the next presidential election: the Plaintiffs will have to wait for the California Supreme Court to hear argument, for the California Supreme Court to make a decision and issue an opinion, and for the Ninth Circuit to issue an opinion after the certified question has been answered. In the cases that Plaintiffs could identify in which certification was ordered, the time between this Court's request for certification and this Court's issuance of an opinion after the certified question was

[6] For example, a Westlaw search disclosed the following four opinions in civil cases issued by the California Supreme Court during June 2001: Harrott v. County of Kings, 923 P.2d 766 (Cal. Sep 25, 1996) (granting petition for review), 25 P.3d 649 (Cal. Jun 28, 2001) (opinion issued almost five years later); In re Griswold, 4 P.3d 265 (Cal. Jul 12, 2000) (granting petition for review), 24 P.3d 1191 (Cal. Jun 21, 2001) (opinion issued more than 11 months later); Aguilar v. Atlantic Richfield Corp., 999 P.2d 666 (Cal. May 17, 2000) (granting petition for review), 24 P.3d 493 (Cal. Jun 14, 2001) (opinion issued 13 months later), as modified (Jul 11, 2001); Howard Jarvis Taxpayers Ass'n v. City of La Habra, 989 P.2d 644 (Cal. Nov 23, 1999) (petition for review granted), 23 P.3d 601 (Cal. Jun 04, 2001) (opinion issued 20 months later), reh'g denied (Jul 18, 2001), as modified (Jul 18, 2001).

answered ranged from a minimum of 18 months up to two years and three months. See, e.g., Ventura Group Ventures, Inc. v. Ventura Port Dist., 179 F.3d 840 (9th Cir. 1999), certified question answered by, 16 P.3d 717 (Cal. 2001), answer to certified question conformed to, -- F.3d --, 2001 WL 1006415 (9th Cir. 2001) (two years and two months between Request for Certification and opinion after certified question answered); Blue Ridge Ins. Co. v. Jacobsen, 197 F.3d 1008 (9th Cir. 1999), certified question answered by, 22 P.3d 313 (Cal. 2001), opinion after certified question answered, 10 Fed. Appx. 563, 2001 WL 580804 (9th Cir. 2001) (one year and six months between Request for Certification and opinion rendered after certified question answered); Asmus v. Pacific Bell, 159 F.3d 422 (9th Cir. 1998), certified question answered by, 999 P.2d 71 (Cal. 2000), answer to certified question conformed to, 1 Fed. Appx. 683, 2001 WL 30194 (9th Cir 2001) (two years and three months between Request for Certification and opinion after certified question answered); Los Angeles Alliance for Survival v. City of Los Angeles, 157 F.3d 1162 (9th Cir. 1998), certified question answered by, 993 P.2d 334 (Cal. 2000), answer to certified question conformed to, 224 F.3d 1076 (9th Cir. 2000) (two years between request for certification and opinion after certified question answered).

Because the delay and attendant chill on First Amendment freedoms that accompany the certification process are similar to the delay and chill resulting from abstention, this court should not certify a question but rather reverse the district court and order the exercise of federal jurisdiction.[7]

[7] Of course, there are rare First Amendment cases where Pullman abstention may be warranted. See, e.g., Almodovar v. Reiner, 832 F.2d 1128 (9th Cir. 1987) However, Almodovar, which the district court relied on, (ER 59-60), is entirely distinguishable. In Almodovar, the plaintiffs brought a First Amendment challenge to the use of California's pandering and prostitution statutes to prevent them from making sexually explicit films. The court overcame its traditional reluctance in First Amendment cases only because the normal harm from abstention in a First Amendment case – "the dangers of first amendment chill" –

2. The District Court Erred Because Constitutional Adjudication Cannot Be Avoided By a Definitive Ruling On the State Issue and Thus Such A Ruling Will Not Terminate the Controversy.

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It is crucial in Pullman abstention that the construction of the state law at issue might obviate the decision of the constitutional question. Canton, 498 F.2d at 845 (citing Baggett, 377 U.S. at 375-378). Thus, the state adjudication must have the potential to terminate the controversy if, by one possible outcome, there will be no need to adjudicate the federal constitutional issue. This court has explained that "the assumption which justifies abstention is that a federal court's erroneous determination of a state law issue may result in premature or unnecessary constitutional adjudication, and unwarranted interference with state programs and statutes." C-Y Development Co., 703 F.2d at 377-378. The district court erred in its determination that this second prong of the Canton test was satisfied because constitutional adjudication will not be avoided by a definitive state court interpretation of California Elections Code §§ 18521 and 18522.[8] See Memorandum of Disposition and Order Staying the Action, at 14 (ER 56)('[I]f the Supreme Court of California determines that the Elections Code does not apply to the 'vote swapping' and the facilitation thereof, such a ruling would terminate the controversy and a constitutional adjudication plainly will be avoided.").

The Plaintiffs contend not only that the defendant's interpretation of California Elections Code §§ 18521 and 18522, as applied to the concerted political action and the facilitation of such concerted political action at issue, violates the First Amendment but also that the defendant engaged in an impermissible prior restraint on the Plaintiffs' speech by threatening criminal prosecution of the operators of a functionally identical website, without providing any indication that the Plaintiffs would not be prosecuted. As such, Secretary Jones coerced the

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was absent in that the same state law issue was already before the California Supreme Court, Id. at 1140. No such unusual circumstances exist here. Because abstention and the attendant delay in adjudication in this case will have a chilling effect on these Plaintiffs, and because there is no similar "sensitive area of social policy" at issue before this court, this is not the rare First Amendment case in which a court should abstain.

[8] Certification is also inappropriate when the resolution of an uncertain question of state law will not affect the pending federal claim. See City of Houston v. Hill, 482 U.S. 451, 471, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987).

Plaintiffs to give up their speech without following the proper safeguards necessary to restrict speech. See Bantam Books v. Sullivan, 372 U.S. 58, 83 S. Ct. 631, 91 L. Ed. 2d 584 (1963) (government officials engage in unconstitutional prior restraint when sending out notices to various book distributors informing them they were carrying books that were deemed "objectionable" and that officials had duty to recommend to Attorney General that purveyors of obscenity be prosecuted); ACLU v. Pittsburgh, 586 F. Supp. 417 (W.D. Pa. 1984) (mayor's letter threatening "criminal prosecutions" against news sellers carrying Hustler magazine constitutes impermissible prior restraint).

Pursuant to the prior restraint doctrine, the government may not use its enforcement powers to prevent a person from speaking, even if it may punish the person after he has spoken for violating a certain law. Bantam Books, 372 U.S. at 65-55, 70. For example, while the First Amendment permits the government to punish a book store for violating obscenity laws by selling obscene books, it may not rely on obscenity laws to prevent a book store that it believes will violate its obscenity laws from selling books, unless it complies with rigid procedural safeguards. See, e.g., Blount v. Rizzi, 400 U.S. 410, 91 S. Ct. 423, 21 L. Ed. 2d 498 (1971) (law allowing Postmaster General to block distribution of allegedly obscene material through mails constitutes invalid prior restraint because it fails to provide adequate safeguards to ensure that material actually is obscene before its distribution is blocked); ACLU v. Pittsburgh, 586 F. Supp. at 421("The doctrine of prior restraint, reduced to its simplest form, is that no prior restraint may prevent exercise of free speech, although civil or criminal action may result from that speech.")[9] Similarly, here, a state official may not prevent the Plaintiffs from

[9] In certain circumstances, government officials may also seek an injunction against speech if, and only if, rigorous procedural safeguards are followed. See, e.g., Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965). By contrast, the threat of criminal prosecution will likely chill speech without the government's having to bear the burden of showing that the speech is not

communicating about concerted political action even if he can prosecute the Plaintiffs, without violating their rights, after the communication has occurred.

Because the Plaintiffs' First Amendment claim incorporates the prior restraint doctrine as well as a challenge to the application of the statutes at issue, adjudication of the First Amendment issue will be required regardless of any potential outcome from the California state courts. If the California courts determine that California Elections Code §§ 18521 and 18522 apply to the Plaintiffs' conduct, the Plaintiffs have a First Amendment claim that the sections are unconstitutional as applied to their concerted political action and the facilitation of such concerted political action. If the California courts determine that §§ 18521 and 18522 do not apply to the Plaintiffs, the Plaintiffs have a First Amendment claim that the defendant imposed an impermissible prior restraint on their political speech and association. Thus, constitutional adjudication cannot be avoided by a definitive ruling on the state law issue and abstention is inappropriate. See Dombrowski, 380 U.S. at 490 (concluding abstention inappropriate because proper interpretation of state statute regulating speech irrelevant to propriety of invoking statute to threaten prosecution).

Because state court interpretation of California Elections Code §§ 18521 and 18522 will not avoid adjudication of the First Amendment issues, the district court erred by abstaining from the exercise of jurisdiction.

C. THE DISTRICT COURT ERRED BY DISMISSING PLAINTIFFS' CLAIM FOR DAMAGES

In dismissing the Plaintiffs' damages claims for failure to satisfy the "heightened pleading standard" by not "alleg[ing] the requisite specific factual allegations of intent," (ER 83), the district court erred for three reasons. First, the heightened pleading standard of Branch v. Tunnell, 937 F.2d 1382 (9th Cir. 1991)

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constitutionally protected.

(hereinafter "Branch I"), does not survive the Supreme Court's opinion in Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998), and the Plaintiffs' allegations regarding intent satisfy the traditional pleading standard. Second, even if the heightened pleading standard does survive Crawford-El v. Britton, it applies only to constitutional torts where "intent" is an element of the tort. Plaintiffs seek damages under a number of different claims, at least one of which requires no proof of intent. Finally, even if the heightened pleading standard applies, the allegations in the Plaintiffs' complaint are sufficiently specific to satisfy it.

1. This Court's Heightened Pleading Standard Cannot Survive the Supreme Court's Decision in *Crawford-El*

In Branch I, this Court adopted a heightened pleading requirement for those cases "in which subjective intent is an element of a constitutional tort." 937 F.2d at 1386. The Court perceived a tension between the requirement, set forth in Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), that the Court consider the "objective reasonableness of an official's action when evaluating a defendant's qualified immunity defense" and "cases in which the 'clearly established law' at issue contains a subjective element, such as motive or intent," Branch I, 937 F.2d at 1385. To protect government defendants from having to undergo the burdens of discovery where the complaint contained no more than "bare allegations" of improper purpose, this Court followed the District of Columbia Circuit and adopted a heightened pleading requirement for constitutional torts in which subjective intent is an element[10]. Id. at 1386 (citing Siegert v. Gilley,

[10] This Court held that the Plaintiff could satisfy the heightened pleading burden with "nonconclusory allegations of subjective motivation, supported either by direct *or* circumstantial evidence. . . ." Branch I, 937 F.2d at 1386. In contrast, the District of Columbia Circuit's heightened pleading standard required a plaintiff to plead direct, as opposed to circumstantial, evidence of intent. Id. (citing Siegert v. Gilley, 895 F.2d 797, 801 (D.C. Cir. 1990), aff'd on other grounds, 500 U.S. 226,

895 F.2d 797, 801-02 (D.C.Cir. 1990), aff'd on other grounds, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991), and four other cases from the District of Columbia Circuit). This Court reaffirmed the applicability of the heightened pleading standard three years later in Branch v. Tunnell, 14 F.3d 449 (9th Cir. 1994) (hereinafter "Branch II").

More recently, the Supreme Court addressed the broad question of "whether the courts of appeals may craft special procedural rules for [a constitutional claim that requires proof of improper motive] to protect public servants from the burdens of trial and discovery that may impair the performance of their official duties." See Crawford-El, 523 U.S. at 577-78. In assessing the D.C. Circuit's requirement that a plaintiff produce clear and convincing evidence of improper motive to defeat a motion for summary judgment in cases where improper motive was an element of the cause of action, the Supreme Court held that courts of appeals may *not* impose procedural rules beyond those set forth in the Federal Rules of Civil Procedure. It stated that its opinion in Harlow v. Fitzgerald did "not justify a judicial revision of the law to bar claims that depend on proof of an official's motive," thus undermining the rationale of this court's heightened pleading requirement. See Branch I, 937 F.2d at 1385-86 (concluding that Harlow requires heightened pleading). After concluding that the Court's opinion in Harlow did not justify "fashioning a special rule for constitutional claims that require proof of improper intent," the Court held that neither common law nor the Federal Rules of Civil Procedure could justify imposing such a rule. Id. at 594-95 ("[Q]uestions regarding *pleading*, discovery, and summary judgment are most frequently and effectively resolved either by the rulemaking process or the legislative process.")(emphasis added).

The Supreme Court's opinion in Crawford-El requires this Court to recognize

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111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991)).

that the heightened pleading requirement set forth in Branch I and reaffirmed in Branch II is no longer viable. Indeed, in light of Crawford-El, other circuits have concluded that heightened pleading requirements are no longer tenable. See Nance v. Vieregge, 147 F.3d 589, 590 (7th Cir. 1998)("Civil rights complaints are not held to a higher standard than complaints in other civil litigation.")(citing Crawford-El); see also Currier v. Doran, 242 F.3d 905, 913-16 (10th Cir. 2001)("There is no relevant difference between the D.C. Circuit's heightened burden of proof at summary judgment and this court's heightened pleading requirements which justifies the continuing viability of the latter after Crawford-El."). Significantly, the District of Columbia Circuit, whose lead this Court followed in Branch I, has stated that Crawford-El allows no heightened pleading in cases involving constitutional claims with an element of improper motive. See Harbury v. Deutch, 233 F.3d 596, 611 (D.C. Cir. 2000) ("The Supreme Court, moreover, . . . has also held that plaintiffs making constitutional claims based on improper motive need not meet any special heightened pleading standard."). This Court should rule similarly.

Because the heightened pleading standard does not apply, the traditional 12(b)(6) standard for dismissal -- that the complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief" – is the appropriate standard. Conley v. Gibson, 355 U.S. 41, 45-6, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); Mendocino, 14 F.3d. at 461 (quoting Conley). The allegations of intent in the Plaintiffs' complaint easily satisfy this traditional standard by explaining that 1) Secretary of State Jones threatened with prosecution the founder of voteswap, a website functionally identical to that of Plaintiff Porter, (ER 3,4); 2) those threats were not restricted just to "voteswap2000.com," (ER 13-14); and 3) the threats, which were disseminated in the media caused Plaintiffs to give up their speech and associational activity.

(ER 6-9, 10).[11] Thus, the district court erred in dismissing the Plaintiffs' damages claims.

2. Heightened Pleading Does Not Apply to Plaintiffs' Damages Claim Under the Commerce Clause, Even if this Court Concludes that *Crawford-El* Does Not Overrule the Heightened Pleading Standard

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The district court improperly dismissed Plaintiffs' entire action for damages on the ground that it did not satisfy the heightened pleading standard. Order at 19 (ER 61) ("Plaintiffs have failed to allege the requisite specific factual allegations of intent and hence, have failed to meet the heightened pleading standard. The action is therefore dismissed with respect to Defendant in his individual capacity, with leave to amend."). That standard only applies to causes of action for damages where "intent" or motivation is one element of the cause of action. Mendocino, 14 F.3d at 461 ("Where the constitutional tort does not require an inquiry into the defendant's state of mind, however, the heightened pleading standard is inapplicable.").

In this case, there is no intent element to Plaintiffs' cause of action under the dormant commerce clause. (ER 9-10; FAC Cause of Action III). Plaintiffs can demonstrate a violation of the dormant commerce clause where the "practical effect" of government action in one state is to regulate activity that takes place outside that state. See Healy v. The Beer Institute, 491 U.S. 324, 336, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989); American Library Association v. Pataki, 969 F.Supp. 160, 175 (S.D.N.Y. 1997). In making that evaluation, the Court will look at whether there is "inconsistent legislation arising from the projection of one state regulatory program into the jurisdiction of another state."[12] Since Plaintiffs can

[11] Plaintiffs set forth the allegations in greater detail below and explain how they are sufficient to meet even the "heightened pleading standard" if the Court concludes that standard survives Crawford-El. See infra, Section VI(C)(3).

[12] Plaintiffs can also demonstrate a violation of the Commerce Clause where the

prove a commerce clause violation without any proof of intent, the heightened pleading standard does not apply. Mendocino, 14 F.3d at 461.

Plaintiffs' commerce clause allegations are sufficient to satisfy the traditional Rule 8 pleading standards. They have pled that the Internet is an instrument of interstate commerce. (ER 9). See also ACLU v. Johnson, 194 F.3d 1149 n.9 (10th Cir. 1999); American Libraries Ass'n v. Pataki, 969 F.Supp. 160, 173 (S.D.N.Y. 1997)("The inescapable conclusion is that the Internet represents an instrument of interstate commerce, albeit an innovative one.").

They have also plead that the Secretary's actions regulated activities that occurred outside of the State of California. (ER 9). The Beer Institute, 491 U.S. at 333 ("The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.") (citing Edgar v. MITE Corp., 457 U.S. 624, 642, 102 S. Ct. 2629, 73 L.Ed. 2d 269 (1982)(striking down Illinois law regulating tender offers, in part, because it affected offers to "stockholders living in other States and having no connection with Illinois.")). Secretary Jones' threatening letters state that "[y]our website specifically offers to broker the exchange of votes *throughout the United States*" and goes on to say that "[a]ny person or entity that tries to exchange votes or brokers the exchange of votes will be pursued with utmost vigor." (emphasis added). (ER 13-14). The Secretary's threats also directly chilled, Steven Lewis, a registered voter in Massachusetts from going on websites like "votexchange2000.com." (ER 6-7)

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burdens of government action on commerce are "clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc. 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970); Cyberspace Communications , Inc. v. Engler, 55 F.Supp.2d 737, 751-52 (E.D.Mich. 1999)(granting preliminary injunction because instate benefits of statute restricting Internet communication greatly outweighed by chilling effect on Internet communications by those outside the State). Intent is not an element of this weighing analysis and therefore heightened pleading is unnecessary.

3. Even Under the Heightened Pleading Standard, Plaintiffs' Complaint Is Sufficiently Specific

If this court disagrees with the Plaintiffs' argument that the heightened pleading standard does not apply to this case, the district court still erred in dismissing the Plaintiffs' damages claims because the Plaintiffs' allegations of intent satisfy the requirements of the heightened pleading standard. Under this Court's heightened pleading standard, the plaintiffs must plead nonconclusory allegations containing evidence of unlawful intent when subjective intent is an element of the claim. Branch I, 14 F.3d at 1386. The evidence relied upon may be either direct or circumstantial "because evidence of intent is largely within the control of the defendant and can be obtained only through discovery." Id. at 1386-87. The heightened pleading "standard is not intended to be difficult to meet as it serves the limited purpose of enabling the district court to dismiss insubstantial suits prior to discovery and allowing the defendant to prepare an appropriate response, and where appropriate, a motion for summary judgment based on qualified immunity." Harris v. Roderick, 126 F.3d 1189, 1195 (9th Cir. 1997)(internal quotation omitted).

One of the bases for Plaintiffs' claim for damages was that the Secretary of State engaged in an illegal prior restraint, in violation of the First Amendment, by sending out letters to "voteswap2000.com" and to the general counsels of Yahoo! and Register.com, threatening them and "[a]ny person or entity that tries to exchange votes or brokers the exchange of votes" with prosecution.[13] (ER 3-4, 13-14). Almost thirty years ago, the United States Supreme Court held that threats of prosecution by government officials, with the intent to suppress speech, which

[13] Although Bill Jones' letter is not attached to the complaint, "the complaint specifically refers to [this] document[] and the defendant do[es] not challenge [its] authenticity." Mendocino, 14 F.3d at 463 n.3. Thus, the Court may consider the letter in assessing the sufficiency of the complaint. Id.

caused "speakers" to silence themselves, constituted an unlawful prior restraint. See Bantam Books, 372 U.S. at 58. In that case, a Rhode Island commission sent out notices to various book distributors informing them they were carrying books that were deemed "objectionable" and that they had a duty to recommend to the Attorney General that purveyors of obscenity be prosecuted. Id. at 62. As a result, many booksellers ceased carrying the identified books in order to avoid the possibility of future action against them. Even though the commission had no independent enforcement powers or jurisdiction over the out-of state book publishers, the Court nevertheless held that its actions constituted a "prior restraint" of book publishers' speech that violated their First Amendment rights. Id. at 64 n.6, 70-72; see also ACLU v. Pittsburgh, 586 F.Supp. 417 (W.D.Penn. 1984)(finding prior restraint where local mayor sends open letter to local media addressed to "all magazine and news dealers" urging them not to carry Hustler and stating that "cooperation [would] eliminate the need for the City to . . . initiat[e] criminal proceedings"). Such prior restraints are presumptively unconstitutional because they stifle speech before there is a full and fair adjudication with proper procedural safeguards of whether the speech in question may legitimately be restricted. See Bantam Books, 372 U.S. at 65 ("The line between speech unconditionally guaranteed and speech which may legitimately be regulated is finely drawn. The separation of legitimate from illegitimate speech calls for sensitive tools.")(quoting Speiser v. Randall, 357 US. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958)).

The Plaintiffs' allegations regarding the defendant's intent to suppress their political speech and association are sufficiently specific and nonconclusory to satisfy the heightened pleading requirement of Branch I. The FAC alleges that Jones sent a letter threatening prosecution to voteswap2000.com and to the general counsels of Yahoo and Register. (ER 3, 13-14). The threats in Secretary Jones' letter were not directed solely at the three recipients but, rather, stated that "*[a]ny person or entity* that tries to exchange votes or brokers the exchange of votes will be

pursued with the utmost vigor." (ER 13-14) (emphasis added). Moreover, the defendant's threats were disseminated by news reports. (ER 6-8). The threatening letters and their widespread dissemination provide powerful circumstantial evidence of Secretary Jones' intent to suppress the speech and associational activities of "voteswap2000.com," its users, and others -- like the Plaintiffs before this court -- who engaged in identical activity.[14]

Thus, even if the heightened pleading standard applies to the Plaintiffs' claim for damages, the district court erred in dismissing the claim because the allegations of intent satisfy the heightened pleading standard of Branch I.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the district court's order staying Plaintiffs' claims for prospective relief under the doctrine of Pullman abstention and reverse the dismissal of Plaintiffs' claims for damages against Secretary Jones in his unofficial capacity.

RESPECTFULLY SUBMITTED,
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
NATIONAL VOTING RIGHTS INSTITUTE

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Peter J. Eliasberg
Mark D. Rosenbaum

_____
Lisa Danetz

[14] The Plaintiffs' complaint also adequately pleads the second element of a prior restraint claim -- that the defendant was successful in suppressing the plaintiffs' speech. See Bantam Books, 372 U.S. at 67. The complaint alleges that Alan Porter, founder of "votexchange2000.com", shut down the web site and that other Plaintiffs did not to use websites like "voteswap2000.com" and "votexchange2000.com" because of the Secretary of State's threats. (ER 5-8, 9).

Brenda Wright
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