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Appearing for the Plaintiffs

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE CENTRAL DISTRICT OF CALIFORNIA**

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| LIBERTARIAN PARTY OF LOS ANGELES COUNTY, THEODORE BROWN, and CHRISTOPHER AGRELLA,<br><br>Plaintiffs,<br><br>v.<br><br>DEBRA BOWEN, in her official capacity as Secretary of State of California,<br><br>Defendant. | Case No. CV10-2488 PSG (OP) |

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

COMES NOW THE PLAINTIFFS, Libertarian Party of Los Angeles Count ("LPLAC"), Theodore Brown ("Brown"), and Christopher Agrella ("Agrella") (collectively, the "Plaintiffs"), by and through their attorneys, The Bernhoft Law

Firm, S.C., (Attorney Daniel J. Treuden), and file this Memorandum of Points and Authorities in Opposition to the Defendant's Motion for Judgment on the Pleadings.

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## INTRODUCTION

Debra Bowen ("Bowen") re-raises the same concern of standing as to the Plaintiffs' amended complaint as Bowen raised as to the Plaintiffs' initial complaint. Most importantly, Bowen should know the Plaintiffs have standing because their own manuals distributed for people in the Plaintiffs' position advise them they cannot circulate petitions in the incipient campaigns unless they reside within the state of California.

For example, Bowen, in formal pamphlets published by her office, requires any circulator state under oath that the circulator is a voter or qualified to register to vote in the state of California. As so articulated, the state, and the county pursuant to the state's direction, warns any circulator: "A circulator must be a registered voter and resident of the election area where the candidate is running for office, i.e., the District or Division." (Exhibit C, p. 48.)[1] Indeed, the state's own petition circulator forms require circulators state, under penalty of perjury, that they are "registered to vote" in a California county or are "qualified to register to vote in California." (Exhibit D, p. 1.) Additionally, these precise laws have been threatened against circulators in the recent past and used and enforced against circulators, their causes and candidates to constantly try to invalidate petitions. County election officials cannot even accept or file petition that do not conform to these residency requirements, by law.

This easily establishes sufficient standing for these plaintiff circulators in an area of right and law as critical and essential as the First Amendment to the United

[1] Exhibits A and B should not change the procedural posture of this case to a motion for summary judgment because a district court, "[u]nder Federal Rule of Evidence 201, . . . may take judicial notice of the records of state agencies and other undisputed matters of public record." *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n. 1 (9th Cir. 2004) (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001)). *See also City of Sasalito v. O'Neill*, 386 F.3d 1186, 1223 n.2 (9th Cir. 2004)).

States Constitution. As the Supreme Court aptly articulated: "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution there-under, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). This is especially true in First Amendment cases and election-related disputes where the courts deliberately encourage a broad definition of standing and invite early pre-enforcement and pre-election adjudication to avoid mid-election judicial infringement and hasty decision-making. *See LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155-55 (9th Cir. 2000). Therefore, defendant's motion for judgment on the pleadings should be denied.

## LEGAL ARGUMENT

### A. Plaintiffs Have Standing and the Case is Ripe for Review.

#### *1. Standing.*

Plaintiffs must merely establish at this procedural stage of the case "only that there is a genuine question of material fact as to the standing elements" to deny the defendant's motion to dismiss. *See Truth v. Kent Sch. Dist.*, 524 F.3d 957, 965 (9th Cir. 2008); *see also Marijuana Policy Project v. Miller*, 578 F.Supp.2d 1290, 1299 (D. Nev. 2008).

In First Amendment cases, district courts continually demand a broad application of standing in favor of plaintiffs and the rights of free speech. As a fellow district court recently concluded in near identical litigation, whenever "the potential enforcement of the challenged statute implicates First Amendment rights, 'the inquiry tilts dramatically toward a finding of standing.'" *Marijuana Policy Project*, 578 F.Supp.2d at 1300 (quoting governing Ninth Circuit precedent in

*LSO, Ltd.*, 205 F.3d at 1154-55). Merely wishing to engage in such speech in the future and the possible enforcement of statutes discouraging engaging in such speech conferred standing on the plaintiffs challenging a statute on First Amendment grounds. *See Am. Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 983-84 (9th Cir. 2004).

In this case there is clearly a controversy capable of clear adjudication, as the plaintiffs face a credible and realistic threat from prospective state action in enforcement of a specific statute against their cognizable interests and protected rights. Indeed, the government's pamphlets, their brochures, their public advisements, their public warnings, their own web site, and, above all, their own petition circulator form makes that crystal clear.

As the twin district courts concluded, all that is required for standing is three-fold: (1) "evidence that in the past they have engaged in the type of speech affected by the challenged government action"; (2) "affidavits or testimony stating a present desire, though no specific plans, to engage in such speech"; and, (3) "a plausible claim that they presently have no intention to do so because of a credible threat that the statute will be enforced." *Marijuana Policy Project*, 578 F.Supp.2d at 1301 (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006)).

Here, plaintiffs have stated that they have circulated petitions in the past and wish to circulate petitions in the future outside of their political districts and wish to employ non-resident circulators to circulate petitions but will not for fear that the statutes in question will be enforced and the petitions declared void and for fear of prosecution under state law. (Compl. ¶¶ 19-21.) Furthermore, Bowen is charged with enforcing all election laws of the State of California and intends to enforce these election laws as she has in the past. (Compl., ¶¶ 7 and 14.) Bowen

has provided notice to prospective candidates and the public that circulators must be residents of the political district in which they circulate petitions. (Compl., ¶¶ 12-16 and Exs. A and B; Exs. C and D.) Indeed, Bowen has done so with his brochures, again with his pamphlets, again with information for the public on the official government web site, and again, and above all, in the petition circulator form.

These facts give rise to the Plaintiffs' credible belief that the statues in question will be enforced if the Plaintiffs violate the statutes and prevent the Plaintiffs from engaging in core political speech.

Hence, a finding of standing here parallels and precisely conforms to comparable cases. Future petition signature gathering efforts conferred standing on the plaintiffs in the seminal Supreme Court case. *See Buckley v. Am. Const. Law Foundation, Inc.*, 525 U.S. 182, 188 (1999). Future petition signature gathering efforts conferred standing on the plaintiffs in other comparable cases. *See Tobin for Governor v. Illinois State Bd. of Elections*, 105 F.Supp.2d 882, 886 (N.D. Ill. 2000). Future intent to circulate petitions sufficed to confer standing on plaintiffs. *Marijuana Policy Project v. Miller*, 578 F.Supp.2d at 1299; *Daien v. Ysursa*, 711 F.Supp.2d 1215 (D. Idaho 2010); *Idaho Coalition United for Bears v. Cenarrusa*, 234 F.Supp.2d 1159, 1162 (D. Idaho 2001). Like the plaintiffs in these cases, the LPLAC, Brown, and Agrella have standing because as a political party, and members thereof, they will be gathering signatures in future petition drives.

***2. The Case is Ripe for Adjudication.***

Equally, the issues of standing and ripeness go hand-in-hand in this case. Standing turns on whether plaintiff's claims are speculative or hypothetical and the ripeness issue turns on whether the action was premature. If the facts support one issue, they will support the other. *See Thomas v. Anchorage Equal Rights*

*Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) ("The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong. . . . Indeed, because the focus of our ripeness inquiry is primarily temporal in scope, ripeness can be characterized as standing on a timeline."). Because the issue is primarily temporal in nature, the ripeness and standing issues completely overlap making their discussion indistinguishable for all intents and purposes and therefore, the parties' discussion of standing should equally apply to ripeness and vice versa.

The case is clearly ripe for judicial review as no additional fact is necessary to adjudicate the matter and failing to rule now would impair the First Amendment interest at stake and endanger future petition circulation campaigns in the state, including, critically, the planning stages of that effort. Equally, waiting for a prosecution of the statutes during an election, forces the court to decide hastily in the middle of an election, upsetting all kinds of public expectations and interests, precisely the reason other courts have called for these disputes to be decided pre-election season. (In previous cases, the state defendants are also fond of arguing that waiting until the last minute is dilatory. In situations like this, it is best to seek a remedy while there is time to fully adjudicate the matter.)

For a claim to be ripe, a plaintiff seeking declaratory or injunctive relief must first establish that he has standing to litigate the claims. A plaintiff must show an injury-in-fact, a causal connection between the injury and the conduct complained of, and that the injury is likely redressed by a favorable decision. *See LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1152-53 (9th Cir. 2000). The Ninth Circuit has made the analysis simple when seeking prospective relief from the future application of a statute. "It is sufficient for standing purposes that the plaintiff intends to engage in a course of conduct arguably affected with a constitutional

interest and that there is a credible threat that the challenged provision will be used against the plaintiff." *LSO*, 205 F.3d at 1154-55 (internal quotation omitted). The plaintiffs meet these requirements.

Here, plaintiffs have demonstrated that they wish to circulate petitions outside of their political districts and wish to employ non-resident petition circulators. (Compl. ¶¶19-21) Furthermore, this conduct will run afoul of the questioned statutes. Finally, plaintiffs' conduct will be used against them by the penalties in the questioned statutes. Petitions circulated by the plaintiffs outside of their political districts or petitions circulated by non-resident circulators hired by the plaintiffs will be voided by the defendant– after the plaintiffs have expended great effort, time, and money. Attempts to avoid the penalties of the questioned statutes by claiming the petitions were circulated by residents can result in fines and/or imprisonment. *See* Cal. Elec. Code § 18203 (2008). These are current or imminent harms.

Imminent harm does not mean an immediate harm when considered within the context of a permanent injunction. An immediate harm is only a necessary showing in a preliminary injunction context. In a declaratory relief or permanent injunctive relief action, "imminent" means "likely" given the circumstances in the case. "Although a showing of 'irreparable harm' is required for the imposition of any injunctive relief, preliminary or permanent, the 'imminent' aspect of the harm is not crucial to granting a permanent injunction." *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 235 n.9 (2nd Cir. 1999). Furthermore, "A finding of 'imminency' does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present." *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2nd Cir. 1991) (issuing permanent injunction for environmental harm) (reversed in part on other grounds related to an attorney fee award). And

that makes sense here because there is a definite conflict between the parties' positions with a known date the conflict will culminate and no indication from either side that the conflict will resolve itself independent of this court's judgment. "The basic inquiry [into whether a case or controversy exists] is whether the 'conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt*, 442 U.S. at 298 (quoting *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 93 (1945)).

Discussing the "imminent" requirement for preliminary injunctions, the Ninth Circuit held "[a] plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." *Carribean Marine Services, Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis omitted). Plaintiffs are not seeking a preliminary injunction, and consequently the imminent showing related to temporal immediacy necessary to establish standing in the permanent injunction context is much less than the preliminary injunction showing of immediacy. Merely expressing an intention to do a future activity is sufficient. *See LSO*, 205 F.3d at 1154-55.

That is exactly what we have here. We have Plaintiffs' undisputed intention to perform acts they argue they have a constitutional right to do, particularly to circulate nomination petitions outside their political districts and to employ non-resident petition circulators. We also have Bowen's opposition without any indication that Bowen will cure the harm before Plaintiffs must suffer the consequences of their contemplated actions (or the plaintiffs decide to self-censor themselves, which is itself a cognizable harm, *see Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988)). By all indications, this is a definite and

concrete dispute whether the action was filed one day before plaintiffs plan to circulate petitions, or three years before. The harm is imminent because we know when it will occur, we know that it is likely the conflict will remain based on the parties' own actions and stated positions, and the parties are unable to point to any reasonably likely intervening event that would moot this issue. Plaintiffs clearly have standing to seek declaratory and injunctive relief on all counts and the case is clearly ripe for adjudication.

Indeed, those in Plaintiffs' position have been criticized and condemned for waiting for the election period or actual denial of petition before filing suit. *See Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) (refusing certain legal relief for waiting until mid-election-cycle to file suit, noting "There would be no question of his standing to seek such relief in advance of the submission or even collection of any petitions.")

***3. Bowen's Specific Challenges to Ripeness and Standing Fail.***

Notwithstanding Bowen's legal interpretations to the contrary, the facts in this case support a finding that standing exists and the issues are ripe. Plaintiffs have articulated a plan related to the next election, namely, that they intend to support candidates by circulating nomination petitions on their behalf outside of their political divisions and by employing non-resident petition circulators in the next election cycle, (Compl., ¶¶ 19-21), but they will avoid these activities if they remain illegal during the next election cycle, (Compl., ¶¶ 19-21). Plaintiffs satisfy the imminent harm prong in the standing analysis.

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000), the plaintiffs only alleged an intention to return to an environmentally distressed area if and when the area was cleaned up:

> FOE member Kenneth Lee Curtis averred . . . that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the [polluting] facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by Laidlaw's discharges.

*Id*. at 181-82.

Other plaintiffs in *Friends of the Earth* made similar averments and the Supreme Court held that "the affiants' conditional statements" could not be considered "speculative 'some day' intentions." *Id*. at 184. The Supreme Court quoted *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992) in *Friends of the Earth* favorably when it said that "'the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.'" *Friends of the Earth*, 528 U.S. at 183 (quoting *Defenders of Wildlife*, 504 U.S. at 562-63)). The focus on whether a plan is speculative or not is whether the plaintiff sets forth a cognizable interest, and plaintiffs have done just that because circulating nomination petitions is a cognizable interest in and of itself, especially for members of a political party.

Plaintiffs state a cognizable interest even if they cannot name which candidate they will support with 100% certainty. Indeed, a plaintiff had standing to sue the State of Hawaii over that state's ban on write-in candidates because the plaintiff intended in the future to vote for some future unknown write-in candidates. "[T]he State points to the fact that Burdick cannot vote in some of the elections affected by the preliminary injunction and the fact **that he has failed to identify a particular candidate for whom he wants to cast his write-in vote**." *Burdick v. Takushi*, 937 F.2d 415, 417 (9th Cir. 1991) (emphasis added). The Ninth Circuit rejected this contention by finding that the right to vote is independently a cognizable interest.

> Burdick has demonstrated that his rights as a voter to freedom of expression and association are threatened by Hawaii's prohibition on write-in voting. Although an order striking down the prohibition on write-in voting may apply to races in which Burdick cannot vote, the State cannot contend that there is any difference in the way the prohibition applies to the various elections throughout the state. **The prohibition is a general statewide restriction that affects Burdick personally, and therefore he has standing to challenge it.** *See Erum v. Cayetano*, 881 F.2d 689, 691 (9th Cir. 1989) (Hawaii voter has standing to challenge the whole of the State election laws creating ballot access restrictions).

*Burdick*, 937 F.2d at 417-18 (emphasis added) (affirmed by *Burdick v. Takushi*, 504 U.S. 428 (1992)).

Plaintiffs' case is similar in all material respects. Plaintiffs' rights to directly participate in the First Amendment activity of circulating ballot-access petitions is not dependent on a particular candidate. Rather, plaintiffs are completely barred from circulating all petitions outside of their political divisions and from employing non-resident circulators by a general statewide restriction, and the rights obviously personally affect plaintiffs' ability to circulate those petitions. Plaintiffs' right to freedom of association are equally affected. *See Anderson v. Celebrezze,* 460 U.S. 780, 793 (1983). Just like the plaintiff in *Burdick* could not identify which candidate he intended to write-in, plaintiffs' inability to precisely identify the candidates they will support does not make their freedom of association claim and equal protection claim fail for lack of standing. Plaintiffs' rights to circulate petitions and employ non-resident circulators remain cognizable rights independent of the particular candidates or causes they will support.

Bowen's claim that plaintiffs have not been injured by Bowen and will not be injured since plaintiffs have not alleged Bowen has enforced or has threatened to enforce the statutes in question is also not a reasonable conclusion given the

undisputed facts in this case. Bowen is charged with executing the election laws of the State of California and intends to enforce the election laws against violators. (Compl., ¶¶ 7 and 14.) Bowen continues to remind prospective candidates and the public of the residency requirement for petition circulators and has not made any public declaration that these statutes will not be enforced. (Compl., ¶¶ 11-16 and Exs. A and B; Exs. C and D.) Plaintiffs' fears of enforcement and significant penalties affecting plaintiffs' finances and liberty interests are not obtuse or generalized.

Furthermore, and as Plaintiffs articulated in the complaint, they are curtailing their activities as a direct result of the statutes in question. (Compl., ¶¶ 19-21.) A fellow district court has previously recognized a plaintiff's standing and the case's ripeness based on the "chilling effect" potential criminal prosecution had on plaintiffs.

> The bottom line is that plaintiffs' asserted harm is not "imaginary" or "speculative." As discussed above, plaintiff Rankin testified that he has curtailed his initiative activity because he is concerned about criminal liability. It is this chilling effect, rather than any actual criminal prosecution or a prosecutor's threat to prosecute, that renders the case ripe for resolution: "[T]he alleged danger is, in large measure, one of self-censorship: a harm that can be realized without an actual prosecution." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 . . . (1988). The Court therefore rejects Idaho's argument that the case is not ripe for resolution.

*United for Bears*, 234 F.Supp.2d at 1162.

In *United for Bears*, Judge Windmill considered *Thomas*. Judge Windmill found that, even though the plaintiff faced no actual threat of criminal prosecution nor was the plaintiff able to show ***any*** actual prior enforcement of the challenged statutes, the mere fact that the plaintiff was altering his present and future conduct was sufficient to find the case ripe for adjudication. Plaintiffs, in the same manner,

are altering their planned future conduct because of a fear of enforcement, an enforcement which can be considered likely to occur if plaintiffs violate the challenged statutes.

Recognizing the "chilling effect" on First Amendment rights as mentioned in *United for Bears* as a cognizable harm allows plaintiffs to make their showing for standing purposes without the necessity of identifying exactly which speech constitutes the harm. The unique nature of the First Amendment predicate the policy reasons for this rule. Facial challenges "are allowed not primarily for the benefit of the litigant, but for the benefit of society – to prevent the statute from chilling the First amendment rights." *Secretary of State of Maryland v. Munson Co.*, 467 U.S. 947, 958 (1984). Facial challenges are permitted "when there is a lack of adequate procedural safeguards necessary to ensure against undue suppression of protected speech." *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998). The California statutes chills and suppresses the free speech of plaintiffs, as well as every other non-resident of California who wishes to circulate petitions in California, giving plaintiffs standing to challenge the statutes. The suppression of plaintiffs' right to free speech and association is the injury-in-fact and their claims are ripe. *See California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003). Therefore, plaintiffs need only show that the regulations "affect [plaintiffs] personally," *Burdick*, 937 F.2d at 418, and they can do that by showing they "self-censor[ed]" themselves, *American*, 484 U.S. at 393. Based on all of the foregoing, this case is ripe for adjudication and plaintiffs have standing to prosecute this action.

Defendant argues that there is no credible threat the statutes in question will be enforced against the Plaintiffs. Defendant should re-examine their own web site, their own brochures, their own pamphlets, their own public statements, and

above all, their own "declaration of circulator" forms. Defendant's arguments remain contradicted by their own brochures, public advisements, public warnings, pamphlets, web sites and petition circulator forms. In spite of the findings in *United for Bears*, Defendant argues that there is no credible threat of enforcement because there is no history of enforcement or any threat of future enforcement. Defendant is incorrect.

To demonstrate a credible threat and establish an injury-in-fact, a plaintiff can show a reasonable likelihood of enforcement. *Lopez v. Candaele*, --- F.3d ---, 2010 WL 5128266, at *6 (9th Cir. Dec. 16, 2010). Specific warnings of possible proceedings or a history of past enforcement against similarly situated parties are evidence of a reasonable likelihood of enforcement. *Id*. at *6, *7.

Bowen has repeatedly provided notice to prospective candidates and the public of the residency requirement for petition circulators. On Bowen's official website, Bowen has posted a "Summary of Qualifications and Requirements for Partisan Nomination for the Offices of STATE SENATOR [and] MEMBER OF THE ASSEMBLY" and "Information Sheet – Qualifications and Requirements – Member of the State Senate, 1st District Special Election. (Compl. Exhibits A and B.) Both of these documents outline the statutory requirements for candidates and specifically cites applicable sections of the California Constitution and the California Elections Code. Both of these documents notify candidates and the public of the residency requirement for petition circulators. These documents are warnings to candidates that the cited statutes, including the circulator residency requirement, are requirements and will be enforced.

Bowen argues that the mere fact these documents appear on her official website is not a warning and does not show a reasonable likelihood of enforcement. (Def. Mot. p. 2.) But if Plaintiffs and others are not to consider these

documents as a notice of applicable statutes and warnings of possible proceedings what information should Plaintiffs and others take from the documents? Plaintiffs must assume that these documents outline the statutory requirements for candidates and the statutes will be enforced unless specifically told otherwise.

Furthermore, within the documents, Bowen specifically states that in the legal opinion of the office of the Secretary of State residency requirements for candidates found in the California Constitution violate the U.S. Constitution and are unenforceable. (Compl, Exs. A and B.) These unenforceable requirements are not listed in the main body of the document and the document is silent on the enforceability of all other statutes including the questioned statutes imposing a residency requirement on petition circulators. There is only one logical conclusion the Plaintiffs can take from a situation where many statutory requirements are listed by Bowen, and one of them is noted by Bowen to be unconstitutional and unenforceable, mainly, that all other statutory requirements *are* constitutional and enforceable in Bowen's opinion. The documents are warnings of possible enforcement and for the Plaintiffs and others evidence a reasonable likelihood of enforcement.

In addition to warnings of enforcement from the Defendant, there has been past attempts to enforce, and enforcement of, similar statutes. In *Brown v. Russell*, 27 Cal.App.4th 1116 (1994), signatures collected by non-resident circulators were not counted and in *Preserve Shorecliff Homeowners v. City of San Clemente*, 158 Cal.App.4th 1427 (2008) a writ of mandate was sought to prevent the counting of signatures on petitions circulated by non-residents. Both of these cases involved ordinances and statutes similar to the questioned statutes in that the statutes imposed a residency requirement on petition circulators. These cases differ from the current case in that the ordinances and statues involved the circulation of

petitions for initiatives and the government official charged with enforcing the ordinances and statues was a city clerk and not the Secretary of State. These differences, though, are immaterial for the Plaintiffs' belief there is a reasonable likelihood that the statutes being question in the present case will be enforced. The facts in *Preserve Shorecliff* demonstrate the near certainty that there will be attempted enforcement of the questioned statutes imposing a residency requirement for petition circulators if Plaintiffs proceed with their stated plans of violating these statutes.

In *Preserve Shorecliff*, non-resident circulators were used to collect signatures in support of an initiative in violation of several statutes. *Preserve Shorecliff*, 158 Cal.App.4th at 1430-31. After the signatures were collected, a rival faction sued for a writ of mandate to prevent the signatures from being counted. *Id*. at 1431. The rival faction sought the writ of mandate in spite of the fact that the Attorney General of California had concluded that at least one of the statutes imposing a residency requirement on initiative petition circulators was unconstitutional. *Id*. Based on the facts in *Preserve Shorecliff*, it is not merely speculative but exceedingly reasonable for Plaintiffs to assume that the statute will sought to be enforced. And as federal courts have previously warned similarly situated plaintiffs, they must file suit before the circulation of petitions, not after, in order to be assured of meaningful and full relief. *See Nader v. Keith*, 385 F.3d at 736 (refusing certain legal relief for waiting until mid-election-cycle to file suit, noting "There would be no question of his standing to seek such relief in advance of the submission or even collection of any petitions.")

Based on documents circulated by the Defendant and the previous history of enforcing similar statutes there is a reasonable likelihood of enforcement of the questioned statutes. Because of the credible threat of enforcement, Plaintiffs are

reasonably curtailing their activities and self-censoring their political speech. The Plaintiffs have suffered an injury-in-fact and have standing to prosecute this action.

Bowen further argues that the current issues are not ripe for adjudication under the principles of justiciability articulated in *Renne v. Geary*, 502 U.S. 312 (1991). The facts in the current case are different than those in *Renne* and Bowen's arguments are incorrect.

There are three primary differences between the facts in *Renne* and the instant case. First, the Supreme Court found that the plaintiffs in *Renne* were attempting to defend the rights of candidates and not themselves. Because of this, it was not clear to the Supreme Court that the *Renne* plaintiffs had standing. *Id* at 319. Second, the statutes in question in *Renne* involved the removal of party endorsements in voter pamphlets for non-partisan elections. The Supreme Court found that plaintiffs could receive the removed information by other means. *Id.* at 322. Third, the statutes in question in *Renne* did not carry severe penalties such as criminal penalties. *Id.*

In the current case, plaintiffs are suing to protect their *personal* First and Fourteenth Amendment rights to engage in core political speech – the circulation of petitions – and rights of free association. Plaintiffs are not attempting to defend the rights of candidates or third parties as in *Renne*. Further, plaintiffs have no other means to gather signatures to nominate candidates for office without circulating petitions throughout California. Without an injunction enjoining Bowen from enforcing the statutes in question, plaintiffs will not be able to engage in the constitutionally protected activities of circulating petitions outside their political subdivision and associating with non-residents to circulate petitions, unlike plaintiffs in *Renne* who could cure their injury by other means. Finally, violation of the statutes in question will lead to plaintiffs' efforts being voided after

great expense to the plaintiffs. Attempts by the plaintiffs to avoid this result can lead to the plaintiffs being fined and/or imprisoned. *See* Cal. Elec. Code § 18203 (2008). The possibility of financial loss, financial forfeiture and/or the loss of personal liberty greatly increase the "chilling" effect on free speech by the statutes in question beyond that of the statutes in *Renne*. It is "quite obvious that these allegations demonstrate a justiciable controversy. In cases in precisely the same posture as this one we have repeatedly entertained pre-enforcement challenges restricting election-related speech." *Renne,* 501 U.S. at 335 (Marshall, J. dissenting). Justice Marshall recognized that in First Amendment cases, and particularly First Amendment cases related to elections, standing is broadly interpreted, and consequently, *Renne*'s holding should be limited to its facts. For these reasons, the current case aligns itself with the long line of precedents granting standing in election cases and not with the limited holding in *Renne*. *See e.g Burdick*, 937 F.2d at 415; *United for Bears*, 234 F.Supp.2d at 11592; *California Pro-Life Council, Inc.*, 328 F.3d at 1088.

**B. <u>The Court has Subject Matter Jurisdiction Over This Case</u>.**

Bowen has also moved this Court for a judgment on the pleadings pursuant to Fed. R. Civ. P. 12 (c). The Complaint has made sufficient factual allegations clearly showing that the Plaintiffs alleged injuries for the violation of their constitutional rights, specifically their rights to free speech, free association, and voting rights. The complaint also alleges that a state actor, in their official capacity, violated those rights. Congress passed a statute granting persons the ability to protect their civil rights, including constitutional rights, by filing an action in federal court. *See* 42 U.S.C. § 1983. Subject matter jurisdiction exists.

## CONCLUSION

Plaintiffs have standing and the case is ripe for adjudication. Defendants pretend their own brochures, pamphlets, and required declarations of a circulator don't state precisely what they do state. If the plaintiffs waited until mid-election to file, defendants would complain the plaintiffs didn't file suit sooner. This is the "not ripe in winter, but scream laches by spring" approach to First Amendment litigation. Federal courts consistently compel plaintiffs to file suit before circulation; this suit achieves those ends in directly reply to federal court command.

To have standing, plaintiffs must show: (1) a concrete injury in fact; (2) a connection between the injury and defendant's conduct; (3) and a likelihood that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. The chilling effect of the statutes in question on plaintiffs' rights to free speech and association is the plaintiffs' injury in fact. The chilling effect of the statutes in question on plaintiffs' rights to free speech and association is caused by a credible threat of enforcement of the statutes by the defendant. A permanent injunction enjoining the defendant from enforcing the statutes in questions will remove the chilling effect on plaintiffs' rights of free speech and association and redress the plaintiffs' injury. For the case to be ripe for adjudication the issues must not be premature or moot. The plaintiffs are currently not engaging in the circulation of petitions – core political speech – because of the statutes in questions. The case is neither premature nor moot.

For these reasons, plaintiffs pray for the Court to deny Bowen's motion to dismiss.

Respectfully submitted on this the 10th day of January, 2011.

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Appearing for the Plaintiffs

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| LIBERTARIAN PARTY OF LOS ANGELES COUNTY, THEODORE BROWN, and CHRISTOPHER AGRELLA,<br><br>Plaintiffs,<br><br>v.<br><br>DEBRA BOWEN, in her official capacity as Secretary of State of California,<br><br>Defendant. | Case No. CV10-2488 PSG (OP) |

**CERTIFICATE OF SERVICE**

I hereby certify that on January 10, 2011, I electronically filed the forgoing document with the Clerk of Court using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. This includes Attorney Michael Witmer at michael.witmer@doj.ca.gov.

Dated this 10th day of January, 2011.

/s/ Daniel J. Treuden
Daniel J. Treuden