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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

BEN EILENBERG, Plaintiff, v. CITY OF COLTON, Defendant.	No. SA CV 20-00767-FMO (DFM) Report and Recommendation of United States Magistrate Judge

This Report and Recommendation is submitted to the Honorable Fernando M. Olguin, United States District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. INTRODUCTION

On April 20, 2020, Ben Eilenberg ("Plaintiff") filed a pro se civil rights complaint in this court. See Dkt. 1 ("Complaint").[1] On April 29, Plaintiff applied ex parte for a temporary restraining order. See Dkt. 10. The Court denied that application. See Dkt. 16 ("Order Denying TRO"). On June 4,

[1] As Judge Olguin previously noted, see Dkt. 16 at 2 n.2, Plaintiff is an attorney who is currently suspended from the practice of law in California. Since Judge Olguin's order, Plaintiff also has been suspended from the practice of law in this Court. See In re Eilenberg, Case No. 2:20-ad-00480-VAP, Dkt. 2.

Plaintiff filed the operative first amended complaint. See Dkt. 18 ("FAC"). Plaintiff now seeks a preliminary injunction. See Dkt. 19 ("PI Motion"). Plaintiff seeks an order that either (1) prohibits the City of Colton ("City" or "the City") from preventing signature gatherers from operating within city limits and tolls the time for gathering signatures, (2) places the ballot initiative on the next general election ballot, or (3) any other relief the Court deems proper. See id. The State of California ("California" or "the State") filed an opposition and two supporting declarations. See Dkts. 20 ("State Opp'n"), 20-1 ("Quirarte Decl."), 20-2 ("Boutin Decl."). The City also filed an opposition and a supporting declaration. See Dkts. 21 ("City Opp'n"), 21-1("Richards Decl.").[2] Plaintiff filed a reply. See Dkt. 31 ("Reply").

II. FACTUAL BACKGROUND

The following facts are taken from the FAC and exhibits attached thereto as well as the briefing and evidence submitted concerning the PI Motion.

A. California's Ballot Initiative Scheme

The California Constitution enshrines the right to bring ballot initiatives and referenda to adopt or change laws. See Cal. Const. art. II, § 8(a). The California Elections Code governs the process of bringing these initiatives. First, the proponent of the initiative files a draft of the proposed ballot measure and a notice of intent with the City Clerk. See Cal. Elec. Code § 9202. The City attorney then provides a title and summary for the measure within 15

[2] Both parties ask the Court to take judicial notice of certain extrinsic materials, including state court records, state and county orders, a list of essential workers made by the California Public Health Officer, and documents prepared by public health agencies. Federal Rule of Evidence 201 permits this Court to take judicial notice of matters of public record, including state court records. See United States v. 14.02 Acres of Land, 547 F.3d 943, 955 (9th Cir. 2008). These requests are accordingly GRANTED.

days of the filing of the notice of intent. See id. § 9203. The proponent must provide public notice of the initiative and file proof of publication with the city. See id. §§ 9205, 9206. The proponent may then prepare and circulate the petition. See id. § 9207. The proponent must file the petition and the required number of signatures with the city within 180 days of receipt of the title and summary. See id. § 9208. For a city with a population over 1,000, the proponent must get the signatures of at least 10 percent of the voters of the city. See id. § 9215. After receiving the petition and signatures, the city has 60 days (excluding Saturdays, Sundays, and holidays) to verify the signatures. See id. §§ 9115, 9211. If the petition has a sufficient number of signatures, the city's legislative body may (1) adopt the petition as an ordinance, (2) submit the ordinance to the voters, or (3) order a report under Cal. Elec. Code § 9212. See id. § 9215. This report considers a number of factors including the petition's fiscal impact and its impact on the city's ability to attract and retain business and employment. See id. § 9212(a). The report must be filed within 30 days after the elections official certifies the petition is sufficient. See id. § 9212(b). After receiving the report, the legislative body may then adopt the petition as an ordinance or submit it to the voters. See id. § 9215. If the city's legislative body decides to submit the petition to the voters, the initiative is put on the ballot at "the jurisdiction's next regular election occurring not less than 88 days after the date of the order of election." Id. § 1405.

B. Plaintiff's Proposed Ballot Initiative

Ramona Padilla serves as the proponent of the Colton Food Truck Economic Development Act of 2020, a proposed ballot initiative in the City. See FAC, Ex. A. Plaintiff is an authorized agent for Padilla. See id. at 22.

On November 7, 2019, Plaintiff submitted the proposed initiative for title and summary to the City, as required by California law. See FAC ¶ 16. On November 21, 2019, the City provided a title and summary for the proposed

initiative. See id. ¶ 17. This began a 180-day window to collect signatures. See id. ¶ 18; see also Cal. Elec. Code § 9208. Plaintiff published the initiative in local newspapers and hired a signature gathering firm. See id. ¶¶ 19-20.

C. California's and Colton's Response to COVID-19

On March 4, 2020, due to the COVID-19 pandemic, California Governor Gavin Newsom proclaimed a state of emergency. See Richards Decl. ¶ 2, Ex. 1. On March 19, Governor Newsom issued Executive Order N-33-20, which ordered all people living in California, except for those needed to maintain critical infrastructure sectors, to stay at home. See id. ¶ 3, Ex. 2.

On March 23, 2020, Plaintiff asked the City if his signature gatherers could continue gathering signatures or, alternatively, if the City would add his initiative to the City's general election ballot. See FAC ¶ 22, Ex. C. The City declined to place the initiative on the ballot. See id. ¶ 23, Ex. D. Plaintiff then asked the City to provide written confirmation that signature gatherers are "essential workers" who can continue to work under Executive Order N-33-20. See id. ¶ 24, Ex. E. The City replied that signature gatherers were not essential workers and that they did not have discretion to vary from the order. See id. ¶ 25, Ex. F. The City ordered Plaintiff and other initiative proponents to refrain from circulating their petitions. See id.

III. LEGAL STANDARD

A preliminary injunction is an extraordinary remedy "that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008). Whether to grant or deny a preliminary injunction is a matter within the court's discretion. See id. at 32.

To obtain a preliminary injunction, the moving party must establish that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor;

and (4) that an injunction is in the public interest. See id. at 20. Alternatively, "'serious questions going to the merits' and a hardship balance that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

Preliminary injunctions can take two forms. A prohibitory injunction prohibits a party from taking action and preserves the status quo. A mandatory injunction orders a responsible party to take action. Mandatory injunctions are "particularly disfavored" and, in general, "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009) (internal citations and quotation marks omitted).

IV. DISCUSSION

A. Plaintiff Lacks Standing

"To satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc., 528 U.S. 167, 180-81 (2000) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). The party invoking federal jurisdiction bears the burden of establishing these elements. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990).

In his order denying the Temporary Restraining Order, Judge Olguin noted "serious concerns" about whether Plaintiff has constitutional standing to

bring the claims asserted in the initial complaint. Order Denying TRO at 5. Although Plaintiff has since amended his complaint, neither the FAC nor Plaintiff's PI Motion persuasively addresses the Court's concerns about standing. The only part of the FAC that arguably addresses the concerns about a lack of particularized injury is the additional harm of "[l]oss of the constitutional right to have the initiative placed on the 2020 ballot." FAC ¶ 34. But as Judge Olguin noted, Plaintiff is not the proponent of the ballot initiative. Any harm to the constitutional right to have the initiative placed on the ballot is the proponent's injury, not Plaintiff's. See Pagan v. Calderon, 448 F.3d 16, 30 (5th Cir. 2006) ("[T]he agent must allege an injury that does not derive from the injury to the principal.").

As for any economic harm, Plaintiff also has not demonstrated that his injury is either fairly traceable to the conduct of Defendants or likely to be redressed by a favorable judicial decision. It is also entirely speculative. As Judge Olguin noted when he denied Plaintiff's application for a temporary restraining order, Plaintiff has provided no information on the number of signatures gathered before the Governor's stay-at-home order or any other information indicating that, absent the order, he would have been able to gather sufficient signatures. Indeed, the only detail Plaintiff provides on his efforts to gather signatures before the stay-at-home order is that "[a]fter the publication, Plaintiff hired a signature gathering firm and began gathering signatures." FAC ¶ 20. In a supplemental declaration that accompanied his reply, Plaintiff provides slightly more detail, indicating he interviewed several signature gathering firms, hired a firm on February 6, 2020, and personally worked to gather signatures as well. See Reply at 9-10.[3]

[3] To receive this information with Plaintiff's reply is frustrating and most likely improper. Although Local Rule 7-10 allows the submission of new evidence with a reply, the evidence should not be materials that should have

In his reply, Plaintiff also argues that he has standing to bring suit as an agent under Federal Rule of Civil Procedure 17. See Reply at 3-5. Rule 17 does not create constitutional standing. See Davis v. Yageo Corp., 481 F.3d 661, 678 (9th Cir. 2007) ("Rule 17(a) does not give [a party] standing; 'real party in interest' is very different from standing.") (citation omitted). As the case Plaintiff cited notes, "[t]he real party in interest is the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." Farrell Const. Co. v. Jefferson Parish, 896 F.2d 136, 140 (5th Cir. 1990). And, "a party not possessing a right under substantive law is not the real party in interest with respect to that right and may not assert it." Id. It is the proponent of the ballot initiative whose constitutional rights would be enforced by a favorable decision. Plaintiff's agency relationship does not give him standing.

Plaintiff has not adequately addressed Judge Olguin's concerns about his lack of standing. Accordingly, his motion for a preliminary injunction should be denied on this ground alone. Nevertheless, the Court will consider whether a preliminary injunction would be warranted under the Winter factors.

B. Plaintiff Has Not Established He Is Entitled to a Preliminary Injunction

1. Plaintiff Is Unlikely to Succeed on the Merits of His Claims

The parties dispute what legal framework should apply to Plaintiff's claims. Plaintiff argues that the Court should apply the so-called Anderson-

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been submitted with the moving papers. See United States ex rel. Giles v. Sardie, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) ("It is improper for a moving party to introduce new facts . . . in the reply brief than those presented in the moving papers."). Moreover, as noted above, the Court's concern about Plaintiff's lack of diligence is not new; Judge Olguin noted the absence of any evidence when he denied Plaintiff's TRO application. See Order Denying TRO at 9.

Burdick test, under which strict scrutiny would be applicable. See PI Motion at 11-14. But like other district courts evaluating the effects of COVID-19 restrictions on ballot initiative proponents, the Court concludes that it should apply the more flexible framework set forth by the Ninth Circuit in Angle v. Miller, 673 F.3d 1122 (9th Cir. 2012). See Fair Maps Nevada v. Cegavske, No. 20-00271, 2020 WL 2798018 (D. Nev. May 29, 2020) (applying Angle); Arizonans for Fair Elections v. Hobbs, No. 20-00658, 2020 WL 1905747 (D. Ariz. Apr. 17, 2020) (same).

In Angle, the Ninth Circuit held that election regulations imposing "severe burdens" on a plaintiff's rights must be "narrowly tailored and advance a compelling state interest" while "lesser burdens" can usually be justified by a state's important regulatory interest. 673 F.3d at 1132 (citations omitted). A restriction on the ballot initiative process can create a "severe burden" when it "restrict[s] one-on-one communication between petition circulators and voters" or "make[s] it less likely proponents will be able to garner the signatures necessary to place an initiative on the ballot." Id. Ballot access restrictions place a "severe burden on core political speech, and trigger strict scrutiny," when they "significantly inhibit" the ability of "reasonably diligent" initiative proponents to place initiates on the ballot. Id. at 1133.

As the Court touched on above, Plaintiff's showing of reasonable diligence is woefully inadequate and ultimately fatal to his efforts to establish a severe burden. As Judge Olguin noted when he refused to grant a temporary restraining order, Plaintiff has provided no information about how many signatures were gathered before the Governor's stay-at-home order.[4] The only

[4] Although Plaintiff notes he has collected "a number of signatures" in his supplemental declaration, see Dkt. 31 at 10, he does not tell the Court how many signatures he has collected.

information Plaintiff provides is the bare fact that he hired a signature gathering firm. In his reply, Plaintiff acknowledges that he did not hire the signature gathering firm until February 6, 2020, after approximately 40% of the signature gathering period had passed. See Reply at 9. The Governor's stay-at-home order prevented signature gathering during approximately 35% of the signature gathering period.[5] Plaintiff has not provided any evidence that suggests that a reasonably diligent proponent could not have gathered the necessary signatures during the other 65%, i.e., the period between November 21, 2019, and the Governor's stay-at-home order on March 19, 2020. Indeed, Plaintiff notes that the signature gathering firm he hired had "finished its work on other initiatives" by the time of the stay-at-home order, see id. at 10, suggesting a reasonably diligent Plaintiff, such as one that hired a firm during the first two-plus months of the 180-day period, would have already gathered the necessary signatures.

The Court's conclusion is buttressed by the conclusion reached by the district court in Arizonans for Fair Elections. There, the district court found that Arizona's stay-at-home order did not create a severe burden when the plaintiff did not use a substantial portion of the time available to gather signatures, expressly noting that "had Plaintiffs simply started gathering signatures earlier, they could have gathered more than enough to qualify for

[5] The State argues that Plaintiff has been able to gather signatures since May 1, relying on guidance that stated that "election-related activities" were "permissible activities." State Opp'n at 21 (quoting Quirarte Decl. ¶ 5). But the Court disagrees that a member of the public would have interpreted the May 1 guidance to allow signature-gathering, especially as the City had previously forbidden Plaintiff from gathering signatures and did not inform him he could begin doing so on May 1. Accordingly, the Court treats Plaintiff as restricted from gathering signatures until May 19, when the signature-gathering period expired.

the ballot before the COVID-19 pandemic started interfering with their efforts." 2020 WL 1905747, at *11. As the court reasoned,

> [Plaintiffs] are hardly the only members of our community who failed to anticipate and plan for a once-in-a-century pandemic. But the relief they are seeking in this case is profound—the displacement of a bedrock component of Arizona law. Such laws should not be wantonly overturned, and that is why courts (including the Ninth Circuit) require parties raising constitutional challenges to state ballot access laws to show not only that they have been thwarted by the law, but that a reasonably diligent party would have been thwarted, too.

Id.

The Court agrees with this reasoning. A reasonably diligent party would be able to make a showing that at least a substantial portion of the necessary signatures were collected before the Governor's stay-at-home order. While the circumstances of COVID-19 are unusual, it is not unforeseeable that waiting until the last two months of a six-month period could lead to unexpected issues. When a party procrastinates as Plaintiff did, it should not expect the Court to bail out its lack of diligence by setting aside the state's election requirements.

Plaintiff relies on two out-of-circuit decisions—Esshaki v. Whitmer, 2020 WL 1910154 (E.D. Mich. Apr. 20, 2020), aff'd in part and rev'd in part, Esshaki v. Whitmer, 2020 WL 2185553 (6th Cir. May 5, 2020) and Thompson v. DeWine, 2020 WL 2557064 (S.D. Ohio May 19, 2020), motion for stay pending appeal granted, Thompson v. Dewine, 959 F.3d 804 (6th Cir. 2020)—to argue that strict scrutiny should be applied. But the Ninth Circuit's precedent establishes that unless the restriction restricts one-on-one communication, a plaintiff must show reasonable diligence to demonstrate a

severe burden. See Angle, 673 F.3d at 1132-34. As noted above, Plaintiff has failed to do so.

Given Plaintiff's failure to demonstrate a severe burden, Defendants need only to provide an important regulatory interest to justify the restrictions. See Angle, 673 F.3d at 1132. Protecting public health during a once-in-a-century pandemic clearly qualifies. See S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (noting that the federal Constitution entrusts the safety and health of the people to politically accountable state officials (citing Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905))); see also Order Denying TRO at 7 (citing Jacobson for the proposition that "judicial review of state action is limited" during a public-health crisis). Accordingly, Plaintiff is unlikely to succeed on the merits of his First Amendment claim.

Finally, for his claim against the State, Plaintiff is unlikely to succeed on the merits because the State has sovereign immunity. The Eleventh Amendment also bars federal jurisdiction over suits against the state or a state agency unless the state or agency consents to the suit. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55 (1996); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100 (1984). While California has waived its sovereign immunity so that it may be sued in its own courts under the California Tort Claims Act, such a waiver does not constitute a waiver of its Eleventh Amendment immunity in the federal courts. See BV Eng'g v. Univ. of Cal., L.A., 858 F.2d 1394, 1396 (9th Cir. 1988); see also Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985) (holding that Art. III, § 5 of the California Constitution did not constitute a waiver of California's Eleventh Amendment immunity). Further, Congress has not abrogated California's sovereign immunity against suits under 42 U.S.C. § 1983. Peltier-Ochoa v. Miele, No. 12-0663, 2012 WL 4107924, at *1 (C.D. Cal. Aug. 28, 2012).

Although an exception allows suits against state officers in their official capacities for prospective declaratory or injunctive relief for their alleged violations of federal law, see Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128, 1133-34 (9th Cir. 2012), Plaintiff named the State rather than any officer in their official capacity.[6] Accordingly, the State is immune to suit, and the Court is without jurisdiction to issue a preliminary injunction against the State.

C. Irreparable Injury

Apart from his failure to show a likelihood of success on the merits, Plaintiff has not demonstrated irreparable injury. As discussed above, Plaintiff's alleged injuries are entirely speculative as he has not made any showing that the initiative would have gathered the requisite number of signatures but for the Governor's stay-at-home order. See Caribbean Marine Services Co. v. Baldridge, 844 F.2d 668, 674 (9th Cir. 1988) ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction."). Finally, any showing of irreparable injury is hampered by Plaintiff's own delay, as he waited nearly a month after the City told him that he could not gather signatures to initiate this action. See Oakland Tribune, Inc. v. Chronicle Publishing Co., 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."). Accordingly, he has not shown irreparable injury.

[6] Although Plaintiff states in his reply that he is willing to substitute the Secretary of State of California for the State. See Reply at 5 n.2, no such motion is before the Court. Accordingly, the Court does not consider whether the Secretary would be an appropriate Defendant.

D. Balance of Equities and Public Interest

"When the government is a party, these last two factors [balancing the equities and the public interest] merge." Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1099 (9th Cir. 2014). As Judge Olguin previously concluded, see Order Denying TRO at 9-10, both the balance of hardships and the public interest weigh against granting the preliminary injunction. Nothing in the FAC or PI Motion addresses Judge Olguin's conclusions and so the Court adopts that reasoning. Tellingly, the relief sought would upend the state's interest in ensuring the integrity of its election process through a signature requirement. As another district court recently noted in rejecting a similar request for provisional injunctive relief, "[t]he public has a strong interest in the continued adherence to such requirements, even during challenging times." Arizonans for Fair Elections, 2020 WL 1905747, at *16.

V. CONCLUSION

Plaintiff seeks the disfavored remedy of a mandatory injunction. He has not persuasively addressed the Court's concerns about standing and has not shown a likelihood of success on the merits.

Accordingly, IT IS RECOMMENDED that Plaintiff's Application for a Preliminary Injunction be DENIED. Under 28 U.S.C. § 636(b)(1), Plaintiff may file and serve any written objections within fourteen days of service of this Report and Recommendation.

Date: July 9, 2020

DOUGLAS F. McCORMICK
United States Magistrate Judge