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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAN PORTER, et al.

Plaintiffs,

vs.

BILL JONES,

Defendant.

Case No. 00-11700 RJK (Mcx)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Date: February 12, 2001
Time: 10:00 a.m.
Crtm: 840

I. INTRODUCTION

This case presents an issue of paramount importance: whether the Secretary of State acted constitutionally in threatening to prosecute persons who set up web sites for the purpose of allowing voters to engage in speech and political association around one of the most cherished events of our political democracy, the presidential election. Defendant now contends that because the November 2000 presidential election is over, this Court cannot evaluate either the legality of his past action, or its permissibility in the future. Defendant wrongly argues that Plaintiffs' claims for both prospective relief and damages are moot or barred by the Eleventh Amendment.

Controversies concerning restrictions on First Amendment activities around elections are the archetypal examples of controversies that are not moot because they fall within the capable of repetition yet evading review exception to the mootness doctrine. Indeed, the United States Supreme Court and the Ninth Circuit have repeatedly held that cases arising under the First Amendment around elections are not mooted by the occurrence of the election. See, e.g., Norman v. Reed, 502 U.S. 279, 287-88(1992); Reich v. Local 396, Int'l Brotherhood of Teamsters, 97 F.3d 1269, 1272 n.5 (9th Cir. 1996).

Defendant's arguments to the contrary do not withstand scrutiny. First, he ignores the fact that Plaintiff Alan Porter intends to set up a web site in 2004 similar to the one he set up in 2000, and would do so absent fear of prosecution. Second Supplemental Porter Decl. ¶5. Indeed, he has already gone to the trouble to register the domain name, "votexchange2004.com." FAC ¶25. Nor has Defendant renounced the intention to enforce the California Elections Code against web sites like Mr. Porter's that bring voters together to discuss their voting intentions. Therefore, all that is necessary for this controversy to recur is for there to be a third-party candidate on the ballot with the potential to obtain anything more than an insignificant number of

votes. In light of the regular presence of third-party candidates in presidential elections, and their success in obtaining millions of votes, there is a sufficient likelihood for the controversy to recur to make this a case capable of repetition, yet evading review.

Defendant's arguments as to why Plaintiffs' claim for damages should be dismissed border on frivolity. Defendant contends that since all the actions that Plaintiffs complain of were taken as part of his job as Secretary of State, he is entitled to Eleventh Ammendment immunity. The Supreme Court rejected this exact argument in Hafer v. Melo, 502 U.S. 21,112 (1991), a case Defendant does not bother to cite. Defendant's argument that Plaintiffs' claim for damages is moot is nonsensical. Plaintiffs seek recompense for the Secretary of State's infringement on their rights of speech and association in November 2000. Defendant cannot explain how events taking place after these injuries occurred could moot the damages claim.

Finally, Defendant's request that this Court abstain from deciding Plaintiffs' damages claim should be rejected for two reasons. First, the courts have a strong policy against abstaining in cases involving civil rights, and in particular, the First Amendment. Second, abstaining in this case would not be consistent with the underlying goal of abstention -- to allow the federal court to avoid addressing constitutional questions because they may be avoided by the resolution of a state law question. In this case, regardless of how the state court interprets the California Elections Code, this Court cannot avoid addressing Plaintiff's claim that the Secretary of State engaged in an unconstitutional prior restraint. Where, as here, a government official threatens people with prosecution and coerces them into silence, Plaintiff has stated a valid claim that a prior restraint has been committed. It does not matter how the state court would interpret the law under which prosecution was threatened. Nor does it matter whether a

prosecution under that law would be permissible. The process by which the government official has attempted to silence the speaker is what matters. Since abstention will not obviate the need for this Court to address constitutional questions and will force the Plaintiffs to litigate their case in two fora, abstention is inappropriate.

II. FACTS AND STATEMENT OF THE CASE

Because mootness pertains to a federal court's subject-matter jurisdiction, it is properly raised in a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), not a motion to dismiss for failure to state a claim under Rule 12(b)(6). White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). When faced with a motion to dismiss for lack of subject matter jurisdiction, a "district court may properly look beyond the complaint's jurisdictional allegations and view whatever evidence has been submitted to determine whether in fact subject matter jurisdiction exists." Adler v. Federal Republic of Nigeria, 107 F.3d 720, 728 (9th Cir. 1997) (internal quotations omitted).

A. VOTEXCHANGE2000.COM

Plaintiffs initially brought this action to prevent Secretary of State Jones from interfering with their right to engage in speech and political association around the 2000 presidential election. On October 23, 2000, Plaintiff Alan Porter set up a web site registered as "votexchange2000.com."[1] Mr. Porter decided to help create 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. See Porter Supp. Decl., Ex. A, p. 18.[2]

[1] The other plaintiffs are one organization and five individual voters who were interested in going onto votexchange2000.com and/or onto similar websites.

[2] Both the initial Porter declaration and the first Supplemental Porter

On October 26, 2000, the votexchange2000.com site became functional. Porter Decl. ¶ 3. Votexchange2000.com allowed voters who supported any of the major party candidates or any of the many third-party candidates to be put in touch with like-minded voters throughout the country. Porter Supp. Decl. at ¶ 4 ("It just so happens that the attention is focused on Ralph Nader and Al Gore right now. But one could use the site to support conservative candidates just as easily."). 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. Id.

B. Threats of Prosecution By the Secretary of State

On October 30, 2000, Defendant Bill Jones, the Secretary of State of California, sent e-mail correspondence to Mssrs. Jim Cody and Ted Johnson, the founders of a web site known as "voteswap2000.com," threatening criminal prosecution under the California Elections[3] and Penal Codes and demanding that Mssrs. Cody and Johnson "end [the web site's] activity immediately." See Jones Letter, attached hereto as Ex.1. 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. Complaint ¶ 5.

As a direct result of these threats, Mssrs. 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 web site and effectively discontinued all activities that assisted citizens in communicating with like-minded citizens around the country. Complaint ¶ 6.

Declaration are attached to Plaintiff's Memorandum of Points and Authorities in Support of Their Application for a TRO.

[3]California Elections Code §§ 18521 and 18522 attached hereto as Exhibit 4.

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. Porter Decl.¶5.

C. The November Election And Subsequent Events

Since the election, Secretary of State Jones has not disclaimed an intention to enforce the Elections Code against persons that set up web sites that facilitate what he believes constitutes illegal trading of votes. Porter has already registered the domain name votexchange2004.com. FAC ¶ 25; Second Supplemental Porter Decl.¶ 5. He intends for the site to be similar to votexchange2000.com. FAC ¶25. In particular, he would include information about the Electoral College, allow interested voters to express their preferred candidate as well as their preferred candidate among the major party candidates, and allow voters with similar preferences to obtain contact information for other similar voters. Second Supp.Porter Decl.¶5. Mr. Porter's interest in setting up votexchange2004.com does not depend on his own political preferences. Id. He believes that the site promotes speech and political association and he would set up the site as long as any third-party

candidate were running, regardless of his own candidate preference. The only thing barring Mr. Porter from setting up the site in 2004 is his fear of prosecution by the Secretary of State, based on his actions in 2000. Id. ¶ 6.

III. ARGUMENT

A. Plaintiffs' Claims For Declaratory and Injunctive Relief Are Not Moot Because They Are Capable Of Repetition Yet Evading Review

Defendant mistakenly contends that Plaintiffs' claims for declaratory and injunctive relief are moot now that the 2000 presidential election has occurred. Plaintiffs' claims for prospective relief are not moot because they fall squarely within the mootness exception for disputes that are "capable of repetition, yet evading review." Cases satisfy the capable of repetition yet evading review standard where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 774 (1978).

This case, is typical of cases that are not moot because they are capable of repetition yet evading review. There is a virtual wall of federal court authority holding that issues that concern elections do not become moot after the election is over. See, e.g., Norman v. Reed, 502 U.S. 279, 287-88, 112 S. Ct. 698 (1992) (challenge to law governing ballot access falls within capable of repetition yet evading review exception to mootness); Anderson v. Celebrezze, 460 U.S. 780, 784 n.3 (1983); Bank of Boston, 435 U.S. at 774-75 (challenge to law criminalizing corporate expenditures respecting ballot measures submitted to voters not moot even though 1976 election in which ballot measure that corporations wished to challenge is over); Becker v. FEC, 230 F.3d 381 (1st Cir. 2000)(claims of third-party candidate Ralph Nader deemed capable of repetition yet evading review); Reich, 97 F.3d at 1272 n.5

(9th Cir. 1996) (request to invalidate union election based on challenge to legality of union practice prior to election is not moot even though election is complete); Fulani v. League of Women Voters, 882 F.2d 621, 628 (2d Cir. 1989) (rejecting as "wholly without merit" defendants' argument that challenge involving third-party candidate's exclusion from presidential debates is moot after presidential election occurs).

The first prong of the capable of repetition yet evading review standard is satisfied here because challenges to restrictions on speech that concern presidential elections cannot be fully litigated before the election ends. The identities of the candidates for the two major parties as well as those of third-parties are not established until the spring of the election year. The election itself takes place early in November. That six to eight month period is too short to enable the legality of a restriction on that speech to be fully litigated. See, e.g., Bank of Boston, 435 U.S. at 774 (18-month period between "legislative authorization of the proposal and its submission to voters" too short to enable issue to be litigated fully); Joyner v. Mofford, 706 F.2d 1523, 1527 (9th Cir. 1983) (controversies involving elections evade review because "[a]ppellate courts are frequently too slow to process appeals before an election determines the fate of a candidate").

This case satisfies the second prong of the mootness exception because there is a "reasonable expectation" that Mr. Porter's desire to post a votexchange2004.com web site will be hindered in 2004. The second prong of the test does not require that there be a virtual certainty of the issue arising again. Nor does the doctrine require a repetition of the enforcement of the exact same law or the same behavior. See California Energy Resources v. Bonneville Power Admin., 754 F.2d 1470, 1473 (9th Cir. 1985). For example, in Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court concluded that there was a reasonable expectation of a recurrence of the controversy between the Jane Roe

and the State of Texas over the legality of Texas' law banning abortion because "[p]regnancy often comes more than once to the same woman. . . ." Id. at 125. Contrary to the thrust of Defendant's argument, it was not necessary for Roe to demonstrate that she would definitely get pregnant again, or that she intended to do so in the immediate future, or that she would definitely want to have an abortion if she did become pregnant. Contra Def's P&A's at 1-2, 8.

In Bank of Boston, the Plaintiffs challenged a law that criminalized corporate expenditures to influence voter initiatives and referenda. Plaintiffs wanted to oppose a 1976 ballot measure that would have allowed the legislature to impose a graduated income tax. 438 U.S. at 769. By the time the case had reached the Supreme Court the election was over, and the measure had been defeated. The Court held that there was a "reasonable expectation" that the issue would arise again, because the corporations intended to oppose any similar ballot measure in the future, similar measures had been submitted to the voters numerous times in recent years, and there was no reason to believe that the authorities would not enforce the challenged law. Id. at 774-75. The Court rejected defendants' contention that the case was moot because the legislature might give up submitting similar tax measures to the voters. Id.

Like the corporations in Bank of Boston, Mr. Porter intends to engage in the same First Amendment activity as he did in 2000. He would set up a web site similar to the site he set up in 2000 if he did not fear the threat of criminal prosecution. FAC ¶25; Second Supplemental Porter Decl. ¶6. He has already registered the domain name "votexchange2004.com." Id. In addition, the probability of there being third-party presidential candidates (as well as a Democratic and Republican candidates) on the ballot in 2004 is high. Third party candidates are a regular feature of American politics. George Wallace,

John Anderson, Ross Perot, Pat Buchanan and Ralph Nader are the most notable in the last thirty years, FAC ¶23, and that there have been many others. Rosenstone Decl. ¶¶4-6 (attached hereto as Exhibit 4); Maisel Decl. ¶4 (attached hereto as Exhibit 5). The Presidential Election Matching Fund Program creates a strong incentive for third-party candidates to enter and stay in the presidential race, even if they have little chance of winning. FAC ¶24; Maisel ¶5; Rosenstone Decl. ¶9. Given this program and the history of third-party candidacies, there is more than a reasonable probability of one or more third-party candidates with the potential to attract substantial numbers of votes being on the ballot in 2004. Maisel ¶ 8; Ness ¶11. Nor is it likely that Electoral College, which creates one of the incentive for voters to consider interstate cooperative voting strategies, will be abolished, Finally, there is no reason to believe the Secretary of State will not continue to threaten to enforce, or enforce the election code, as he did in 2000.

There is also a substantial likelihood that voters such as the plaintiffs will want to use sites such as votexchnage2004.com.[4] Maisel ¶8; Rosenstone ¶¶11-12; Ness ¶ 11. Voters have all sorts of incentives to vote for a third-party candidate other than a desire to have the candidate obtain 5% of the vote. For example, a supporter of Pat Buchanan in 2000 might well have wanted his candidate to obtain as many votes as possible, but still have feared that his vote might have hurt George Bush's chances of defeating Al Gore. That voter could have explored a concerted voting strategy on Mr.

[4] There is a viable controversy between Defendant and Alan Porter, as well between Defendant and the voter Plaintiffs. There is, however, no need for the Court to inquire as to whether a controversy exists with respect to each and every Plaintiff. See Leonard v. Clark, 12 F.3d 885, 888 (9th Cir. 1993) ("The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others.")

Porter's web site, even though Mr. Buchanan was unlikely to obtain 5% of the vote, and could not be described as a "third party candidate who is progressive." Contra Def's P&A's at 1.

Defendant mistakenly contends that the events of the 2000 presidential election must occur in an almost identical fashion for the case not to be moot. Mr. Porter's web site featured *all* the presidential candidates who were on the ballot in 2000, (FAC ¶11), and his web site in 2004 would be similar. FAC ¶25; Second Supp. Porter Decl. ¶¶ 5-6. The purpose of the site was to set up communications among any voters who were concerned that a vote for any of the third-party candidates whom they preferred, might hurt the chances of whichever of the major party candidates they found less objectionable. In other words, contrary to Defendant's assertions, Mr. Porter's intent to set up votexchange2004.com does not depend there being the complicated series of eventualities, such as "a third party presidential candidate who is likely to receive the votes necessary for federal matching funds," or a "third party candidate who is progressive" and might take votes away from the Democratic candidate."[5] Def's P&A's at 1. If he did not fear prosecution, he would set up the site if one third-party candidate is on the ballot in 2004. Second Supp. Porter Decl. ¶ 6.

B. Defendant's Reliance on Golden v. Zwickler and Renne v. Geary Is Entirely Misplaced

Defendant relies on Golden v. Zwickler, 394 U.S. 103 (1969) to support his contention that Plaintiffs' claims for prospective relief are not

[5] Even if it were necessary for there to be a "reasonable probability" that a third party candidate who is likely to receive the votes necessary to obtain federal matching funds, that standards is satisfied here. In the last nine presidential elections, third-party candidates have either garnered 5% of the votes necessary to qualify for matching funds or come close five times. George Wallace, John Anderson, and Ralph Nader garnered at least 5% of the vote or came close on one occasion. Ross Perot did so twice. See Almanac of American Politics 2000, at 64 (attached hereto as Exhibit 2); Encyclopedia of American Politics, at 1717-18 (attached hereto as Exhibit 3).

justiciable. In particular, he argues that Porter has not and cannot show that he wishes to speak about a particular candidate who has a real and substantial prospect of running in the immediate future.[6] Def's P & A's at 8-9. Defendant is mistaken. In Golden, the Plaintiff challenged a law that infringed on his ability to distribute handbills concerning a candidate for Congress. By the time the case reached the Supreme Court, not only was the election over, but the candidate had accepted a post on the New York State Supreme Court for a 14 year term. The Court concluded there was no justiciable controversy because "[o]n the record therefore the only supportable conclusion was that Zwickler's sole concern was literature relating to the Congressman and his record," and it was highly unlikely that this particular Congressman would be running for office any time soon. 394 U.S. at 103.

Mr. Porter is an entirely different situation from Zwickler because Mr. Porter's web site does not concern one particular candidate whose future candidacy is highly unlikely. In 2000, his site "did not seek to endorse any candidate or political party" and "included the names of Al Gore and George Bush as well as Ralph Nader, Pat Buchanan, and other third-party candidates." FAC¶¶ 10, 11. His intention in 2004 is to set up a similar site. FAC ¶25; Second Supplemental Porter Decl. at ¶5. Unlike Zwickler, the likelihood of his speaking in the future did not end with the 2000 election.

This case is controlled by Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), rather than Golden v. Zwickler. In Baldwin, the Plaintiffs challenged city restrictions on temporary campaign signs. During the 1974 campaign they had posted signs in support of a particular candidate. After

[6] Contrary to Defendant's argument, the capable of repetition yet evading review standard does not require that the controversy recur in the *immediate future*. All that is necessary is a reasonable expectation of recurrence. See Bank of Boston, 435 U.S. at 774-75.

the election ended, the City contended the case was no longer justiciable, citing Golden v. Zwickler. Baldwin, 540 F.2d at 1364-65. The Ninth Circuit rejected the argument and concluded that the case was capable of repetition yet evading review because the Plaintiffs had previously spoken in support of other candidates and probably would do so in the future. Id. Since Porter's web site does not concern only one candidate, but all the presidential candidates, including third-party candidates, there is a "reasonable expectation" that there will be controversy concerning his web site in 2004. Id.

Defendant's reliance on Renne v. Geary, 501 U.S. 312, 111 S. Ct. 2331, 115 L. Ed. 2d 288 (1991), is also unavailing because Renne is fundamentally different from this case for variety of reasons. In particular, in Renne, there was no case or controversy *at the time the case was filed* because the plaintiffs lacked standing at the beginning of the case. As a result, they could not avail themselves of the capable of repetition yet evading review exception to the mootness doctrine that may apply in cases where events that take place after the litigation commences that raise questions about mootness. Id. at 320.

In Renne, voters, party central committees and committee members challenged the constitutionality Article II, § 6(b) of the California Constitution, which forbids political parties from endorsing candidates for nonpartisan offices. In particular, plaintiffs challenged defendants' policy of "deleting any references to a party endorsement from the candidate statements included in voter pamphlets." 501 U.S. at 315. many factors led the Court to hold that the case was not justiciable.

First, the Court concluded that the voters lacked standing to assert the claim that their constitutional right to receive information was infringed upon by the Defendant's "censorship" of party endorsements from candidate

statements. This injury was not "redressable" because another unchallenged law forbid candidates from including any information about endorsements in their candidate statements. As a result, even if the Court had enjoined § 6(b), voters still would not have been able to receive information about party endorsements in candidate statements. Id. at 319-20. No such redressability concerns exist here.

Second, the fact that most of the Plaintiffs were attempting to assert the rights of others undermined Plaintiffs' contention that there was a justiciable controversy. Section 6(b) restricted the speech of central committees and candidates, but no candidate was a plaintiff. The Court had serious doubts as to whether committee members had third-party standing to assert the rights of candidates or the committees themselves. Id. at 320. Plaintiffs in this case are asserting their own rights, rather than attempting to assert the rights of third parties.

Third, any controversy between the central committees themselves and the defendants had either never ripened or expired before the case was even filed. There was no evidence in the record to show that there had been any enforcement or threats against the Republican Party for endorsement that they had made, or any indication that any candidates even wanted to include the endorsements in their candidate statements. Id. at 320-23. As a result, there was no ripe controversy as to the Republican Party. The Democratic Committee had not endorsed any candidate since 1986, *before* the case was filed. Moreover, the Committee has submitted no evidence that it had intended to endorse any specific candidate in any particular election. As a result, the Democratic Party Committee lacked standing at the time the case was filed. Id. at 320-21. In this case, however, the issue is whether a live controversy that existed at the time the case was filed has become moot because of an

intervening event – the 2000 presidential election.[7] See, e.g., Becker, 230 F.3d at 389("Standing is assessed at the time the action commences, whereas mootness concerns whether a justiciable controversy existed but no longer remains.")(internal quotations and citations omitted).

The Supreme Court has held that there are important differences between cases where no controversy exists when the case is filed and cases that where events occurring after the case was filed that may have rendered it moot. See Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 190-91 (2000). In particular, "if a plaintiff lacks standing at the time the action commences [because the controversy between the parties is over], the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum." Id. at 191. Since the Plaintiff has a much heavier burden to establish standing than he does to demonstrate that the capable of repetition yet evading review exception applies to his case, Renne is of little relevance to this case. See id. at 190-91.

C. Defendant's Motion to Dismiss Plaintiffs' Claim for Damages or Abstain Should Be Rejected Out of Hand Because Defendant Failed to Comply Fully With Local Rule 7.4.1

Local Rule 7.4.1 requires that counsel confer "to discuss *thoroughly* . . . the substance of the motion and any potential resolution." LR 7.4.1 (emphasis added). Defendant's counsel did contact Plaintiff's counsel and the motion to dismiss Plaintiffs' claims for prospective relief was discussed. The parties agreed that their could be no resolution of the issues without a court ruling. However, at no time during the meet and confer did Defendant's counsel state any intention to move to dismiss the claims for damages.

[7] Defendant himself states that "[t]ime has simply passed by plaintiffs' claims that arose out of this past November's election." Def's P & A's at 18.

Indeed, Defendant's counsel stated that she believed that the complaint would likely survive a FRCP 12(b)(6) motion and as a result that she did not have any intention to file such a motion. Nor did she ever mention moving for abstention. Eliasberg Decl. ¶¶ 4-5. Defendant failed to follow LR 7.4.1 with respect to the motion to dismiss the claim for damages or to abstain. Accordingly, that portion of Defendant's motion should be denied.

D. Plaintiffs' Claim For Damages Against Bill Jones In His Unofficial Capacity Is Not Barred By the Eleventh Amendment, Nor Is It Moot

Defendants' assertion that Plaintiffs' damages claims against Bill Jones in his unofficial capacity are barred by the Eleventh Amendment flies in the face of Supreme Court precedent. Def's Mot. 18-20. "[T]he Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983." Hafer v. Melo, 502 U.S. 21, 31, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991); see also Arizonans for Official English v. Arizona, 520 U.S. 43, 69 n.24, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)("AOE")("State Officers are subject to § 1983 liability in their personal capacities, even when the conduct in question relates to their official duties."). In Hafer, the Plaintiffs sued Defendant Hafer, who was the auditor general of Pennsylvania, after Hafer had fired them from their government jobs. They sought money damages from Hafer under § 1983 in her personal capacity. Hafer argued that she could not be held personally liable under § 1983 for the firings because she fired the plaintiffs as part of her job as a state official. The Supreme Court rejected Hafer's argument, holding that 1) she was a "person" for purposes of § 1983, id. at 27-9, and 2) the Eleventh Amendment does not bar suits for damages against a persons sued in his or her personal or unofficial capacity, even if the suit is for actions the person took as part of his or her job as a state official. Id. at 30-1.

Defendant Jones is no more entitled to Eleventh Amendment immunity than

was Hafer. Although Plaintiffs complaint does relate to actions he took in his role of Secretary of State, that fact is irrelevant for the purposes of the Eleventh Amendment. "[I]t has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he deprived another of a federal right under the color of state law" where, as here, he is sued in his individual or unofficial capacity. Hafer, 502 U.S. at 30-31 (internal quotation omitted); see also FAC at ¶ 21.

Defendant's contention that the Eleventh Amendment bars Plaintiffs' damages claim because "[t]he FAC is tellingly devoid of any allegations that Secretary Jones knew of, or took part in, any purported constitutional deprivations," is flatly incorrect. The First Amended Complaint, alleges that Secretary of State Jones *personally* sent e-mail to the founders of voteswap2000.com and Yahoo! threatening prosecutions under the California Elections Code and Penal Code. FAC ¶ 7. The complaint further alleges that the threats of prosecution in these letters, which were personally signed by Secretary of State Jones, caused Plaintiff Porter to shut down his web site and denied the other Plaintiffs the opportunity to use these web sites. FAC ¶¶ 15, 17-20.

Defendant asserts, relying on AOE, that Plaintiffs' damages claim "must be closely scrutinized" and is improperly directed at Secretary Jones in his official capacity. Def's Mot. at 19. This assertion is wrong for three reasons.

In AOE, the Plaintiff, Yniguez, who was employed by the state government, challenged the constitutionality of a state initiative that forbad government workers from using any language other than English. 520 U.S. at 49. Plaintiff sued only for prospective relief under 42 U.S. C. § 1983 and named then-Governor Mofford, in her official capacity only, and the State of

Arizona as Defendants.[8] Id. at 50. The district court "ultimately dismissed all the parties save [the Plaintiff] and Governor Mofford] *in her official capacity*" and then granted Plaintiff's claim for declaratory relief. Id. at 55 (emphasis added). During the pendency of the appeal to Court of Appeal, the Plaintiff ceased working for the State, thereby mooting her claims for prospective relief. Id. at 59-60. The Ninth Circuit kept the case alive by reading into her prayer for relief a claim for nominal damages, even though she had "not expressly request[ed] nominal damages." Id. at 60. Moreover, the court held that the State of Arizona was the party liable for the nominal damages, even though the court had previously held that the State was *not* a party the action. Id. at 58, 69.

Defendant's reliance on the Supreme Court's statement that Yniguez's claim for nominal damages against the State of Arizona "bore close inspection" is misplaced in this case. First, in AOE, unlike here, there was no party against whom a claim of damages could rightfully have been made. Governor Mofford had only been sued in her official capacity and therefore could not be liable for damages under § 1983 because state officials sued in their official capacities cannot be liable for damages in suits brought under § 1983 . Id. at 58 & 59 n.24; see also Will v. Michigan Dept. of State Police, 491 U.S. 58, 71, (1989)("[N]either a State nor its officials acting in their official capacities are [sic] 'persons' under § 1983."). By contrast, Plaintiffs have sued Secretary Jones in his unofficial capacity, and he is therefore liable for damages under § 1983, and the Eleventh Amendment provides no immunity to the damages claim. Hafer, 502 U.S. at 26 & 30-1. Second, Governor Mofford would not have been liable for damages, even if she had been sued in her unofficial capacity, because she had refused to enforce the challenged

[8] Other parties were named as well, but they are irrelevant to this discussion.

ordinance and refused to appeal when the district court declared it illegal. AOE, 520 U.S. at 69 n. 24. By contrast, Secretary Jones took affirmative steps to enforce California's Election Code against web site operators. FAC ¶¶ 7-8; see also letter from Secretary Jones, Exhibit 1.

Finally, the Court noted that the imposition of nominal damages "bore close inspection" because the Ninth Circuit held the State of Arizona liable for those damages. Under settled law, a claim for damages may not be brought against a State under § 1983. AOE, 520 U.S. at 69 ("We have held, however, that § 1983 actions do not lie against a State.")(citing Will, 491 U.S. at 71). Moreover, the State was being held liable for damages, even though it was not a party to the appeal of the case. Id.

None of the unusual circumstances that rendered the claim for damages invalid in AOE exist here. The claim for damages against Secretary Jones is proper because, unlike Governor Mofford, he is sued in his unofficial capacity under § 1983. FAC ¶21;[9] Hafer, 502 U.S. at 27, 30-31. Moreover, unlike the State of Arizona in AOE, Secretary Jones is a party to the case in his unofficial capacity, and the Eleventh Amendment provides him with no immunity against claims for damages under § 1983. Id.

Defendant's contention that Plaintiffs' claims for damages are moot, (Def's P &A's at 2, 18), makes no sense. The purpose of a claim for damages is to recompense a plaintiff for harm he has suffered in the past. A damages claim cannot become moot based on events that occur *after* the alleged injury. The only thing that would arguably moot the damages claim would be payment by the Defendant in an amount that recompenses Plaintiff.

D. This Court Should Not Abstain From Deciding The First Amendment Issues Presented By This Case

[9] He is also sued in his official capacity because Plaintiffs also seek declaratory and injunctive relief. FAC ¶21.

Pullman abstention is only proper where there exists a state law issue that is unclear, in an area that touches on a sensitive area of social policy, and the resolution of that state law question would clearly allow a federal court to avoid resolving a federal constitutional question. See, e.g., Privetera v. California Bd. of Medical Quality Assurance, 926 F.2d 890, 895-96 (9th Cir. 1991). The Ninth Circuit has set forth the criteria for Pullman abstention as follows:

> (1) The complaint touches on a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.
> (2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.
> (3) The possibly determinative issue of state law is doubtful.

Id. at 895 (internal quotations omitted).

This case fails to satisfy two of the three prongs of the test. In "First Amendment cases, the first of these [Pullman] factors will almost never be present because the constitutional guarantee of free expression is, quite properly, always an area of particular federal concern." J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482, 488 (9th Cir. 1984), rev'd on other grounds sub nom, Brockett v. Spokane Arcades, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed. 2d 394 (1985). The Supreme Court has repeatedly rejected motions to abstain where the Plaintiff's claims are based on the First Amendment. Procunier v. Martinez, 416 U.S. 396 (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, 252 (1967), Baggett v. Bullitt, 377 U.S. 360, 379 (1964). Moreover, this past election demonstrates that courts do not perceive state election laws to be "sensitive areas of social policy" where they should be reluctant to intrude to ensure that federal constitutional rights are vindicated. See Bush v. Gore, __ U.S.___ , 121 S.Ct. 525 (2000).

Although there is no absolute bar to abstention where freedom of expression is involved, Defs' P& A's at 22 (citing Almodovar v. Reiner, 832 F.2d 1138, 1140 (9th Cir. 1987)), there were unusual circumstances in Almodovar, not present here, that weighed in favor of abstention. In Almodovar, plaintiffs challenged the application of California's pandering and prostitution statutes to their film making activity. The Ninth Circuit determined that the ordinary concern that precludes abstention in First Amendment cases did not exist because the California courts had never interpreted the statutes to determine if they applied to film making *and* that very question was already before the California Supreme Court in a different suit. 832 F.2d 1139-41. The Almodovar Court held that since the California Supreme Court "might well resolve the issues presented" in a way that would foreclose the need to consider the First Amendment question, abstention was warranted. Id. at 1141. The unusual factor that weighed in favor of abstention in Almodovar does not exist here, and thus this Court should adhere to the policy against Pullman abstention in cases involving freedom of expression and the First Amendment. See Procunier, 416 U.S. at 404.

Abstention is also inappropriate because, regardless of how a state court would interpret of California's Election Code the interpretation will not terminate the controversy. Plaintiffs allege that the Secretary of State violated their First Amendment rights. As was explained in detail in their memorandum of points and authorities in support of their application for a TRO at pages 16-18, Plaintiffs contend that Secretary of State Jones violated their First Amendment rights by engaging in an impermissible prior restraint on speech. Specifically, Plaintiffs allege that by sending letters threatening to initiate prosecutions, Secretary Jones, coerced Plaintiffs to give up their speech without following the proper safeguards necessary to restrict speech. See Bantam Books v. Sullivan, 372 U.S. 58 (1963)(government

officials engage in unconstitutional prior restraint when they send 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); ACLU v. Pittsburgh, 586 F. Supp. 417 (W.D. Pa. 1984) (mayor's letter threatening "criminal proceedings" against news sellers carrying Hustler magazine constitutes impermissible prior restraint).

Plaintiffs' prior restraint argument is unaffected by how the state court interprets California's Elections Code. That is true because the prior restraint doctrine is premised on the principle that even if the government may punish a speaker *after* he has spoken for violating a certain law, government may not use its enforcement powers, to *prevent* that person from speaking. Bantam Books, 372 U.S. at 65-66, 70. For example, while government may, consistent with the First Amendment, 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. E.g., Blount v. Rizzi, 400 U.S. 410,(1971)(law allowing Postmaster General to block the distribution of allegedly obscene material through the mails constitutes an invalid prior restraint because it fails to provide adequate safeguards to ensure that material actually is obscene before its distribution is blocked).[10] Similarly here, a state official may not use the threat of prosecution to prevent a person from speaking, even if he could prosecute the speaker under the same law after he had spoken without violating the speaker's rights.

[10] 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 (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 constitutionally protected.

Because Plaintiffs' claim that Defendant violated their First Amendment rights by engaging in a prior restraint is unaffected by any state law interpretation of the Elections Code, the second element for Pullman abstention is not satisfied.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendant's motion to dismiss, or in the alternative, to stay, be denied.

Dated: January 29, 2001 RESPECTFULLY SUBMITTED BY,

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Attorney for Plaintiffs