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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A. Defendant Has Not Established the Exceptional Circumstances Necessary for Pullman Abstention.

1. Defendant Cannot Overcome the Presumption Against *Pullman* Abstention in First Amendment Cases.

None of Defendant's arguments is adequate to overcome the strong presumption against Pullman abstention, which applies with particular force in First Amendment cases. See, e.g., Zwickler v. Koota, 389 U.S. 241, 252 (1967). Defendant does not dispute that there will be a significant delay in adjudication if this Court affirms the district court's abstention order.[1] An affirmance by this Court would make it unlikely that there would be any final adjudication of Plaintiffs' claims prior to the next presidential election, when Plaintiffs desire to engage again in the conduct at issue here. See Appellants' Opening Brief ("AOB") at 25-27. Such delay is the reason why Pullman abstention is almost never granted in First Amendment cases. See, e.g., Zwickler, 389 U.S. at 252 (courts are especially loath to invoke abstention in First Amendment cases 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); Sable Communications v. Pacific Tel. & Tel. Co., 890 F.2d 189, 191 (9th Cir. 1989); Ripplinger v. Collins, 868 F.2d 1043, 1048 (9th Cir. 1989).[2]

2. Defendant Fails to Show That This Is Not A First Amendment Case.

The Secretary argues the normal presumption against abstention in a First Amendment case does not apply because this is not a First Amendment case. He wrongly contends that 1) substantively, Plaintiffs' First Amendment claims must fail, and 2) that Plaintiffs' Dormant Commerce Clause claim precludes Plaintiffs'

First Amendment claims.

In attempting to show that Plaintiffs' claims are not First Amendment claims, Defendant outlines why this case "does not involve protected speech" and "is not a prior restraint case." Appellee's Answering Brief ("AAB") at 14, 16. Addressing those issues requires this Court to engage in the exact constitutional adjudication that the district court sought to avoid by abstaining. Since a central purpose of Pullman abstention is to avoid "the friction of a premature constitutional adjudication," Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941), it is illogical to suggest that this Court should affirm the district court's decision to abstain from deciding Plaintiffs' constitutional claims, by deciding the merits of those claims.[3]

Defendant also errs for two reasons in arguing that Plaintiffs' Dormant Commerce Clause claim precludes their First Amendment claims. First, as we will explain below on pages 14-15, those claims are not inconsistent. Second, even if they are inconsistent, plaintiffs may plead alternative and inconsistent theories of recovery. See Fed. R. Civ. P. 8(e)(2); McCalden v. California Library Ass'n, 955 F.2d 1214, 1219 (9th Cir. 1992) ("[A] pleading should not be construed as an admission against another alternative or inconsistent pleading in the same case."). Therefore, the First Amendment claims are not precluded.

3. Constitutional Adjudication Cannot Be Avoided by an Interpretation of California's Elections Code.

Pullman abstention requires that "[c]onstitutional adjudication can plainly be avoided if a definitive ruling on the state issue will terminate the controversy. Canton v. Spokane School Dist., 498 F.2d 840, 845 (9th Cir. 1974). Here, no interpretation of Elections Code §§ 18521 & 18522 will render adujudication of the First Amendment claims unnecessary. See AOB at 31-33.

Defendant suggests that this second prong of Pullman abstention is satisfied because Plaintiffs' claims require the resolution of a state law issue. However,

Defendant has cited no First Amendment cases, with the judicial concern about delay, in which the court has invoked Pullman abstention where there was anything less than the potential to avoid constitutional adjudication. Compare Almodovar, 832 F.2d at 1140-41 (First Amendment case), with C-Y Development Co. v. Redlands, 703 F.2d 375, 380 (9th Cir. 1983)(land use planning case).

B. The District Court Applied the Incorrect Standard to Plaintiffs" Claims for Damages, and Plaintiffs Sufficiently Pled Their Damages Claims

1. The Heightened Pleading Standard Applied Does Not Survive The Supreme Court's Decision in *Crawford-El v. Britton*

Defendant's contention that the "heightened pleading requirement" established in Branch v. Tunnell, 937 F.2d 1382 (9th Cir. 1991), survives the Supreme Court's decision in Crawford-El v. Britton, 523 U.S. 574 (1998), is unavailing.[4] Contra Opp. Br at 24. Indeed, three other Circuits have concluded that Crawford-El prohibits courts from imposing a heightened pleading standard. See AOB at 36-37 (citing cases).

Crawford-El requires the repudiation of the heightened pleading standard because the Supreme Court's opinion eviscerates the fundamental basis for the holding in Branch. In Branch, this Court decided that Harlow v. Fitzgerald, 457 U.S. 800 (1982), supported the adoption of a heightened pleading standard where intent was an element of the alleged constitutional tort. Branch, 937 F.2d at 1385-86. This Court noted that in Harlow, the Supreme Court held that the test to determine if a public official was entitled to qualified immunity was whether the official's actions were "objectively reasonable." Branch, 937 F.2d at 1382. Thus, "[a]fter Harlow, 'bare allegations of malice' are insufficient to subject government officials to the costs of trial or the burdens of discovery." Id. at 1385 (quoting Harlow, 457 U.S. at 817-18). This Court concluded that Harlow required the adoption of a heightened pleading standard to ensure that a plaintiff alleging a

constitutional tort with an intent element could not subject a defendant to discovery with "bare allegations of malice." Branch, 937 F.2d at 1385.

In Crawford-El, the Supreme Court stated that Harlow's holding applied *only* to the proper test for evaluating the defense of qualified immunity; it did not provide a basis to change the rules concerning plaintiff's affirmative case. Id. at 589. "Our holding in Harlow, which related only to the scope of an affirmative defense, provides no support for making any change in the nature of plaintiff's burden of proving a constitutional violation." Id. The Supreme Court contrasted its support for judicially crafted rules relating to immunity defenses with its rejection of such rules concerning a plaintiff's affirmative case. The Court explained it was judicially appropriate to craft rules governing immunity defenses because the judiciary was "engaged in a process . . . that [it] had consistently and repeatedly viewed as appropriate for judicial decision – a process predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." Id. at 594 (internal quotation omitted). By contrast, judicially created revisions to federal statutes and rules governing a plaintiff's affirmative case "lack[] any common-law pedigree." Id. at 95.

In Crawford-El the Supreme Court recognized the significant breadth of its opinion. It stated that it was dealing with *both* the "broad question [of] whether the courts of appeal may craft special procedural rules . . . in cases" that are "based on a constitutional claim that requires proof of an improper motive," and the narrow question of the validity of the District of Columbia's clear and convincing evidence standard. Id. at 577. See also id. at 595 ("Our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking or legislative process.). To illustrate the breadth of the principle established in Crawford-El, the Court listed four other cases in which it had refused to accept judicially created rules or alter traditional procedural rules for government defendants outside the

context of qualified immunity. See id. (citing, inter alia, Gomez v. Toledo, 446 U.S. 635, 639-40 (1980)(reversing court of appeals rule requiring plaintiff to plead in a way that anticipates the qualified immunity defense)). Likewise, Crawford-El dictates that this Court may not impose a heightened pleading standard.

2. This Court Has Not Held That *Branch's* Heightened Pleading Standard Survives *Crawford-El*

This Court has not held that Branch's heightened pleading standard survives Crawford-El. Contra AAB at 23-4 (citing Lee v. Los Angeles, 250 F.3d 668 (9th Cir. 2001), and Jeffers v. Gomez, 267 F.3d 895 (9th Cir. 2001)). In Lee, this Court mentioned the heightened pleading requirement in dictum in a footnote. In that case, however, the Court only evaluated the sufficiency of plaintiff's allegations of *municipal liability*. Id. at 679-80 n. 6. In light of a Supreme Court case holding "a federal court may not apply a heightened pleading standard to a complaint alleging municipal liability," see Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993), this Court held that "the bare requirements of notice pleading under Rule 8(a) govern our review of the legal sufficiency of plaintiffs' claims." Lee, 250 F.3d at 679-80.

Nor does Jeffers "indicate[] this Circuit's continuing support for the heightened pleading rule." AAB at 24. Jeffers never mentions Branch or its heightened pleading requirement. Rather, there is a discussion of Crawford-El in Jeffers concerning the need for "specific nonconclusory factual allegations that establish improper motive" at the summary judgment stage. 267 F.3d at 911. The discussion of the standards for summary judgment are irrelevant to the vitality of the heightened pleading requirement because "heightened pleading" governs pleading -- the process of setting forth allegations in a complaint. See generally FRCP Rule 8. Unlike in opposition to motions for summary judgment under Rule 56, plaintiff's pleading need not allege specific facts,[5] nor does plaintiff generally introduce evidence, such as affidavits or documents, to refute defendant's motion

to dismiss. When a pleading is tested through a motion under Rule 12(b)(6), the court "presumes that general allegations [in the complaint] embrace those specific facts that are necessary to support the claim." Lujan v. National Wildlife Federation, 497 U.S. 871, 889 (1990)(citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). By contrast "when a motion for summary judgment is made and supported as provided [in Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings." FRCP 56.[6]

3. If this Court Concludes that the Heightened Pleading Standard Survives *Crawford-El*, Plaintiffs Have Alleged Sufficient Facts to Satisfy that Standard

Secretary Jones incorrectly contends that Porter and the other Plaintiffs have not alleged specific facts showing that 1) his actions constitute an illegal prior restraint or 2) that he acted with improper purpose towards *them*. In fact, the complaint, and the Secretary's letter, referred to in the complaint, provide ample basis to support Plaintiffs' claim that the Secretary engaged in an illegal prior restraint against their speech. As Porter has previously explained, the Supreme Court and other courts have held that where a government official engages in threats of prosecution against speech that may be protected by the First Amendment in order to stop that speech from continuing, and succeeds in doing so, that official violates the First Amendment. See AOB at 31-33, 41-43. The Secretary wrote a letter threatening prosecution to one web site, voteswap2000.com, and the General Counsels of Yahoo and Register. The letter stated that the site was "specifically offer[ing] to broker the exchange of votes throughout the United States in violation of state law." The Secretary also wrote that "*any person or entity* that tries to exchange votes or brokers the exchange of votes will be pursued with the utmost vigor." ER 13-14.

The Secretary's contention that his threats of prosecution "reflects no improper purpose" ignores federal court authority. Contrary to the Secretary's

contention, it is impermissible for government officials to threaten prosecution against speech activity that may be protected by the First Amendment. Thus, in Bantam Books v. Sullivan, 372 U.S. 58 (1963), the United States Supreme Court held that the Rhode Island Commission on Morality was engaging in an impermissible prior restraint by sending notices to book distributors telling them that they were carrying objectionable materials and informing the distributors of the Commission's "obligation" to recommend to the Attorney General prosecution under the obscenity laws. The Court held that the Commission's actions were impermissible even though 1) obscenity was not protected by the First Amendment; and 2) the Commission itself had no prosecutorial powers. Id. at 65-7.

Similarly, in ACLU v. Pittsburgh, 586 F.Supp. 417 (W.D.Pa. 1984), the court considered the legality of the Mayor's writing a letter to a local media organization urging that newsstands cease carrying Hustler magazine and stating that "cooperation [would] eliminate the need for the City to engage in a massive sweep of all news stands and stores and the initiation of criminal proceedings." Id. at 417. The court determined that the Mayor's actions constituted an illegal prior restraint because the Mayor had intended to suppress the distribution of Hustler magazine and had succeeded in doing so without having a judicial determination of whether the magazine actually was obscene. Id. at 423-25. See also Drive In Theatres, Inc. v. Huskey, 435 F.2d 228 (4th Cir. 1970)(Sheriff's threats to prosecute theaters for showing films he believed obscene held illegal prior restraint).

The courts in these cases recognized that if the government establishes, through a proper adversary procedure in a court of law, that speech is not protected by the First Amendment, then the government can suppress its distribution (or prosecute its distributor). Conversely, the government cannot suppress speech activities through threatened prosecutions, even under valid laws, without violating

the First Amendment. The Secretary's threats of prosecutions were illegal because they silenced speakers without a court or jury's determining whether the speech at issue is protected. "In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process." Bantam Books, 372 U.S. at 69-70. The rationale for prohibiting the suppression of speech prior to a legal determination whether the speech is protected is simple, but fundamental: "[T]he freedoms of expression must be ringed with adequate bulwarks. The line between speech unconditionally guaranteed and speech which may be legitimately regulated is finely drawn. The separation of legitimate from illegitimate speech calls for sensitive tools." Id. at 66 (internal citations and quotations omitted).

This principle applies equally here. The Secretary's threats silenced speakers with a judicial determination whether the speech is protected. Although the First Amendment may not protect all speech communicated over the internet, internet communication must be treated as presumptively protected. See Reno v. ACLU, 521 U.S. 844, 870 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.") . Moreover, speech concerning political issues is entitled to the highest level of First Amendment protection. See, e.g., Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971). Nor may government prohibit, consistent with the First Amendment, speech concerning elections merely because that speech seeks to solicit a voter to vote for a particular candidate in exchange for a promise that that vote may result in a tangible benefit to the voter. In Brown v. Hartlage, 456 U.S. 45 (1982), the Supreme Court considered a state court decision holding that a candidate had violated a state law that prohibited candidates from making expenditures or promises in exchange for votes. The state court held by promising to work for a reduced salary if elected a candidate "offers to reduce pro tanto the amount of taxes each individual taxpayer must pay, and thus makes an offer to the voter of

pecuniary gain." Brown 456 U.S. at 50 (quoting Kentucky Court of Appeal, 618 S.W.2d 623). The Supreme Court reversed because the candidate's promise was protected by the First Amendment. Brown, 456 U.S. at 54-9.

Thus, the Secretary is wrong to contend that there is no First Amendment issue in this case because Plaintiffs were trying to persuade voters to cast their votes in a certain fashion in exchange by for promised action by the Plaintiffs. That is exactly what was issue in Brown – an attempt by one person to persuade voters to cast their votes in a specific fashion in exchange for a promise by the other to take a certain action, e.g., vote for a particular candidate. Thus, at this stage of the proceedings, Plaintiffs have sufficiently alleged that their speech is protected by the First Amendment under Brown.

Moreover, as stated earlier, Plaintiffs need not prove that their activities were absolutely protected by the First Amendment to prevail on their claim of prior restraint. In Bantam Books and the other cases cited above, the courts were careful to note that they did not need to adjudicate whether the speech that had been chilled was obscene, and therefore unprotected, in order to hold that there had been an unconstitutional prior restraint. 372 U.S. at 65; ACLU, 586 F.Supp. at 424-25. Similarly here, by showing that the Secretary threatened prosecution and thereby restricted speech and association over the Internet concerning the presidential election analogous to the speech at issue in Brown v. Hartlage, Plaintiffs have sufficiently alleged a claim of an impermissible prior restraint.[7]

The Secretary also incorrectly contends that his actions did not interfere with Plaintiffs' rights. Plaintiffs have alleged that Porter's web site was functionally identical to voteswap2000.com and that they either set up the web site, or wanted to use it. ER 04-09. The Secretary did not limit the threats of prosecutions in his letters to voteswap2000.com, Yahoo! and Register; he stated he would prosecute "[a]ny person or entity that tries to exchange or brokers the exchange of votes . . . with the utmost vigor." ER 13-14.

4. Plaintiffs' Allegations Were Sufficient to State a Dormant Commerce Clause Claim

Plaintiffs sufficiently pled a Dormant Commerce Clause claim by alleging that 1) the Internet is an instrumentality of interstate commerce; 2) Secretary Jones' actions regulated solely out of state activities occurring on the Internet; 3) the Secretary's actions impose burdens on interstate commerce that outweigh local benefits; and 4) the Secretary's actions subject interstate use of the Internet to inconsistent regulation. AOB at 38-40. Numerous courts have held that the Internet is an instrumentality of interstate commerce. See ACLU v. Johnson, 194 F.3d 1149, 1159 (10th Cir. 1999); American Libraries Ass'n v. Pataki, 969 F.Supp 160, 173 (S.D.N.Y. 1997).

For purposes of a motion to dismiss, there are sufficient allegations to sustain the claim that Secretary Jones violated the Dormant Commerce Clause by threatening to apply California's election code to activity on the Internet occurring anywhere in the United States. The letter Secretary Jones sent to the founders of "voteswap2000.com" accuses their website of "specifically offer[ing] to broker the exchange of votes *throughout the United States of America*," and states that "[t]his activity is a corruption of the voting process in violation of Elections Code sections 18521 and 18522 as well as Penal Code section 182, criminal conspiracy." The letter also states that "[a]ny person or entity that tries to exchange votes or brokers the exchange of votes will be pursued with the utmost vigor." ER13-14. Nothing in the letter, or in the text of the statute purports to limit the Secretary's threats to persons living in California, including Plaintiff, Steven Lewis, who lived in Massachusetts at the time of the 2000 election. ER 006. As a result, Plaintiffs have stated a viable claim under the Dormant Commerce Clause because the Secretary's threats burdened and threaten to burden activity initiated by persons living outside California and taking place on an instrumentality of interstate commerce. See Pataki, 969 F.Supp. at 175 (New York statute regulating display of

material to minors on Internet invalid because it can apply to California artist who intends work to be seen in Oregon). See also Healy v. Beer Institute, Inc., 491 U.S. 324, 333 (1989) ("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 (1982)(plurality)).

Because the Secretary's threats to enforce the Election Code appeared to apply to Internet users throughout the United States, plaintiffs' Dormant Commerce Clause claim is sufficient to state a claim that, as applied, the statute imposes a burden on commerce that is excessive in relation to the local interests served. Even assuming that the Election Code serves legitimate state objectives when applied to activities in California, the State has no legitimate interest in prosecuting out-of-state internet users. See Johnson, 194 F.3d at 1162; see also Edgar, 457 U.S. at 643.

Plaintiffs have also sufficiently pled a violation of the Dormant Commerce Clause by alleging that the Secretary's threats to impose his interpretation of California's Elections Code on Internet use "throughout the United States" will subject the Internet to "inconsistent regulations."[8] Numerous courts have concluded the Internet is an instrumentality of commerce that "requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations." See, e.g., Johnson, 194 F.3d at 1162.

Secretary Jones does not dispute that the district court improperly applied the heightened pleading standard to this claim.[9] Nevertheless he makes two conflicting arguments about Plaintiffs' inclusion of a claim under the Dormant Commerce Clause – 1) the inclusion of that claim proves that Plaintiffs were engaged in the sale or trade of votes, thereby vitiating their First Amendment claim, AAB at 14&26; and 2) that if Plaintiffs' activities were protected speech, their regulation cannot implicate the Commerce Clause. AAB 25-26. Both these

arguments miss a fundamental point: The Internet is itself an instrumentality of interstate commerce. See, e.g., Johnson, 194 F.3d at 1159. Thus, although Plaintiffs were not selling votes and their activity was not-for-profit, the Secretary's attempt to restrict it can still violate the Dormant Commerce Clause. See, e.g., Edwards v. California, 314 U.S. 160, 172 n.1 (1941)(California statute prohibiting transport of indigent people into the state violates Dormant Commerce Clause regardless of whether "the transportation is commercial in character."); Caminetti v. United States, 242 U.S. 470, 491 (1917)(holding that Congress' power to regulate "commerce" includes applying Mann Act's prohibition against transport of women across state lines to transport with no commercial purpose).

C. Plaintiffs' Claims for Damages and Prospective Relief Are Justiciable

Plantiffs' First Amended Complaint alleges injury that resulted from Defendant's conduct prior to the 2000 election but that continues because Plaintiffs desire to engage in similar political speech and association in future election cycles. Rather than recognize Plaintiffs' claims of harm as originating in the events prior to the 2000 election and continuing after the election because of Plaintiffs' stated desire to engage in the same speech again and Defendant's refusal to affirm that the Secretary will not take the same actions in 2004, Defendant subdivides the First Amended Complaint into separate claims regarding the 2000 and the 2004 election. These arguments are unavailing because all Plaintiffs' claims regard the same conduct by Defendant.

Although the 2000 election has already occurred, Plaintiffs' claims for prospective relief are not moot because they are "capable of repetition yet evading review. The future conduct at issue, such as Porter's stated desire to establish the same type of web site in 2004, relates not to separate claims regarding the 2004 election, but rather shows that Plaintiffs' claims are capable of repetition, and therefore satisfy the mootness exception. Moreover, Defendant's contention that

the damages claims relating to the Secretary's past actions are moot is illogical.

1. Plaintiffs' Claims For Prospective Relief 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). There is a virtual wall of federal court authority holding that issues that concern elections fall within this exception. See, e.g., Norman v. Reed, 502 U.S. 279, 287-88 (1992) (challenge to ballot access law falls within capable of repetition yet evading review exception to mootness); Anderson v. Celebrezze, 460 U.S. 780, 784 n.3 (1983); Bellotti, 435 U.S. at 774-75; Becker v. FEC, 230 F.3d 381 (1st Cir. 2000); Reich v. Local 396, Teamsters, 97 F.3d 1269, 1272 n.5 (9th Cir. 1996); Fulani v. League of Women Voters, 882 F.2d 621, 628 (2d Cir. 1989).

There are six to eight months between the identification of parties' presidential candidates and the actual election in November, which is too short a period to enable the legality of a restriction on speech about the election to be fully litigated. See, e.g., Bellotti, 435 U.S. at 774 (18 months too short to enable issue to be litigated); Joyner v. Mofford, 706 F.2d 1523, 1527 (9th Cir. 1983) ("Appellate courts are frequently too slow to process appeals before an election determines the fate of a candidate").

There is also a reasonable expectation that Porter will again be hindered by fear of prosecution.[10] Mr. Porter 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 That website featured *all* the presidential candidates who were on the ballot in 2000, ER 4, and the web site in 2004 would be similar. ER 8 He has already registered the domain name "votexchange2004.com." ER 8; SER 79 (Second Supplemental Porter Decl.

¶6). Because third-party presidential candidates are a regular feature of American politics, there is a high probability that such candidates will be on the ballot in 2004.[11] Finally, there is no reason to believe the Secretary of State will not continue to threaten to enforce, or actually enforce, the election code, as he did in 2000.

The voter plaintiffs also satisfy the second prong of the "capable of repetition yet evading review" standard because there is a substantial likelihood that they will want to use sites like votexchange2004.com.[12] SER 54, 63-64, 75 (Maisel ¶8; Rosenstone ¶¶11-12; Ness ¶ 11). Voters have numerous incentives to vote for third-party candidates including the desire to have a particular candidate obtain 5% of the vote. For example, the Electoral College creates an incentive for voters to consider interstate cooperative voting strategies. ER 54 (Rosenstone ¶¶ 10-12). Additionally, a supporter of Pat Buchanan in 2000 might have wanted Buchanan to obtain as many votes as possible for symbolic reasons, but still feared that his vote would hurt George Bush's chances of victory. That voter could have explored a concerted voting strategy on Mr. 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 AAB p. 48.

Defendant mistakenly contends that the events of the 2000 presidential election must recur in an almost identical fashion in 2004 for the case not to be moot. The second prong of the "capable of repetition yet evading review" test requires neither a virtual certainty that the same issue will arise again nor the 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); see also Bellotti, 435 U.S. at 774-775 (Although particular ballot measure opposed by corporations had been defeated, corporations' challenge to law banning corporate expenditures on ballot measure was not moot because corporations intended to oppose any similar ballot measure in future, because

similar measures had been submitted to voters numerous times in recent years, and because there was no reason to believe that authorities would not enforce challenged law); Roe v. Wade, 410 U.S. 113, 125 (1973)(mootness exception applies because "[p]regnancy often comes more than once to the same woman. . . .").

Simply stated, satisfaction of the second prong of the "capable of repetition yet evading review" standard does not depend on the recurrence of identical facts. Thus, there is no need for the recurrence of a 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" because Porter wants to engage in the same activity in 2004 regardless.[13] See AAB p. 47-48.

2. Defendant's Reliance on *Golden v. Zwickler* and *Renne v. Geary* Is Misplaced**.**

Golden v. Zwickler, 394 U.S. 103 (1969), and Renne v. Geary, 501 U.S. 312 (1991), on which Defendant rely, are inapposite. In Golden, the plaintiff challenged a law that infringed on his ability to distribute handbills concerning one particular congressional candidate. By the time the case reached the Supreme Court, the election was not only over but also the particular Congressman had accepted a post on the State Supreme Court for a 14-year term. Because the plaintiff alleged no interest in any other candidate and it was highly unlikely that the Congressman would be running for office again any time soon, the Court concluded there was no justiciable controversy. Golden, 394 U.S. at 109.

Porter's situation is different from the plaintiff's in Golden because 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" but, rather, included the names of all the presidential candidates

ER 3-4. He intends to set up a similar site in 2004. ER 8; ER 79 (Second Suppl. Porter Decl. ¶5).

This case is controlled by Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), not Golden. In Baldwin, the plaintiffs – who posted signs in support of a particular candidate during the 1974 election cycle -- challenged city restrictions on temporary campaign signs. After the election ended, the City contended the case was no longer justiciable, citing Golden. Baldwin, 540 F.2d at 1364-65. This Court disagreed, concluding 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. Similarly, Porter's web site did listed all the presidential candidates and it will do so again during the 2004 election cycle.[14]

Defendant's reliance on Renne v. Geary, 501 U.S. 312 (1991), is also unavailing. In Renne, the plaintiffs could not avail themselves of the "capable of repetition yet evading review" exception to the mootness doctrine because they lacked standing and thus there was no case or controversy *at the time the case was filed*. Id. at 320. Here, by contrast, 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. 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 recognized important differences between cases where no controversy exists when the case is filed – like Renne -- and cases like this one where events may render it moot occur after the case is filed. See Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 190-91 (2000). In particular, the "capable of repetition yet evading review" "doctrine will not revive a dispute which became moot before the action commenced." Renne,

501 U.S. at 320; see also Friends of the Earth, 528 U.S. at 191.. Accordingly, the Supreme Court's holding that there was no justiciable controversy in Renne does not apply here.

3. Plaintiffs' Damages Claims Are Neither Moot Nor Barred by the Eleventhth Amendment

The Secretary's contention that Plaintiffs' claims for damages are moot, AAB at 43-44, makes no sense. The purpose Plaintiffs' damages claim is to recompense them for harm they suffered in 2000, thus it cannot become moot just because the election has occurred.

The Secretary's argument that the damages claims are barred by the Eleventh Amendment flies in the face of Supreme Court precedent. AAB at 44. "[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 (1991); see also Arizonans for Official English v. Arizona, 520 U.S. 43, 69 n.24 (1997)("AOE")("State Officers are subject to § 1983 liability in their personal capacities, even when the conduct in question relates to their official duties."). Secretary Jones is no more entitled to Eleventh Amendment immunity than was Hafer, the state official sued in her personal capacity in Hafer v. Melo. Although Plaintiffs' complaint does relate to actions he took in his role of Secretary of State, that is irrelevant. "[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).

Jones'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 wrong. AAB at 45. 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. ER 03 (FAC ¶ 7); ER 13. 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. ER 5-8 (FAC ¶¶ 15, 17-20).

Defendant assertion, relying on AOE, that Plaintiffs' damages claim "must be closely scrutinized" and is improperly directed at Secretary Jones in his official capacity is wrong for numerous reasons. AAB at 44. In AOE, a state employee brought a First Amendment challenge under 42 U.S.C. § 1983 to a state initiative and sought only prospective relief. 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 appeal, the Plaintiff left her state job, mooting her claims for prospective relief. Id. at 59-60. This Court kept the case alive by reading into her complaint a claim for nominal damages, even though she had "not expressly request[ed] nominal damages." Id. at 60. Moreover, this 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.

In AOE, unlike here, no party existed against whom a damages claim could rightfully have been made. Plaintiff sued then-Governor Mofford only in her official capacity and therefore she could not be liable for damages. Id. at 58 & 59 n.24. Mofford also would not have been liable for damages, even in her unofficial capacity, because she had refused to enforce the challenged ordinance and refused to appeal when the district court declared it illegal. Id. at 69 n. 24. Finally, this Court held that Arizona could be liable for the nominal damages, although a § 1983 claim for damages may not be brought against a state, Id. at 69, *and* Arizona was not a party to the appeal of the case. Id. at 58, 69. By contrast, Plaintiffs have

sued Secretary Jones in his unofficial capacity. Thus, he may be held liable for damages under § 1983, and the Eleventh Amendment provides no immunity to the damages claim. Hafer, 502 U.S. at 26 & 30-1. Finally, Secretary Jones took affirmative steps to enforce California's Election Code against web site operators. ER 03 (FAC ¶¶ 7-8); ER 13-14, and unlike in AOE, no one is seeking to impose damages against the State. In sum, none of the unusual circumstances that applied in AOE exist here.

II. CONCLUSION

Because the district court erred by 1) abstaining, 2) holding Plaintiffs' damages claims to a heightened pleading standard, and because 3) Plaintiffs' damages claims were properly pled; and 4) all Plaintiffs' claims are justiciable, Plaintiffs respectfully request that this Court reverse the district court stay and judgment.

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

_____
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_____
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[1] The same is true if this Court certifies issues to the California Supreme Court. AOB at 28-29.
[2] Defendant cites only one First Amendment case in which this Court invoked Pullman abstention, Almodovar v. Reiner, 832 F.2d 1138 (9th Cir. 1987), which Plaintiffs have already shown is entirely distinguishable. Appellant's Answeing Brief ("AAB") at 29 n.2.
[3] Of course, Plaintiffs contend that their activities are protected political speech and association and that Defendant

engaged in an illegal prior restraint. See, infra,at 7-12.

[4] Secretary Jones incorrectly states that Crawford-El was a 5-4 decision in which only *three* Justices joined Justice Stevens' opinion and Justice Kennedy concurred separately. AAB at 22 & n.16. Four Justices joined Justice Stevens' majority opinion with Justice Kennedy concurring separately.

[5] See, e.g., Nance v. Vieregge, 147 F.3d 589, 590 (7th Cir. 1998) (In a complaint, "Plaintiffs need not plead specific facts or legal theories; it is enough that [plaintiff] set out a claim for relief.").

[6] Plaintiffs have found one other case from this Court, not cited by Defendant, which mentions Branch and the heightened pleading standard after Crawford-El. See Johnson v. California, 207 F.3d 650 (9th Cir. 2000). In Johnson, this Court set forth the well-established standard for review of 12(b)(6) motions. Id. at 653. The opinion later stated that the defendants "urge the court affirm" on the grounds that the plaintiffdid not satisfy Branch's heightened pleading standard. Id. at 654. In its analysis reversing the dismissal of the complaint, the Court did not refer to Branch or heightened pleading. It is unclear what standard the Court applied although it states, "[a]lthough inartfully stated, these allegations are sufficient to state a claim or racial discrimination in violation of the Equal Protection Clause." Id. at 655. The conclusion that the "inartfully stated" allegations survived a 12(b)(6) motion suggests that the Court was not applying a heightened pleading standard.

[7] It bears noting that Defendant's counsel states that differentiating between web sites that the Secretary believed were permissible and others that were illegal is done "on a case-by-case basis," and that the process is "very fact intensive." SER 054. This statement reveals that here, as with obscenity, "the line between speech unconditionally guaranteed and speech which may be regulated is finely drawn." Bantam Books, 372 U.S. at 66. Accordingly, the government must invoke the appropriate judicial procedure, rather than silencing speakers by threatening prosecutions. Id.

[8] The DOJ concluded that the web sites like voteswap2000. com were not engaged in activity that violated the federal laws against "vote buying," and Maine and Michigan's Secretaries of State reached a similar conclusion concerning state law. See articles attached at SER 1-7.

[9] Even if this Court concludes that the heightened pleading standard remains viable, the district court improperly applied it to the Dormant Commerce Clause claim, because intent is not an element of that claim. Mendocino Env'tl Center v. Mendocino, 14 F.3d 457, 461 (9th Cir. 1994); AOB at 38-9.

[10] 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 Bellotti, 435 U.S. at 774-75.

[11] 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. ER 8; ER 53-54, 63 (Maisel ¶5; Rosenstone Decl. ¶9)**.** George Wallace, John Anderson, Ross Perot, Pat Buchanan and Ralph Nader are the most notable among many other third-party candidates in the last thirty years. ER 8; ER 52-3, 62-3 (Maisel Decl. ¶4; Rosenstone Decl. ¶¶4-6).

[12] 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 whether a controversy exists with respect to 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.")

[13] 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; Encyclopedia of American Politics, at 1717-18, ER 42-49.

[14]Defendant's attempts to distinguish Baldwin are neither relevant nor right. See AAB at 35 n.21. Defendant contends that in Baldwin, unlike here, only speech was regulated. Even if true, that argument is relevant only merits of the case, not to the procedural question of justiciability. Moreover, the Secretary is wrong that his actions did not restrict protected speech. See, supra, at 8-12. He is also wrong to state that Plaintiffs do not allege a future intent to violate the Elections Code. For example, Porter alleges that he has already registered the domain name votwexchange2004.com and in 2004 will set up a site similar to the one he had in 2000, except for his fear of prosecution by the Secretary. ER 08. The Secretary threatened to prosecute voteswap2000.com, a site materially identical to Porter's, as well as anyone engaged in the same activities as voteswap2000.com. ER 04, 13.