No. 11-50061

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TAN DUC NGUYEN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF BAIL / DETENTION STATUS

Defendant Tan Duc Nguyen was sentenced on February 14, 2011, to 12 months' and 1 day's imprisonment. Pursuant to Circuit Rule 28-2.4, I state that, according to the Federal Bureau of Prisons inmate locator database, defendant Tan Duc Nguyen is currently confined and has an actual or projected release date of February 9, 2012.

s/ Erin H. Flynn
ERIN H. FLYNN
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JURISDICTIONAL STATEMENT

This is an appeal from a district court's final judgment in a criminal case. The court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment on February 14, 2011, and defendant filed a timely appeal on February 18, 2011. E.R. 115.[1] This Court has jurisdiction under 28 U.S.C. 1291.

[1] Citations to "E.R. ___" refer to pages in appellant Tan Duc Nguyen's Excerpts of Record filed with Nguyen's opening brief. Citations to "S.E.R. ___" refer to pages in appellee's Supplemental Excerpts of Record filed with this brief.

STATEMENT OF THE ISSUE

Whether the district court erred in denying defendant's motion to suppress items seized pursuant to an authorized search of defendant's campaign headquarters and home, where probable cause existed to believe a search of these locations would result in evidence of a violation of California election law.

STATEMENT OF THE CASE

In October 2006, state investigators commenced an investigation into defendant Tan Duc Nguyen's role in a possible voter intimidation scheme relating to a Spanish-language letter mailed to registered voters in defendant's congressional district who had Hispanic surnames and were born outside of the United States. While federal investigators received a copy of the letter in October 2006 and continued to monitor the situation in defendant's congressional district, a federal investigation into possible violations of federal election law was not formally opened until October 2007. S.E.R. 131-135. The federal agent assigned to the case reviewed materials and statements obtained during the State's investigation and conducted her own interviews of individuals with information concerning the letter sent out by defendant's campaign. S.E.R. 133-140.

On October 1, 2008, a federal grand jury returned a one-count indictment charging defendant with obstruction of justice, in violation of 18 U.S.C. 1512(b)(3). E.R. 1-2. On June 9, 2010, a federal grand jury returned a superseding

indictment charging defendant with two counts of obstruction of justice, in violation of 18 U.S.C. 1512(b)(3). E.R. 3-7. The superseding indictment charged defendant with (1) attempting to corruptly persuade his office manager, Chi Dinh, to provide false information to state investigators regarding the letter, with the intent to hinder, delay, or prevent the communication of information to a federal agent regarding the possible commission of a federal offense (Count One); and (2) knowingly misleading state investigators (and federal investigators who received the statements) regarding his knowledge of, and participation in, the creation and distribution of the letter (Count Two). E.R. 3-7.

On December 26, 2009, defendant filed a motion to suppress items seized from his home and campaign headquarters pursuant to a search warrant issued by a state court judge. E.R. 8-17. Defendant also sought to suppress evidence seized under two subsequent warrants that authorized state investigators to search computers seized under the initial warrant as well as the e-mail accounts of several individuals, including defendant. E.R. 10.[2] The district court held a suppression hearing and, on January 25, 2010, denied defendant's motion. E.R. 102-109. The

[2] While defendant sought to suppress all items seized under the subsequent warrants, which were based in part on facts presented in the initial warrant, defendant conceded in his motion that he did not have standing to move to suppress evidence seized from third parties under the January 25, 2007 warrant. E.R. 13 n.3.

court found that the state court judge had probable cause to issue the three search warrants for evidence of violations of California election law. E.R. 108-109. The court further found that even if probable cause had been lacking, the evidence was admissible under *United States* v. *Leon*, 486 U.S. 897 (1984), because investigators acted in good-faith reliance on the existence of probable cause when executing the warrants. E.R. 108-109.[3]

After a four-day trial in August 2010, the jury was unable to reach a verdict and the court declared a mistrial. E.R. 126. A second trial commenced on November 30, 2010. E.R. 127. On December 7, 2010, the jury found defendant guilty on Count Two (knowingly misleading state investigators with the intent to hinder, delay, or prevent the communication of information to federal agents), but could not reach a verdict on Count One. S.E.R. 160.

On February 14, 2011, the court sentenced defendant to twelve months' and one day's imprisonment on Count Two of the superseding indictment. E.R. 110. Count One was dismissed on the Government's motion. S.E.R. 162-163. This appeal followed.

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[3] In the same order, the court granted defendant's pending motion for a bill of particulars. E.R. 102-109. After the jury returned the superseding indictment, defendant filed a motion to dismiss that indictment for vindictive prosecution, which the court denied. E.R. 124; S.E.R. 4. Defendant does not challenge that ruling on appeal.

STATEMENT OF FACTS

In fall 2006, defendant Tan Duc Nguyen was a candidate for the United States House of Representatives for the 47th congressional district, in Orange County, California. He ran against incumbent Congresswoman Loretta Sanchez. In September and October 2006, defendant endorsed and facilitated the mass mailing of a Spanish-language letter to nearly 14,000 registered voters in his congressional district who had Hispanic surnames and were born outside of the United States. The letter, as unofficially translated into English, stated as follows:

> This letter is been [sic] sent to you, because you were registered to vote recently. If you are a citizen of the United States, you are kindly asked to participate in the democratic process of voting.
>
> You are also being informed that if you are in this country illegally or if you are [a legal resident/immigrant/green card holder],[4] voting in a federal election is a crime, which may result in incarceration, and you will indeed be deported for voting, when you do not have the right to do so.
>
> Also, you are being informed that the government of the United States is implementing a new computer system, with which to verify the names of all the new registered parties who vote in the coming elections of October and November. Organization[s] who are against immigration, might request information from this new computer system.

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[4] In explaining the adverse consequences of voting illegally, the Spanish version of the letter used the term "emigrado," which was open to multiple interpretations and could be understood by recipients as warning *immigrants* – a group that includes non-citizens as well as naturalized citizens – of possible incarceration and deportation as a result of voting. E.R. 12, 21, 28-29; S.E.R. 50-51; Appellant's Br. 8.

> Unlike Mexico, there is no incentive for voting in this country. There is no voting registration card in the United States. Therefore, it is useless and dangerous to vote, in any election, if you are not a citizen of the United States.
>
> Do not mind any politician that tells you otherwise. Said politicians are only looking after their best interest. They only want to win the elections, with total disregard to what might happen to you.

E.R. 22; S.E.R. 31-32.

As early as August 2006, defendant was concerned with the issue of non-citizen voter participation in that fall's upcoming election. S.E.R. 15. Shortly thereafter, defendant's campaign advisor, Roger Rudman, informed defendant of his plan to send a Spanish-language letter to certain registered voters. S.E.R. 93-95. Rudman enlisted the help of Mark Nguyen – defendant's college roommate, friend, and campaign volunteer – in preparing and mailing the letter. S.E.R. 91-101. In September and October 2006, defendant communicated with Rudman about the content and translation of the letter (S.E.R. 46-48); obtained blank letterhead from Barbara Coe, the CEO and chairperson of the California Coalition for Immigration Reform, that defendant used for the letter (S.E.R. 36-38); provided Mark Nguyen with Barbara Coe's contact information to enable him to obtain a signature for the letter (S.E.R. 96-97); directed his office manager, Chi Dinh, to include an eagle image on the letter (S.E.R. 69-72); and approved the signature and eagle image ultimately used for the letter (S.E.R. 79-80, 86-87). Defendant also purchased political data regarding registered voters in his district who had Hispanic

surnames and were born outside of the United States (S.E.R. 104-114); provided Chi Dinh with, and authorized her to release, the data files containing the list of approximately 14,000 addressees (S.E.R. 80-84, 87); provided Mark Nguyen with the contact information for the mass mailing company used to send the letter (S.E.R. 97); and personally ensured the timely mailing of the letter (S.E.R. 119-120, 126-127).

On October 19, 2006, criminal investigators with the California Department of Justice conducted a voluntary interview of defendant as part of the State's investigation into numerous complaints from Hispanic voters who felt threatened or intimidated by the letter they had received just days earlier. E.R. 23-24; S.E.R. 9-11, 21-22, 28, 34-35. In advance of their interview with defendant, investigators spoke with a number of individuals in an attempt to identify the source of the letter. E.R. 23-24. Investigators contacted Barbara Coe; she denied any knowledge of, and involvement in, the mass mailing. E.R. 23. Investigators also spoke with Christopher West, the owner of the mailing services company that sent the 14,000 letters; he stated that he completed the mailing on behalf of "Mark Lam"[5] and that defendant had called him to expedite the order. E.R. 23-24. Kevin

[5] Defendant does not dispute that the individual referred to as "Mark Lam" is Mark Nguyen. E.R. 25. Thus, we use "Mark Nguyen" when referring to the individual whom Christopher West and Agent Williams initially identified as "Mark Lam."

Callan, an employee of a company that sold political data, also verified that, in September 2006, defendant had purchased a list of newly registered voters who had Hispanic surnames and were born outside of the United States. E.R. 24. Callan told investigators that he provided the information to defendant electronically in mid- to late-September 2006. E.R. 24.

At his interview, defendant told California Special Agent Shannon Williams that campaign volunteers created and disseminated the letter without his knowledge. E.R. 25. He also told Williams that he had done extensive business with the mailing services and political data companies, and that the data files he requested were saved on both his personal and office computers. E.R. 24. He stated that only two additional individuals – Chi Dinh and a friend, Binh Quach – had access to the data files. E.R. 24.

Defendant also provided Agent Williams with a portion of an e-mail chain from September 2006 between him and his campaign advisor, Roger Rudman, regarding the content and translation of an English version of the letter. E.R. 24-25, 28-29. In the e-mail, defendant expressed doubt over including the paragraph about the federal computer system and instead offered a story about a Mexican national who was deported from the United States for voting illegally prior to obtaining his United States citizenship. E.R. 28. Defendant stated that he did not have access to any further e-mails regarding the letter and did not know why

Rudman had e-mailed the English version of the letter to him, though he assumed Rudman had done so in support of the campaign. E.R. 24-25. He stated he heard nothing more about the letter until Christopher West notified him about negative press reports concerning the letter his company had mailed on behalf of Mark Nguyen. E.R. 25. Defendant told Williams that he then called Mark Nguyen, who admitted to defendant that he sent the letter using data files he obtained from Chi Dinh without defendant's permission. E.R. 25. Defendant also stated that while he called Christopher West to expedite Mark Nguyen's mailing, he had no knowledge of the letter's content. E.R. 26.

Immediately following defendant's interview, Agent Williams prepared a warrant application to search defendant's campaign headquarters and home for evidence of a voter intimidation scheme; that night, she presented the warrant application to a state court judge. E.R. 19-20; S.E.R. 39, 58. The affidavit accompanying the warrant application detailed the State's investigation thus far and expressed Agent Williams' skepticism over defendant's "selective and incomplete" memory as well as his denial of any knowledge of, or participation in, the creation and distribution of the letter. E.R. 23-27.

Agent Williams stated that defendant appeared to be involved in a scheme to discourage voter participation by a discrete and vulnerable set of registered voters likely to favor defendant's opponent in the upcoming election. E.R. 26. She

suspected defendant's involvement in the creation and distribution of the letter for two reasons: (1) Mark Nguyen had no independent basis for sending the letter and likely had used the name "Mark Lam" to give cover to the campaign; and (2) defendant's telephone call to expedite the mailing directly served defendant's interest by ensuring that the letter would be received prior to the absentee voting period, thereby reaching the greatest number of potential voters who could be expected to favor defendant's opponent. E.R. 26. Agent Williams stated that she had been advised by the State Attorney General's Office that the sending of the letter could violate three provisions of the California Elections Code: Section 18540 (voter intimidation); Section 18502 (voter interference); and Section 18543 (challenging right to vote without probable cause). E.R. 23. The state judge issued the warrant. E.R. 19-20.

On October 20, 2006, state agents executed the search warrant at defendant's campaign headquarters and home. E.R. 33-34; S.E.R. 39. On October 25, 2006, Agent Williams applied for and received a warrant to search computers seized during the initial search. E.R. 30-36. On January 25, 2007, after further witness interviews and a review of the seized items, Agent Williams sought authorization to search certain e-mail accounts used in the creation and distribution of the letter for evidence related to the planning and execution of a voter intimidation scheme. E.R. 40-52.

SUMMARY OF THE ARGUMENT

The district court properly denied the motion to suppress items seized from defendant's campaign headquarters and home.

Defendant's targeted mailing of a Spanish-language letter to registered voters with Hispanic surnames who were born outside of the United States reasonably could be viewed as an attempt to intimidate and interfere with certain registered voters to keep them from participating in the 2006 federal election. The letter could be interpreted as misinforming naturalized citizens that their immigrant status could subject them to incarceration and deportation as a result of voting. The letter also warned registered voters that anti-immigration organizations might request information about them through a federal database being implemented to verify the names of all registered voters who participated in that fall's election. Finally, the letter stated that there was no benefit to voting in the United States.

Defendant also provided Agent Williams with conflicting accounts regarding the source of the letter and the rationale behind its mailing. He failed to explain why Roger Rudman and Mark Nguyen would act unilaterally to send the letter without his knowledge or authorization. He likewise offered no explanation for his piecemeal involvement in reviewing an English version of the letter and later ensuring the timely mailing of the Spanish-language letter. Given the content and tone of the letter, the fact that it was mailed surreptitiously to foreign-born

registered voters with Hispanic surnames, and defendant's incomplete and seemingly evasive answers to investigators during his interview, there was a substantial basis for the state court judge to find probable cause that defendant had violated state election law and that evidence of a voter intimidation scheme would be found at his campaign headquarters and home.

Even if this Court were to conclude that probable cause was lacking, investigators reasonably relied on the issuing judge's probable cause determination in executing the initial and subsequent search warrants. In addition, the warrant was not so lacking in indicia of probable cause that no well-trained officer could rely upon it. Thus, the district court properly applied the good faith exception to the exclusionary rule.

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS ITEMS SEIZED FROM DEFENDANT'S CAMPAIGN HEADQUARTERS AND HOME

A. Standard Of Review

This Court reviews *de novo* the denial of a motion to suppress evidence and the application of the exclusionary rule. See *United States* v. *Krupa*, 633 F.3d 1148, 1151 (9th Cir. 2011); *United States* v. *Crews*, 502 F.3d 1130, 1135 (9th Cir. 2007). The factual findings underlying the district court's determination that probable cause existed and that investigators acted in good faith in relying upon a warrant are reviewed only for clear error, however, and are provided great deference. See *Krupa*, 633 F.3d at 1151.

B. The District Court Properly Concluded That The Agent's Affidavit Established Probable Cause To Search For Evidence Of A Violation Of California Election Law

1. The Fourth Amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. "For probable cause, an affidavit must establish a reasonable nexus between the crime or evidence and the location to be searched." *Crews*, 502 F.3d at 1136-1137. "Probable cause means only a 'fair probability,' not certainty." *United States* v. *Hill*, 459 F.3d 966, 970 (9th Cir.

2006) (quoting *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983)), cert. denied, 549 U.S. 1299 (2007). "Whether there is a fair probability depends upon the totality of the circumstances, including reasonable inferences, and is a commonsense, practical question, for which neither certainty nor a preponderance of the evidence is required." *Krupa*, 633 F.3d at 1151 (internal quotation marks and citations omitted). Accordingly, the task of a reviewing court is simply to ensure that the "totality of the circumstances" afforded the issuing judge "a substantial basis" for making the requisite probable cause determination. *Gates*, 462 U.S. at 238-239; see also *Krupa*, 633 F.3d at 1151; *United States* v. *Clark*, 31 F.3d 831, 834 (9th Cir. 1994), cert. denied, 513 U.S. 1119 (1995).

2. On appeal, defendant primarily argues that the October 19, 2006 search warrant lacked probable cause because the letter was lawful and there was thus no basis to believe he had engaged in criminal activity. The district court properly determined, however, that the issuing judge could have reasonably concluded that there was probable cause to issue a search warrant for evidence of state election law violations. The detailed affidavit included with the warrant application supported a conclusion that defendant had attempted to fraudulently mislead or intimidate foreign-born registered voters with Hispanic surnames and that relevant evidence of a voter intimidation scheme would be located at defendant's campaign headquarters and home.

Section 18543 of the California Elections Code prohibits "challeng[ing] a person's right to vote without probable cause or on fraudulent or spurious grounds," "engag[ing] in mass, indiscriminate, and groundless challenging of voters solely for the purpose of preventing voters from voting or to delay the process of voting," and "*fraudulently advis[ing] any person that he or she is not eligible to vote * * * when in fact that person is eligible*." Cal. Elec. Code 18543(a) (emphasis added). A person who conspires to violate Section 18543 is guilty of a felony offense. See Cal. Elec. Code 18543(b).

In her affidavit, Agent Williams detailed defendant's involvement in what she reasonably believed was an attempt to dissuade a particular subset of voters – foreign-born registered voters with Hispanic surnames who had registered as Democrats or had declined to state a party affiliation – from participating in that fall's election. E.R. 23-29. Upon receipt of the letter, numerous citizens and community organizations contacted the California Attorney General's Office and the Orange County Registrar of Voters regarding the letter. E.R. 23; S.E.R. 9-10. While all of the individuals who received the letter were registered voters and thus had attested to their United States citizenship,[6] the letter advised these presumably

[6] California registers voters using the Federal Form developed under the National Voter Registration Act (NVRA), 42 U.S.C. 1973gg *et seq.* See California Sec'y of State, Voter Registration Information, available at http://www.sos.ca.gov/elections/elections_vr.htm; California Sec'y of State,

(continued . . .)

Spanish-speaking individuals that based on their immigrant status, they might be subject to incarceration or deportation as a result of voting. Naturalized citizens, of course, may fully participate in the electoral process. Based on the letter's content as well as evidence that showed defendant was working in some capacity with Roger Rudman and Mark Nguyen to draft and distribute the letter, there was a substantial basis for the issuing judge to conclude that a search of defendant's campaign headquarters and home would yield evidence of a violation of Section 18543.

In addition, Section 18540 of the California Elections Code prohibits "mak[ing] use of or threaten[ing] to make use of any force, violence, or tactic of coercion or intimidation, to induce or compel any other person to vote or refrain from voting at any election." Cal. Elec. Code 18540(a). It likewise prohibits an individual from hiring or arranging for another person to engage in voter intimidation tactics. See Cal. Elec. Code 18540(b). A voter intimidation tactic need not be overt for it to violate Section 18540. See *Hardeman* v. *Thomas*, 208

(. . . continued)
National Voter Registration Card, available at https://www.sos.ca.gov/nvrc/fedform. An applicant who completes the Federal Form must swear under penalty of perjury that he or she is a United States citizen who meets the eligibility requirements of his or her State. Because they had successfully registered to vote, the recipients of defendant's letter were presumably United States citizens. Thus, implicit in their receipt of defendant's letter was the accusation that they were not naturalized citizens or had registered to vote illegally.

Cal. App. 3d 153, 170 (1989) (discussing voter intimidation under Section 29630, the predecessor to Section 18540, and stating that "subtle manipulation and suggestion can be a forceful and effective form of influence on our actions").

Here, defendant and his colleagues targeted a particular subgroup of registered voters for receipt of a Spanish-language letter from the "California Coalition for Immigration Reform," an organization seemingly unconnected to defendant's campaign. E.R. 23-26. Despite defendant's concern over the accuracy of certain statements in the letter (E.R. 28), the letter warned recipients that anti-immigration organizations might request information from a newly implemented federal database that would be used to verify the names of registered voters who participated in that fall's election. E.R. 22. The letter implied that by voting in that fall's election, the recipient's identifying information might become available to anti-immigration organizations for any number of purposes. Immediately following this warning was the statement that there was no incentive or benefit to voting in the United States. E.R. 22. The letter therefore sent a clear message that by not participating in the upcoming election, the recipient could avoid the risk of incarceration, deportation, and anti-immigrant harassment, all without incurring any tangible loss.

In her affidavit, Agent Williams highlighted the targeted nature of Roger Rudman, Mark Nguyen, and defendant's conduct as well as defendant's strong

interest in intimidating potential voters who could be expected to favor his opponent. E.R. 26. Based on the targeted nature of defendant's conduct, the content and tone of the letter, the reaction of voters who received the letter, and the initial results of Agent Williams' investigation as set forth in her affidavit, the issuing judge had probable cause to believe a search of defendant's campaign headquarters and home would reveal evidence of a voter intimidation scheme.

C. The District Court Properly Concluded That Even If Probable Cause Were Lacking, Suppression Was Not Warranted Under The Exclusionary Rule

1. Even assuming *arguendo* that probable cause was lacking, a violation of the Fourth Amendment does not necessarily result in suppression of the items seized. The Supreme Court has repeatedly rejected the exclusion of evidence as an automatic remedy; rather, it has emphasized that exclusion should be the "last resort, not [the] first impulse" in dealing with a Fourth Amendment violation. *Herring* v. *United States*, 555 U.S. 135, 140 (2009) (quoting *Hudson* v. *Michigan*, 547 U.S. 586, 591 (2006)); see also *Arizona* v. *Evans*, 514 U.S. 1, 10-11 (1995); *United States* v. *Leon*, 468 U.S. 897, 906-908 (1984); *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983). "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Davis* v. *United States*, 131 S. Ct. 2419, 2427 (2011). Accordingly, a defendant seeking the exclusion of evidence for a Fourth Amendment violation faces "a high obstacle" since suppression places

a "costly toll upon truth-seeking and law enforcement objectives." *Herring*, 555 U.S. at 141 (internal quotation marks omitted).

The Supreme Court has stated that application of the exclusionary rule is appropriate only when the challenged police conduct is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, 555 U.S. at 144. "The pertinent analysis of deterrence and culpability is objective," and the "'good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" *Herring*, 555 U.S. at 145 (quoting *Leon*, 468 U.S. at 922 n.23). Where a warrant is issued based on detailed factual allegations in support of probable cause, investigators will almost always have reasonably relied on the warrant. As the Supreme Court stated in *Leon*, "[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause * * * * In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination." 468 U.S. at 921; see also *Illinois* v. *Krull*, 480 U.S. 340, 348-349 (1987); *Davis*, 131 S. Ct. at 2428 ("[P]unishing the errors of judges is not the office of the exclusionary rule." (internal quotation marks and brackets omitted)).

2. Accordingly, even if this Court were to determine that the search warrants in this case were not supported by probable cause, the exclusionary rule should not apply for two reasons: (1) Agent Williams neither misled the issuing judge nor recklessly disregarded the truth in her affidavit; and (2) the affidavit was not so lacking in indicia of probable cause that no reasonable officer could rely upon it in good faith.

Here, defendant has not argued that the warrant application contained false or misleading information; rather, he argues only that the results of Agent Williams' investigation did not suggest any unlawful activity on his part and that, in any event, any reasonable officer would have recognized the letter as protected political speech under the First Amendment. See Appellant's Br. 7-11; E.R. 12-16. Defendant does not dispute that, in preparing the warrant application, Agent Williams verified the potential illegality of defendant's conduct with the State Attorney General's Office and accurately set forth the relevant facts in an affidavit supporting the issuance of a particularized warrant. In executing the warrant, Agent Williams and her colleagues relied on the issuing judge's probable cause determination. Under such circumstances, the exclusionary rule serves little, if any, deterrent value and the district court properly denied defendant's motion.

Defendant mistakenly argues that the warrant was so clearly lacking in probable cause that no well-trained officer could have thought a warrant should

issue. As an initial matter, defendant argues that the letter sent the "clear and indisputable message that U.S. citizens, of any * * * type, are welcomed and encouraged to vote," and that "non-citizens in this country of any stripe cannot vote." Appellant's Br. 8-9; E.R. 13. The district court, however, flatly rejected this oversimplified characterization of the letter. E.R. 108.

Defendant also argues that the letter contained protected political speech that precluded a finding of probable cause that he was engaged in unlawful activity. See Appellant's Br. 7-11. The United States agrees with defendant that the First Amendment's protections – made applicable to the States through the Fourteenth Amendment – are broad and extend to political speech. Yet these protections are not absolute, and even protected speech must yield to compelling state interests. See *Virginia* v. *Black*, 538 U.S. 343, 358 (2003); *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 336 n.1, 346-347 (1995); *Daily Herald Co.* v. *Munro*, 838 F.2d 380, 384 (9th Cir. 1988) (citing *Brown* v. *Hartlage*, 456 U.S. 45, 52-53 (1982)). As such, States may prohibit the use of intimidating or fraudulent messages intended to cause citizens to refrain from voting. Cf. *Black*, 538 U.S. at 361-363; *McIntyre*, 514 U.S. at 349 ("The state interest in preventing fraud and libel * * * carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large."); *Burson* v. *Freeman*, 504 U.S. 191, 199 (1992) (plurality) (recognizing state

interests in protecting voters from confusion and undue influence, preserving electoral integrity, and ensuring the right to vote is not undermined by fraud); *Planned Parenthood of Columbia/Willamette, Inc.* v. *American Coal. of Life Activists*, 290 F.3d 1058, 1067-1080 (9th Cir.) (considering context when determining whether speech is threatening and intimidatory or protected, political expression), cert. denied, 539 U.S. 958 (2002); *Daily Herald Co.*, 838 F.2d at 385 (noting the State's interest in preserving the integrity of the electoral process).

As the above discussion makes clear, interfering with an individual's exercise of his or her voting rights, fraudulently advising an eligible voter that he or she is ineligible to vote, and using, or encouraging another to use, voter intimidation tactics to induce an individual to refrain from voting are all criminal offenses under California law. See Cal. Elec. Code 18502; Cal. Elec. Code 18540; Cal. Elec. Code 18543. In proceeding with her investigation into multiple complaints of possible voter intimidation and voter interference, Agent Williams sought to enforce these valid criminal provisions and acted in accordance with, and not in contravention of, governing law.

For the reasons set forth above, the district court properly applied the good faith exception to the exclusionary rule and correctly denied defendant's motion.

CONCLUSION

The district court's denial of defendant's motion to suppress items seized from his campaign headquarters and home should be affirmed. The conviction should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I certify that I am unaware of any related cases pending in this Court.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing Brief For The United States As Appellee complies with the type volume limitation because it contains 4966 words of proportionally spaced text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). The foregoing brief was prepared using Microsoft Word 2007 in Times New Roman, 14-point font.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2011, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the Appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney