

Defendant's Opposition demonstrates that the Secretary ought to have no objection to the entry of the TRO. Defendants' opposition to Plaintiffs' Application for a Temporary Restraining Order does not even address Plaintiffs' argument that their activities are protected by the First Amendment, except by implying that they are not. The Opposition also mistakenly contends that the Secretary of State is merely expressing his opinion about various web sites and that there is no basis for an injunction to issue. This is simply incorrect.

The Secretary of State mistakenly contends that a TRO should not issue because he is entitled to express his opinion as to the legality of various web sites and because he has no actual prosecutorial authority. Def's Memorandum at 2, 3. This argument is contrary to Supreme Court and Ninth Circuit precedent. The Secretary of State wrote a letter to the founders of voteswap2000.com, a web site that is materially the same as

votexchange2000.com founded by Plaintiff Alan Porter. He informed the founders of voteswap2000.com by letter as follows: Your 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 of the Elections Code sections 18521 and 18522 as well as Penal Code section 182, criminal conspiracy. . . . As the Chief Elections Officer of the State of California, I demand that you end this activity immediately. If you continue, you and anyone knowingly working with you may be criminally prosecuted to the fullest extent of the law.

Pls' TRO Mem, Exhibit 1.

That letter is more than sufficient to create chill on speech in the form of a prior restraint that justifies a TRO. Indeed, in Bantam Books v. Sullivan, 372 U.S. 58 (1963), the Court rejected an almost identical article made by the government. The Rhode Island Commission on Morality wrote letters to booksellers "thanking them in advance for their cooperation and reminding [them] of the Commission's duty to recommend to the Attorney General prosecution of purveyors of obscenity." Id. at 62. Even though the Commission had no prosecuting authority of its own, the

Court concluded that it was engaged in an illegal prior restraint. “People do not lightly disregard public officer’s thinly veiled threats to institute criminal proceedings against them if they do not come around. . . . It would be naive to credit the State’s assertion that these blacklists are in the nature of mere legal advice. . . .” Id. at 68.

Similarly, in Culinary Workers v. Del Papa, 200 F.3d 614 (9th Cir. 1999), the Attorney General sent a letter to a union informing them that their actions might violate state law and that further violations would be referred for prosecution. After the union sued the Attorney General, he claimed that there was no case or controversy because he did not have authority to prosecute under the statute referred to in the threatening letter. Del Papa, 200 F.3d at 616-17. The Court held that his actual power to prosecute was irrelevant, that the letter was a sufficient threat to give the union ground to seek judicial protection.

Defendant never addresses the legal argument made in Plaintiffs’ initial memorandum, which makes clear that the Mr. Porter’s web site consists of pure political speech that is protected by the First Amendment. Nor does Defendant even mention Brown v. Hartlage, 456 U.S. 45 , 54 (1982) which makes clear that the types of pledges or promises that users of Mr. Porter’s web site might enter into are clearly protected by the First Amendment because they are unverifiable, unenforceable and thus constitute nothing more than exhortations..

The Opposition does no more than conclusorily assert that he will not act against legitimate speech, but he will act against “exchanging” or swapping of votes. The Defendant’s Opposition clearly reveals that Plaintiffs’ face a severe chill on their speech. But the Opposition does not, and cannot, refute Plaintiffs’ showing that their activities are protected by the First Amendment and are therefore entitled to the Court’s protection in the form of a TRO.

Dated: November 3, 2000
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RESPECTFULLY SUBMITTED

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