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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

WYLMINA HETTINGA, Plaintiff, v. GAVIN NEWSOM et al., Defendants.	No. CV 20-06092-PA (DFM) Report and Recommendation of United States Magistrate Judge

This Report and Recommendation is submitted to the Honorable Percy Anderson, 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 July 7, 2020, Wylmina Hettinga ("Plaintiff") filed a pro se civil rights complaint under 42 U.S.C. § 1983 in this Court. See Dkt. 1 ("Complaint"). The Complaint names as Defendants Governor Gavin Newsom, Secretary of State Alex Padilla, and the State of California ("State"). See id. Governor Newsom and Secretary Padilla are named in their official capacities. See id.

Defendants have filed a Motion to Dismiss with a Supporting Memorandum. See Dkt. 20 ("Motion"), Dkt. 20-1 ("Memorandum").[1] Plaintiff filed an Opposition. See Dkt. 22 ("Opp'n").[2] Defendants filed a Reply. See Dkt. 26. The matter was taken under submission without a hearing. See Dkt. 23. For the reasons set forth below, the Motion is GRANTED.

II. LEGAL STANDARD

To survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "Threadbare recitals of the elements of the cause of action, supported by mere conclusory statements, do not suffice." Id. In reviewing a Rule 12(b)(6) motion, the Court accepts as true all facts alleged in the complaint and draws all reasonable inferences in favor of the plaintiff. See al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009).

III. FACTUAL BACKGROUND

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

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[1] Defendants also request the Court takes judicial notice of several documents. See Dkt. 20-2. As these documents are appropriate for judicial notice, see Fed. R. Evid. 201, Defendants' request is GRANTED.

[2] Plaintiff also requests the court take judicial notice of several opinions issued in California state court in similar cases. See Dkts. 28, 29. The Court has considered these opinions.

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 request for title and summary with the California Attorney General. See Cal. Elec. Code § 9001. The Attorney General allows for a period of public review then issues a title and summary for the proponent to circulate. See id. § 9004. The proponent must obtain the required number of signatures within 180 days of issuance of the title and summary. See id. § 9014(a), (b). For initiatives proposing to change a statute, the proponent must get signatures equal to at least 5% of the statewide votes cast for the office of Governor in the last gubernatorial election. See id. § 9035. All signatures on the petition must be from the person signing. See id. § 9020. If the proponents have collected 25% of the signatures required to qualify the initiative for the ballot, they must certify that fact to the Secretary of State. See id. § 9034. After receiving the certification, the Secretary provides a copy of the initiative to the State Senate and Assembly. See id. After the proponent has gathered enough signatures to qualify the initiative for the ballot, he or she must submit the signatures to county officials for counting and verification. Id. §§ 9030-31. The submission requires a declaration that the circulator of the petition "witnessed the appended signatures being written." Id. § 104(b)(1). If the petition acquires sufficient signatures, the initiative is placed on the next general election ballot that is at least 131 days later. See id. § 9033(b).

B. Plaintiff's Proposed Ballot Initiative

Plaintiff is the proponent of statewide ballot initiative to allow for jury trials in child custody and dependent-child proceedings. See Complaint at 3-5. On March 4, 2020, Plaintiff was "cleared" to begin gathering signatures for her

proposed ballot initiative. Id. at 17. That same day, Governor Newsom declared a state of emergency due to COVID-19. See id. at 7. On March 25, 2020, Secretary Padilla informed Plaintiff that the elections code does not allow electronic signature gathering but that she could gather signatures by mail. See id. at 5. Plaintiff was not given additional time to collect signatures by mail. See id. Plaintiff's resources for collecting signatures were exhausted in March 2020. See id. at 6-7.

IV. DISCUSSION

A. First Amendment

Plaintiff asserts Defendants violated her First Amendment rights by imposing restrictions on her ability to support her proposed ballot initiative. Defendants argue that the case should be dismissed because Plaintiff fails to adequately state a claim for a First Amendment violation. See Memorandum at 7-11.[3]

"Under the First Amendment, election regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest." Angle v. Miller, 673 F.3d 1122, 1132 (9th Cir. 2012) (alterations and internal citations omitted). "Lesser burdens trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." Id. A restriction on the initiative process imposes a severe burden when it (1) "restrict[s] one-on-one communication between petition circulators and voters" or (2) "makes it less likely that proponents will be able to garner the signatures necessary to place an initiative on the ballot." Id.

[3] The Court struggles to understand what relief it could afford to Plaintiff, given that California's November 3, 2020 general election took place nearly three months ago.

Plaintiff makes no showing that the various regulations inhibit one-on-one communication with voters. To the contrary, the in-person signature collection and witness requirements of the California Election Code affirmatively promote speech. See id. at 1132-32 (stating that Nevada's signature requirements "likely increases the 'total quantum of speech' on public issues, by requiring initiative proponents to carry their messages to voters in different parts of the state"). Although Plaintiff has been unable to engage in face-to-face interaction with qualified electors, "that's the fault of the COVID-19 pandemic," not California law. Arizonans for Fair Elections v. Hobbs, 454 F.Supp.3d 910, 923 (D. Ariz. Apr. 17, 2020) (finding that Arizona statutes did not inhibit one-on-one communication with voters).

Plaintiff also fails to show that the challenged regulations "significantly inhibit the ability of initiative proponents to place initiatives on the ballot." Angle, 673 F.3d at 1133. In that respect, "the burden on plaintiffs' rights should be measured by whether, in light of the entire statutory scheme regulating ballot access, 'reasonably diligent' candidates can normally gain a place on the ballot." Id. (citation omitted). Plaintiff does not allege when she filed a draft of her proposed ballot measure with the California Attorney General, what steps she took, if any, to obtain the necessary 623,212 signatures, or whether she obtained any signatures at all. See Hobbs, 454 F.Supp.3d at 925-26 (finding plaintiffs did not establish diligence where they did not file necessary paperwork until August 2019).

Plaintiff does reference Governor Newsom's order declaring a statement of emergency on March 4, 2020, the same day she was "cleared to start collecting." Complaint at 17. But Plaintiff does not allege that the order prohibited Plaintiff or anyone else from signature gathering. Although the Governor's subsequent March 19, 2020 "stay at home" order arguably did, Plaintiff does not allege what actions she took up until then. "Speculation,

without supporting evidence," is insufficient to demonstrate that the statutory scheme results in a severe burden. Angle, 673 F.3d at 1134.

Even in the face of COVID-19, one can imagine ways for individuals like Plaintiff to safely comply with California's election requirements. Indeed, Plaintiff acknowledges that on March 25, 2020, then-Secretary Padilla informed her that she could do signature gathering via snail mail. See Complaint at 5. That Plaintiff did not do so because she believes mail is not efficient is additional evidence that she was not reasonably diligent in her efforts.

Given Plaintiff's failure to demonstrate a severe burden, the State need only to provide an important regulatory interest to justify the restrictions. See Angle, 673 F.3d at 1132. Additionally, the State need not demonstrate that the rule is narrowly tailored to promote that interest. Here, California "undeniably has an important regulatory interest 'in making sure that an initiative has sufficient grass roots support to be placed on the ballot.'" Id. at 1135 (citing Meyer v. Grant, 486 U.S. 414, 425-26 (1988)). The Supreme Court has recognized this interest as "substantial." See Buckley v. Am. Const. Law Found., Inc., 525 U.S. 182, 204 (1999).

Accordingly, Plaintiff has failed to adequately state her First Amendment claim.

B. Eleventh Amendment

The State also seeks dismissal based on the Eleventh Amendment of the U.S. Constitution. See Memorandum at 12-13. The Eleventh Amendment bars federal jurisdiction over suits against a state or a state agency unless the state or agency consents to the suit. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996); Pennhurst State Sch. & Hosp. 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. See 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 Def. Affirmative Action v. Brown, 674 F.3d 1128, 1133-34 (9th Cir. 2012), Plaintiff named the State in addition to officers in their official capacity. The State itself is immune to suit.

Defendants also argue that the state's immunity should be extended to Governor Newsom as Plaintiff only complains about the signature gathering requirement and does not seek relief from the Governor's COVID-19 executive orders. See Memorandum at 6. The Court agrees.

In order to sue an officer of the State for relief, "such officer must have some connection with the enforcement of the act." Ex Parte Young, 209 U.S. 123, 157 (1908). The connection "must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." Snoeck v. Brussa, 153 F.3d 984, 986 (9th Cir. 1998) (citation omitted). California's Elections Code is enforced by the Secretary of State, not the Governor. See Cal. Elec. Code § 10 ("The Secretary of State is the chief elections officer of the state, and has the powers and duties specified in this code"). Governor Newsom is thus not sufficiently connected to the laws complained of for the Ex Parte Young exception to apply. Indeed, Plaintiff does not request any

injunctive relief against Governor Newsom as she seeks "injunctive relief requiring the California Secretary of State to either toll the period I have been prevented from collecting signatures, to allow for electronic signature gathering, to place this initiative on the November ballot, to require the California Secretary of State to provide our title and summary to the California Senate and Assembly and have each assign our initiative to appropriate committees to hold joint public hearings, or whatever relief a jury deems proper and just." Complaint at 18. Accordingly, the State's immunity extends to Governor Newsom in this case.

C. Leave to Amend

"If a complaint is dismissed for failure to state a claim, leave to amend should be granted 'unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir.1986)). Here, it appears Plaintiff will be very unlikely to overcome the State's Eleventh Amendment immunity or the extension of such immunity to Governor Newsom. However, although Plaintiff has been unable to state a First Amendment claim against Secretary Padilla, the Court is not convinced that she could not cure the deficiencies of her pleading through amendment. Accordingly, the Court will grant Plaintiff leave to amend.

V. CONCLUSION

IT IS THEREFORE RECOMMENDED that the District Judge issue an Order: (1) accepting this Report and Recommendation; (2) granting Defendants' Motion to Dismiss; and (3) ordering Plaintiff to file a First Amended Complaint within twenty-one (21) days of the date of this order. Under 28 U.S.C. § 636(b)(1), the parties may file and serve any written

objections within fourteen days of service of this Report and Recommendation.

Date: January 25, 2021

DOUGLAS F. McCORMICK
United States Magistrate Judge