IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 13-35090

ROBERT RAYMOND,

Appellant,

v.

GAIL FENUMIAI, In her official capacity as Director of the Alaska Division of Elections,

Appellee

APPELLANT ROBERT RAYMOND'S OPENING BRIEF

Appeal from the United States District Court for the District of Alaska

Case No. 3:12-cv-00185-JWS

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I. STATEMENT OF JURISDICTION

(a) *District Court Jurisdiction:* Robert Raymond ("appellant") brought a civil suit seeking declaratory and injunctive relief. The district court had jurisdiction over the subject matter of that action pursuant to 28 U.S.C. §§ 1331, 1343(a) and 2201. The cause of action was based on 42 U.S.C. § 1983. Venue of the action was proper in the district pursuant to 28 U.S.C. § 1391(b)(2).

(b) *Appellate Jurisdiction:* This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

(c) *Timeliness of Appeal:* Appellant's appeal is timely pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A). The Clerk's Judgment was entered in this action on February 8, 2013. Appellant's Notice of Appeal was filed on February 11, 2013.

(d) *Appeal From Final Judgment:* This case is an appeal of a final judgment entered on February 8, 2013.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by granting appellee Gail Fenumiai's motion to dismiss the first and fourteenth amendment claims made against her office by the appellant.

III. STANDARD OF REVIEW

We review de novo the district court's grant of a motion to dismiss under Rule 12(b)(6). Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005). When we review the grant of a motion to dismiss, "we accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." Id.

IV. STATEMENT OF THE CASE

On November 11, 2012, Appellant filed his first amended complaint for injunctive and declaratory relief based on the

claim that the Appellee had violated his first and fourteenth amendment rights by threatening to enforce various Alaska election laws that forbid nonresidents from circulating petitions for iniatives, referenda, and recalls.

On November 9, 2012, the Appellee filed her second motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. The Appellants' opposed the motion on December 3, 2012. On February 8, 2013 the district court granted the appellee's motion to dismiss without prejudice.

V. STATEMENT OF RELEVANT FACTS

Appellant resides outside Alaska. He is a political activist who has been involved with political activities both inside and outside his home state for over two decades. He has been active on behalf of Alaska political causes before and intends to be active in the future. He intends to circulate petitions in Alaska to help place initiatives, referenda, and/or recalls on the

Alaska ballot. However, he is aware of the Alaska statutes that forbid a non-Alaska resident from circulating petitions for initiatives, referenda, and recalls, and provide that petition booklets circulated by a non-resident shall not be counted.[1] Through counsel, Appellant contacted Appellee, the official charged with administering Alaska's election laws, and inquired whether she would enforce the residency requirement. Appellee answered affirmatively. Under these circumstances, Appellant will not circulate petitions.

Appellant has standing to challenge the Alaska residency requirement based on the facts that establish (1) his intent to participate in the Alaska electoral process by circulating petitions for initiatives, referenda, and/or recalls, (2) the Division of Elections' clearly expressed plan to enforce the residency requirements stated in the law and not to count any petition signatures he gathers, and (3) his self-censorship of his

[1] *See* AS 15.45.105(3), .130(1) (initiatives); .335(3), .360(1) (referenda); .575(3), .600(1) (recalls).

political expression due to the law that would not allow any signatures he collected to be counted.

VI. ARGUMENT SUMMARY

First and foremost, the appellant's case deserves to be heard on the merits because existing ninth circuit precedent has already rendered indefensible the laws challenged in appellant's complaint. In *Nader v. Brewer* the ninth circuit struck down Arizona's state laws requiring petition circulators to be residents of a state before circulating petitions in that state. *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008).

Secondly, existing Ninth Circuit precedent clearly supports a finding of standing for the appellant. Appellant has standing to challenge the Alaska residency requirement based on the facts that establish (1) his intent to participate in the Alaska electoral process by circulating petitions for initiatives, referenda, and/or recalls, (2) the Division of Elections' clearly expressed plan to enforce the residency requirements stated in the law and not to count any petition signatures he gathers, and

(3) his self-censorship of his political expression due to the law that would not allow any signatures he collected to be counted.

Lastly, neither actual law-breaking by the appellant nor actual prosecution by the appellee is necessary to confer standing. This simple principle – the ability to challenge a law without spending a night in a jail cell or facing a criminal prosecution or having the effect of one's efforts nullified at the last minute -- conforms to decades of good law and controlling precedent from this Circuit and the Supreme Court. *See, e.g., ACLU v. Heller*, 378 F.3d 979, 984 (9th Cir. 2004)

VII. ARGUMENT

A. Existing Ninth Circuit Precedent Renders The Challenged Laws Indefensible

Existing Ninth Circuit precedent already prohibits states from banning non-residents from circulating petitions for the causes of their choice. *See Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008). Courts across the country followed the persuasive precedent of the Ninth Circuit's unanimous decision. *See Nader*

v. Blackwell, 545 F.3d 459, 475 (6th Cir. 2008); *see also Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1028 (10th Cir. 2008). Each conforms to well-established First Amendment principles and Supreme Court canonical precedents. *See Buckley v. Am. Constitutional Law Found. Inc.*, 525 U.S. 182 (1999).

In *Nader*, the Ninth Circuit struck down Arizona's state laws requiring petition circulators to be residents of a state before circulating petitions in that state, noting the laws "severely burdened First Amendment speech, voting, and associational rights of nonresident supporters of independent presidential candidate by excluding them from eligibility to be circulators and significantly decreasing pool of potential circulators." *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008). Defendant makes no pretense the Alaska law is distinguishable or defensible under the *Nader* precedents and respective cross-Circuit progeny. Therefore, the requested relief should be granted and the appellant permitted to petition and circulate petitions in the county without fear of imposition or

enforcement of this illicit ban on non-residents circulating petitions.

B. Existing Ninth Circuit Precedent Clearly Supports a Finding of Standing

As this Circuit notes, the issues of "ripeness" and standing converge. "Whether we frame our jurisdictional inquiry as one of standing or of ripeness, the analysis is the same." *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003). Recent Ninth Circuit panel memorandums make clear the appellant's standing. *See Libertarian Party of Los Angeles v. Bowen*, No. 11-55316, Dkt. 28-1, ORDER of August 21, 2012 (9th Cir. 2012) (noting the likely error of the district court in determining lack of standing to bring the claim).

Based upon unambiguous Ninth Circuit precedent, appellant has more than met the low threshold needed to establish standing to challenge the residency requirements on petition circulators by: (1) alleging that the appellee has not disavowed the residency requirements for petition circulation; (2) alleging that the appellee currently enforces this law; and (3)

by demonstrating that the intended speech is prohibited by the scope of the law.

First and foremost, the appellee made clear to appellant's counsel that the appellee would and does enforce this law. Secondly, the appellee still refuses to disavow their promised enforcement either before suit or even now, after suit. Each suffices for standing and ripeness; both make standing incontrovertible under controlling Ninth Circuit precedent. Independently, as the issue involves First Amendment rights to freedom of speech, self-censorship alone suffices as an injury wherever and whenever a statute's prohibition includes the speech at issue. Indeed, sound Constitutional doctrine and sage public policy recommend and require this construction of standing, lest people like the appellant be forced to become lawbreakers to merely enforce their lawful First Amendment rights.

The Ninth Circuit affirmed again and again that 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 invoked against the plaintiff." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1152 (9th Cir. 2000). Simply put, whenever a plaintiff in a First Amendment challenge faces a credible threat of enforcement, there is injury-in-fact sufficient to establish standing. *See e.g., Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002, 1007 (9th Cir. 2003). The Ninth Circuit recently reaffirmed the same principles even where there was no specific promise or threat to enforce the law. *See Libertarian Party of Los Angeles v. Bowen*, No. 11-55316, Dkt. 28-1, ORDER of August 21, 2012 (9th Cir. 2012).

What the appellee really attempts is to ask this court "overrule years of Ninth Circuit and Supreme Court precedent recognizing the validity of pre-enforcement challenges to statutes infringing upon constitutional rights." *See California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1093 (9th Cir. 2003). The *Getman* Court once again found that the plaintiff suffered an injury sufficient to establish standing where the plain language of the statute appeared to regulate plaintiff's

intended communications. *Id*. at 1095 ("We therefore hold that CPLC suffered the constitutionally recognized injury of self-censorship.")

1. The Fact the Challenged Law Prohibits Appellant's Speech Confers Standing

Realizing that self-censorship is an injury-in-fact sufficient to establish standing, this Circuit has routinely recognized the validity of pre-enforcement challenges to statutes infringing upon First Amendment rights based upon similar allegations and facts. *See Bayless*, 320 F.3d at 1006 ("[plaintiff] faced actual harm from the operation of the statute because the alleged danger is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution"). This conforms to more than a decade of Ninth Circuit precedent. *See Lopez v. Candaele*, 630 F.3d 775, 791 (9th Cir. 2010) (citing *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006).

This further conforms to Circuits across the country. *See Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (in referring to

standing to challenge a statute imposing criminal violations: "A plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; the threat is latent in the statute."); *see also New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996) (the First Circuit concluded from its review of Supreme Court precedents that "[t]he preceding cases make clear that when dealing with pre-enforcement challenges to recently enacted (or, at least, not moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence.").

2. The Fact the Appellee Refuses to Renounce Enforcement Confers Standing

The Supreme Court repeatedly reiterates standing exists in First Amendment cases whenever the State refuses to publicly and affirmatively disavow any enforcement of the law. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393, 108 S.Ct.

636, 98 L.Ed.2d 782 (1988) (concluding that plaintiffs have standing where the "State has not suggested that the newly enacted law will not be enforced and we see no reason to assume otherwise"); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (noting the government's failure to state that it would not prosecute parties like plaintiffs and concluding that plaintiffs "are thus not without some reason for fearing prosecution").

The Ninth Circuit affirms the same precepts and principles repeatedly:

> Arizona has not suggested that the legislation will not be enforced if ARLPAC or any other PAC were to violate its provisions nor has § 16-917(A) fallen into desuetude. Bland, 88 F.3d at 737. Under such circumstances, ARLPAC faced a reasonable risk that it would be subject to civil penalties for violation of the statute.

Arizona Right to Life Political Action Committee v. Bayless, 320 F.3d 1002, 1006 -1007 (9th Cir. 2003).

> That [the plaintiff] ANSWER has never applied for a permit under the Events Ordinance does not destroy its standing. See City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 755-56, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)("[O]ne who is subject to the law may challenge it facially without the

> necessity of first applying for, and being denied, a license.").

Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1034 (9th Cir. 2006).

This follows a decade of good law in this Circuit.

> Courts have also considered the Government's failure to disavow application of the challenged provision as a factor in favor of a finding of standing. *See, e.g., Farm Workers*, 442 U.S. at 302, 99 S.Ct. 2301(noting the Government's failure to disavow application of the challenged provision against parties like plaintiffs, and concluding that plaintiffs "are thus not without some reason in fearing prosecution"); *Bland*, 88 F.3d at 737 ("The Attorney General of California has not stated affirmatively that his office will not enforce the ... statute."); *American-Arab*, 970 F.2d at 508 (noting that Government dropped charges against plaintiff "not because they were considered inapplicable, but for tactical reasons.")

LSO, Ltd. v. Stroh, 205 F.3d 1146, 1155 (9th Cir. 2000)

3. The Fact the Appellee Expressly Threatened to Enforce Confers Standing

A plaintiff has standing to sue whenever any agency or official expressly states they will enforce the laws at issue. That is precisely what this defendant admits this defendant did – enforcement of the law in writing, an admission they refuse to retract or renounce to this date. Indeed, courts consistently find

that a letter of a government official that stated the state's intended enforcement of the law sufficed for standing purposes. *See Culinary Workers Union v. Del Papa*, 200 F.3d 614, 616-618 (9th Cir. 1999); *see also Lopez v. Candaele*, 6340 F.3d 775, 786-788 (9th Cir. 2010) (reinforcing the same precept and principle). This necessarily broad definition of standing and extended definition of ripeness enforces critical and essential First Amendment freedoms, and is necessary thereto.

As this circuit reaffirms repeatedly:

> Constitutional challenges based on the First Amendment present unique standing considerations. In an effort to avoid the chilling effect of sweeping restrictions, the Supreme Court has endorsed what might be called a "hold your tongue and challenge now" approach rather than requiring litigants to speak first and take their chances with the consequences. *See Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) (recognizing the "sensitive nature of constitutionally protected expression," in permitting a pre-enforcement action involving the First Amendment); *see also Bland v. Fessler*, 88 F.3d 729, 736-37 (9th Cir.1996) ("That one should not have to risk prosecution to challenge a statute is especially true in First Amendment cases...."). Were it otherwise, "free expression -- of transcendent value to all society, and not merely to those exercising their rights -- might be the loser."

> *Dombrowski*, 380 U.S. at 486, 85 S.Ct. 1116. Thus, "when the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *LSO*, 205 F.3d at 1155.

Arizona Right to Life Political Action Committee v. Bayless, 320 F.3d 1002, 1006 (9th Cir. 2003)

4. Neither Actual Lawbreaking by the Appellant Nor Actual Prosecution By the Appellee is Necessary to Confer Standing

A person need not "expose himself to actual prosecution to be entitled to challenge the statute." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *see also Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 143, n.29 (1974) (a plaintiff "does not have to await the consummation of threatened injury to obtain preventive relief.")

This simple principle – the ability to challenge a law without spending a night in a jail cell or facing a criminal prosecution or having the effect of one's efforts nullified at the last minute -- conforms to decades of good law and controlling precedent from this Circuit and the Supreme Court. *See, e.g., ACLU v. Heller*, 378 F.3d 979, 984 (9th Cir. 2004) (holding

that plaintiff had standing when an individual member alleged he desired to produce and distribute flyers regarding a specific ballot initiative); *Getman*, 328 F.3d at 1093 (holding that plaintiff had standing when a plaintiff group showed, among other things, that it had merely planned to spend over $1000 to defeat a specific California proposition in the November 2000 election); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (holding that plaintiff had standing to challenge law "despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution"); *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (holding that plaintiff had standing because state had not "disavowed any intention" to prosecute, even though no prosecution had taken place previously and no prosecution was directly threatened currently).

> Good public policy long anchors this doctrine.
>
> Finally, when the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing….Accordingly, we have noted that the tendency to find standing absent actual, impending

> enforcement against the plaintiff is stronger "in First Amendment cases, '[f]or free expression-of transcendent value to all society, and not merely to those exercising their rights-might be the loser." Bland, 88 F.3d at 736-37 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965)); accord *Navegar, Inc. v. United States*,103 F.3d 994, 999 (D.C.Cir.1997) ("Federal courts most frequently find preenforcement challenges justiciable when the challenged statutes allegedly 'chill' conduct protected by the First Amendment."). *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 -1156 (9th Cir. 2000)

VIII. CONCLUSION

For the foregoing reasons, the Appellant respectfully requests the Court reverse in its entirety the Appellee's motion to dismiss granted by the district court and refer this case back to the district court so that it may be heard on its merits.

Dated this 22nd day of May, 2013.

s/ Robert E. Barnes

Robert E. Barnes

Counsel for Appellant

Robert Raymond

STATEMENT OF RELATED CASES

PUTSUANT TO NINTH CIRCUIT RULE 28-2.6

Appellant Robert Raymond is unaware of any pending related cases before this Court as defined in Ninth Circuit Rule 28-2.6.

Dated: May 22, 2013

Respectfully submitted,

s/ Robert E. Barnes

Robert E. Barnes

Counsel for Appellant

Robert Raymond

9th Circuit Case Number(s) 13-35090

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