UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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INDEPENDENT PARTY and WILLIAM LUSSENHEIDE,

Plaintiffs,

v.

ALEJANDRO "ALEX" PADILLA, in his official capacity as Secretary of State of California,

Defendant.

CIV. NO. 2:16-00316 WBS CKD

MEMORANDUM AND ORDER RE: MOTIONS FOR PRELIMINARY INJUNCTION AND JUDGMENT ON THE PLEADINGS

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This suit was initiated by plaintiff Independent Party, a political group headquartered in California seeking official party qualification for the upcoming 2016 presidential general election, and plaintiff William Lussenheide, a California resident who wishes to express his support for the Independent Party, against defendant Secretary of State Alejandro Padilla.[1]

[1] The court questions whether the Independent Party is a

Presently before the court are plaintiffs' motion for preliminary injunction pursuant to Federal Rule of Civil Procedure 65, (Docket No. 6), and defendant's motion for judgment on the pleadings pursuant to Rule 12(c), (Docket No. 9).

I. Factual and Procedural Background

On February 24, 2015, Charles Deemer, the state chairman of the Independent Party, filed an official notice of intent to qualify the Independent Party as a political body in California with the Secretary of State pursuant to California Election Code section 5001. (Compl. at 4 (Docket No. 1); Deemer Decl. ¶ 5 (Docket No. 6-2).) On March 26, 2015, the Secretary of State found that Independent Party's official notice did not meet the requirements of section 5001 because the name Independent Party is too similar to the name of an existing party, American Independent Party. (Compl. at 4; Deemer Decl. ¶ 6.)

In primary and general elections in California, candidates may designate their party preference (or lack thereof) on the ballot as long as they are affiliated with a "qualified" political party. Cal. Const. art. II, § 5(b). Since Proposition 14 was enacted in 2010, however, candidates may not list the word "Independent" in lieu of a party preference.[2] The Independent

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proper plaintiff given that it is not a legal entity or even a qualified political party. The court, however, will proceed with the motions before it because there is also a named individual plaintiff, William Lussenheide.

[2] Proposition 14 amended the California Constitution to replace a closed primary with an open nonpartisan primary leading to a "top two" runoff general election. Cal. Const. art. II, § 5; see also Rubin v. Padilla, 233 Cal. App. 4th 1128, 1137-39 (1st Dist. 2015) (describing the "top two" system). "The candidates who are the top two vote-getters at a voter-nominated primary election for a congressional or state elective office

Party was created "to make it possible for candidates who wish to be identified as 'independent candidates' to be able to run for office with the label, 'Independent.'" (Deemer Decl. ¶ 3; see also Compl. at 1; Pls.' Mot. for Prelim. Inj. ("Pls.' Mot.") at 3 (Docket No. 6).)

II. Preliminary Injunction

In order to obtain a preliminary injunction, the moving party "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 21 (2008); Humane Soc. of the U.S. v. Gutierrez, 558 F.3d 896, 896 (9th Cir. 2009). As the Supreme Court has repeatedly recognized, injunctive relief is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); see also Winter, 555 U.S. at 22, 24.

A. Likelihood of Success on the Merits

The right of individuals to associate for the advancement of political beliefs and the right of qualified voters to cast their votes effectively are protected against federal and state encroachment by the First Amendment. Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). These rights, however, are

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shall, regardless of party preference, compete in the ensuing general election." Cal. Const. art II, § 5(a). Political parties may endorse or oppose candidates but cannot nominate them. Proposition 14 left in place partisan primary elections for presidential candidates, political party committees, and party central committees. Id. § 5(c).

not absolute. Burdick v. Takushi, 504 U.S. 428, 433 (1992). "The Constitution provides that States may prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives,' and the Court therefore has recognized that States retain the power to regulate their own elections." Id. (citing U.S. Const. art. I, § 4, cl. 1). The Supreme Court has "recognized that, 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (citation omitted). Any election system "inevitably affects--at least to some degree--the individual's right to vote." Chamness v. Bowen, 722 F.3d 1110, 1116 (9th Cir. 2013) (citation and internal quotation marks omitted).

In examining challenges to state election laws based on First and Fourteenth Amendment rights, the Supreme Court has developed a flexible balancing standard: the court must weigh "the character and magnitude of the asserted injury" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," considering "the extent to which those interests make it necessary to burden the plaintiff's rights." Anderson, 460 U.S. at 789. When the constitutional "rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" Burdick, 504 U.S. at 434 (citation omitted). "Lesser burdens, however, trigger less exacting review," Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997), and need only be reasonably related to achieving the state's important

regulatory interests, Rubin v. City of Santa Monica, 308 F.3d 1008, 1014 (9th Cir. 2002). "[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' . . . 'the State's important regulatory interests are generally sufficient to justify' the restrictions." Burdick, 504 U.S. at 434 (citing Anderson, 460 U.S. at 788).

For example, in Timmons, the Supreme Court found that Minnesota's laws prohibiting a candidate from appearing on the ballot as the candidate of more than one party did not impose a severe burden. 520 U.S. at 364. While the ban prevented the plaintiff, a chapter of the New Party, from using the ballot to communicate to the public its support for a particular candidate who was already another party's candidate, the Court explained that "[b]allots serve primarily to elect candidates, not as forums for political expression." Id. at 363. The plaintiff and its members were still free to communicate ideas to voters and candidates by campaigning, endorsing, supporting, or voting for their preferred candidate. Id. Further, the court found the burdens were justified by the "correspondingly weighty" valid state interests in avoiding voter confusion and maintaining ballot integrity and political stability. Id. at 369-70.

Similarly, in Chamness, the Ninth Circuit held that California's prohibition against a primary candidate designating himself as "Independent" on the ballot and requirement that he instead be designated as having "No Party Preference" or leave the space blank was not a severe burden on his First Amendment rights. 722 F.3d at 1117. The Ninth Circuit reasoned that this change in the election code following the enactment of

Proposition 14 was viewpoint neutral as it "does not allow any candidates to term themselves 'Independents' and does allow all candidates to put themselves forward on the primary ballot and gather votes." Id. at 1118. Furthermore, the court emphasized that the plaintiff's First Amendment rights were not inhibited given that he was unable to identify a specific message he wished to convey by using the designation "Independent" or explain how that message was hindered. Id. at 1117. Lastly, the state had "an important interest in managing its ballots" to avoid questionable self-designations or case-by-case determinations regarding the acceptability of various self-designations. Id. at 1118-19.

In contrast, in Anderson, the Supreme Court found that Ohio's early filing deadline for independent candidates not only placed a significant burden on Ohio's independent-minded voters but also on the nationwide electoral process because it was enforced in the presidential election. 460 U.S. at 793-95. The Court explained that the filing deadline forced independent candidates to enter the presidential race when the major party nominations were just beginning and the major parties had not yet adopted their platforms. Id. at 790. The deadline disadvantaged independents by depriving them of the flexibility to act on developments that might occur after the early filing deadline, excluding any candidate who wished to enter the race after March, and forcing independent candidates to gather signatures when the election was remote and it was more difficult to secure volunteers, contributions, and media publicity. Id. at 791-92. The court held that a "burden that falls unequally on new or

small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." Id. at 793. Furthermore, the exclusion of candidates "burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." Id. at 788. Not only was this burden severe but the Court also found the state's interests had no merit. Id. at 796-805; see also Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 186 (1979) (reasoning that "an election campaign is a means of disseminating ideas as well as attaining political office" and holding that Illinois failed to state a compelling reason for requiring independent candidates and new political parties to obtain more signatures in city elections than in state-wide elections).

In order to qualify as a new political party under California Election Code section 5001, a group must elect temporary officers, designate a party name, and file notice with the Secretary of State declaring its intent to qualify. Cal. Code of Elec. § 5001. Section 5001 provides that the "designated name shall not be so similar to the name of an existing party so as to mislead the voters, and shall not conflict with that of any existing party or political body that has previously filed notice." Id. In this case, plaintiffs argue that defendant violated their First Amendment rights by wrongfully applying section 5001 and denying Independent Party's notice of intent to qualify as a political party due to the similarity between its

name and that of the American Independent Party. Plaintiffs contend that because "such vital individual rights are at stake," defendant must establish its denial was necessary to serve a compelling state interest. (Pls.' Mot. at 7.)

Although the failure to qualify as a political party may be said to have imposed some burden on plaintiffs, the court does not find it to be a severe burden on plaintiffs' First Amendment rights. As in Timmons and Chamness, members of the Independent Party are still free to run for office,[3] campaign, express their political ideas, and endorse other candidates. While defendant's denial prevents candidates from having an "Independent Party" designation on the presidential election ballot, ballots serve to "elect candidates, not as forums for political expression." Timmons, 520 U.S. at 363. Unlike the plaintiffs in Anderson or Illinois State Board of Elections, Independent Party candidates are not being excluded from the ballot or prevented from expressing their political views through election campaigns. See Anderson, 460 U.S. at 788. Defendant even represents that it is possible for plaintiffs to become a qualified political party under a different name that still

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[3] Any candidate for statewide, legislative, or congressional offices may be placed on the primary election ballot by filing a declaration of candidacy and nomination paper with up to 100 voter signatures and paying a filing fee of 1% (2% for United States Senator and statewide candidates) of the office's salary. Cal. Elec. Code §§ 8060-62, 8103. In lieu of a filing fee, any candidate may submit a petition with 1,500 to 10,000 signatures, depending on the office. Id. § 8106. A candidate for the presidential general election may qualify for the ballot under the independent nomination process and will be designated as "Independent" on the ballot. Id. §§ 13105(c), 8300.

includes the word independent. (Def.'s Mot. for J. on the Pleadings ("Def.'s Mot.") at 9 (Docket No. 9) ("Plaintiffs may even use a name that includes the word 'independent' without running afoul of Section 5001. Indeed, the Secretary has approved the name 'Independent California Party' for a political body that is currently attempting to qualify for the 2016 general election.").) The court therefore finds that any burden imposed on plaintiffs' right to associate or cast votes effectively is not severe and hence does not demand heightened scrutiny.

The state also has important, if not compelling, interests that justify the denial. First, as defendant initially expressed at the time of denial, the name Independent Party is so similar to the name of the existing American Independent Party that voters might be confused and misled. Plaintiffs argue to the contrary that having both the American Independent Party and the Independent Party on the ballot would actually reduce voter confusion because voters are currently mistaking American Independent Party candidates for candidates who are independent of any political group. If both the American Independent Party and the Independent Party were on the ballot, plaintiffs argue, voters would be forced to research the differences between the two groups before selecting a candidate. This argument is speculative at best, and any possible confusion about the American Independent Party's name was an issue for the state to consider prior to qualifying it as a political party and is not relevant to the present case.

Second, California's Election Code provides that a presidential candidate can be independently nominated for the

presidential general election "subsequent to, or by other means than, a primary election," Cal. Elec. Code § 8300, and "[i]f a candidate has qualified for the ballots by virtue of an independent nomination, the word 'Independent' shall be printed instead of the name of a political party," id. § 13105(c). There would therefore be significant risk of confusion if there is both a presidential nominee of the Independent Party and a presidential candidate who is independently nominated and thus designated as "Independent" on the ballot pursuant to section 13105. Voters would likely be unable to differentiate these two distinct types of "Independent" candidates.[4] Even if defendant's initial explanation does not justify imposing a restriction on plaintiffs' right to associate, especially given that defendant approved the Independent California Party for the 2016 presidential election ballot despite its notably similar name to the American Independent Party, (see Def.'s Mot. at 9), the potential for confusion due both to the Independent Party's similarity in name to other political parties and to the designation used for independently nominated presidential candidates is sufficient.

Plaintiffs also assert a "class of one" Equal Protection claim under the Fourteenth Amendment. See, e.g., Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (noting that the

[4] In their reply, plaintiffs argue that defendant could remedy this potential problem by designating an independently nominated presidential candidate as an "independent candidate," "non-partisan," "no party," "by petition," or "unaffiliated" instead of as "Independent." It is not, however, this court's place to mandate this sort of legislative amendment to section 13105(c) of California's Election Code.

Court has recognized successful "class of one" equal protection claims "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment"). Plaintiffs argue that states have repeatedly recognized political parties that have similar names or overlapping words in their names. (See Pls.' Mot. at 5 (listing cases)); see also Craig v. Brown, 114 Cal. 480, 481 (1896) (permitting both the National Democratic Party and the Democratic Party to be on the ballot). For example, plaintiffs cite to former Secretary of State Debra Bowen's approval in 2011 of Americans Elect even though the American Independent Party was already on the ballot. (Pls.' Mot. at 6.) Plaintiffs contend that this precedent demonstrates the Independent Party is being treated differently from other similarly situated political parties and that there is no rational basis for this unequal treatment.

As discussed above, however, defendant does have a strong rational basis for its denial: avoiding voter confusion both with the American Independent Party and also with independently nominated presidential candidates identified as "Independent." This case is distinguishable from the cases plaintiffs cite because the ballot designation "Independent" could not only cause voters to confuse the Independent Party with the American Independent Party or the California Independent Party but, more significantly, it could also cause voters to mistake Independent Party candidates for independently nominated presidential candidates, or vice versa. The court therefore finds that plaintiffs have failed to establish that they were

treated differently from similarly situated political groups.

Accordingly, the court must find that plaintiffs are unlikely to succeed on the merits of their First Amendment right to associate and cast votes effectively claims or Fourteenth Amendment "class of one" claim.

B. Irreparable Harm

Intangible injuries that are incapable of measurement can constitute irreparable harm. Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir. 1991). The harm must be "likely" and not "merely speculative." Am. Trucking Ass'ns v. City of Los Angeles, 559 F.3d 1046, 1058 (9th Cir. 2009).

Plaintiffs seek an injunction ordering defendant to accept the Independent Party's notice of intent in time for it to participate in the May 24, 2016 voter tally to determine whether it has the support of the required 0.33% of registered voters or needs to obtain additional support. (Winger Decl. ¶ 4 (Docket No. 6-1).) If it cannot show it has the requisite number of supporters by the July 8, 2016 registration deadline, the Independent Party will not be able to have a designated Independent Party presidential candidate on the 2016 ballot. (Id.)

While plaintiffs could still attempt to independently nominate a presidential candidate who would, pursuant to section 13105(c), be designated as "Independent" on the ballot, this is not the same as having a party candidate run. Moreover, the hurdles for independently nominating a presidential candidate are higher than those for qualifying a political party to participate

in the general election--the independent presidential nomination must be signed by 1% of registered voters (about 178,000 voters), whereas a qualified political party needs only 0.33% of registered voters (about 46,000 voters) to declare their preference for the party.[5] The court therefore finds that while plaintiffs have failed to demonstrate a likelihood of prevailing on their constitutional claims, they have established that they will suffer irreparable harm if they cannot obtain political body status in time for the May 24, 2016 tally and July 8, 2016 registration deadline.

C. Balance of Equities

"In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" Winter, 555 U.S. at 24 (citation omitted). If an injunction is issued, the state's ability to regulate elections and minimize voter confusion could be significantly impaired. If the court declines to issue an injunction, plaintiffs' constitutional rights will be

[5] An independent nominee for president can attain ballot status by having fifty-five candidates for presidential elector file a nomination paper with the Secretary of State stating the name of the candidate for president and vice president for whom those electors pledge themselves to vote. Cal. Elec. Code § 8303; see also "Summary of Qualifications and Requirements for the Office of Presidential Elector, Independent Nomination, November 8, 2016 Presidential General Election," available at http://elections.cdn.sos.ca.gov//statewide-elections/2016-primary/president-elector-independent-2016.pdf. The nomination papers must be signed by at least 1% of the statewide registration from the November 2014 general election, or 178,039 registered voters, and submitted by no earlier than April 29, 2016 or later than 5 p.m. on August 12, 2016. See Cal. Elec. Code §§ 2187, 8400, 8403(a)(2).

Each of the fifty-five electors must have completed a declaration of candidacy and filed it with the county elections official of the county in which he or she is registered to vote 88 days prior to the election. Id. § 8550.

only minimally burdened. The balance of the hardships therefore weighs against the issuance of an injunction.

D. Public Interest

"'In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.'" Id. (citation omitted). "The public interest analysis for the issuance of a preliminary injunction requires [the court] to consider 'whether there exists some critical public interest that would be injured by the grant of preliminary relief.'" Indep. Living Ctr. of So. Cal., Inc. v. Maxwell-Jolly, 572 F.3d 644, 659 (9th Cir. 2009) (citation omitted). "Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." Preminger v. Principi, 422 F.3d 815, 826 (9th Cir. 2005).

Because plaintiffs have failed to show a likelihood of success on the merits of their First or Fourteenth amendment claims and defendant has an important competing public interest in avoiding voter confusion on the ballots and facilitating fair elections, it is in the public interest to deny the injunction.

E. Conclusion

Even though the court has found plaintiffs are likely to suffer irreparable harm, plaintiffs have failed to satisfy the other elements required by Winters to secure a preliminary injunction. Accordingly, because plaintiffs have failed to establish that this extraordinary remedy is warranted, the court must deny plaintiffs' motion for preliminary injunction.

III. Judgment on the Pleadings

"After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). The standard governing a Rule 12(c) motion is essentially equivalent to that which governs a Rule 12(b)(6) motion for failure to state a claim: the court must accept all factual allegations in the complaint as true and construe them in the light most favorable to the non-moving party. Fleming v. Pickard, 581 F.3d 922, 925 (9th Cir. 2009). The court must determine whether the complaint's factual allegations, together with all reasonable inferences, state a plausible claim for relief. Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054 (9th Cir. 2011) (citing Ashcroft v. Iqbal, 556 U.S. 662 (2009)). A "dismissal can be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Sprint Telephony PCS, L.P. v. County of San Diego, 311 F. Supp. 2d 898, 903 (S.D. Cal. 2004). Because both Rule 12(c) and Rule 12(b)(6) "motions are analyzed under the same standard, a court considering a motion for judgment on the pleadings may give leave to amend and 'may dismiss causes of action rather than grant judgment.'" Id. (citation omitted).

The court may consider only the pleadings, matters incorporated by reference in the complaint, or matters of judicial notice. Kaur v. Citibank, N.A., Civ. No. 1:13-01610 AWI, 2014 WL 3756136, at *2 (E.D. Cal. July 30, 2014). "[J]udgment on the pleadings is improper when the district court goes beyond the pleadings to resolve an issue; such a proceeding

must properly be treated as a motion for summary judgment." Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990). The court therefore does not rely on Richard Winger's declaration, which plaintiffs attached to their opposition, as it is not part of the pleadings or appropriate for judicial notice. Even were the court to consider it, it would not alter the court's conclusions. (See Winger Decl. (Docket No. 11-1).)

For all the reasons discussed above, accepting all facts, including all reasonable inferences, in the light most favorable to plaintiffs, plaintiffs have failed to establish that their First and Fourteenth Amendment rights have been significantly burdened or that they are plausibly entitled to equitable relief. Accordingly, the court must grant defendant's Rule 12(c) motion and dismiss plaintiffs' Complaint with prejudice. While leave to amend should be "freely given when justice so requires," Fed. R. Civ. P. 15(a)(2), a court may deny leave "if permitting an amendment would prejudice the opposing party, produce an undue delay in the litigation, or result in futility for lack of merit," Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990). Leave to amend in this case would be futile as the court cannot conceive, and plaintiffs have not suggested, any additional facts that plaintiffs might be able to allege or establish to cure their defective constitutional claims.

IT IS THEREFORE ORDERED that plaintiffs' motion for preliminary injunction (Docket No. 6) be, and the same hereby is, DENIED; and

IT IS FURTHER ORDERED that defendant's motion to dismiss plaintiffs' Complaint (Docket No. 9) be, and the same hereby is, GRANTED. Plaintiffs' Complaint is hereby DISMISSED WITH PREJUDICE.

Dated: May 3, 2016

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE