

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID JOHN THISTLE,

Plaintiff,

v.

FRANK LA ROSE,

Defendant.

Case No.: 21-CV-1414 JLS (MDD)

**ORDER (1) GRANTING MOTION
TO PROCEED IN FORMA
PAUPERIS; AND (2) DISMISSING
COMPLAINT WITHOUT
PREJUDICE**

(ECF No. 2)

Presently before the Court is Plaintiff David John Thistle's Motion to Proceed *In Forma Pauperis* ("IFP") ("Mot.," ECF No. 2). Plaintiff, proceeding *pro se*, alleges that the Ohio Secretary of State's candidacy forms and documents related to the 11th Congressional District Special Election are unconstitutional. *See generally* "Compl.," ECF No. 1. Having considered carefully Plaintiff's Complaint, IFP Motion, and the applicable law, the Court **GRANTS** Plaintiff's IFP Motion and **DISMISSES WITHOUT PREJUDICE** Plaintiff's Complaint.

IN FORMA PAUPERIS MOTION

All parties instituting any civil action, suit, or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of

1 \$402.¹ See 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to
 2 prepay the entire fee only if the party is granted leave to proceed *in forma pauperis* pursuant
 3 to 28 U.S.C. § 1915(a). See *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). A
 4 federal court may authorize the commencement of an action without the prepayment of
 5 fees if the party submits an affidavit, including a statement of assets, showing that the party
 6 is unable to pay the required filing fee. 28 U.S.C. § 1915(a).

7 Plaintiff has filed an affidavit indicating that he receives \$1,307 in Social Security
 8 benefits and \$3,575.51 in VA compensation and pension for a total monthly income of
 9 \$4,882.51. See Mot. at 2. Additionally, Plaintiff has a motor vehicle, a 2016 Kia Soul,
 10 valued at \$11,922.90, as well as other assets valued at \$8,000. See Mot. at 3. Plaintiff
 11 reports monthly expenses totaling \$4,044.² *Id.* at 5. Plaintiff also reports that he is
 12 "homeless transient – motel & car as afforded." *Id.* at 5. Given these facts, the Court
 13 concludes that Plaintiff is unable to pay the requisite fees and costs. Accordingly, the Court
 14 **GRANTS** Plaintiff's Motion to Proceed IFP.

15 **SCREENING PURSUANT TO 28 U.S.C. § 1915(e)(2)**

16 **I. Standard of Review**

17 Because Plaintiff is proceeding IFP, his Complaint requires a pre-answer screening
 18 pursuant to 28 U.S.C. § 1915(e)(2). See, e.g., *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th
 19 Cir. 2002) (per curiam) (holding 28 U.S.C. § 1915(e)(2) screening applies to non-prisoners
 20 proceeding IFP); see also *Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc)
 21 (discussing 28 U.S.C. § 1915(e)(2)). Under this statute, the Court must *sua sponte* dismiss
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23 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$52. See
 24 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14 (eff.
 25 Dec. 1, 2020)). The additional \$52 administrative fee does not apply to persons granted leave to proceed
 in forma pauperis. *Id.*

26 ² Under the line "regular expenses for operation of business, profession, or farm," Plaintiff indicates he
 27 spends \$2,000 a month, but Plaintiff did not attach a detailed statement of his business expenses as is
 28 required by the application. See Mot. at 5. However, it does not appear that Plaintiff included this expense
 in his "total monthly expenses" figure of \$4,044. Even disregarding Plaintiff's business expenses, the
 Court finds that Plaintiff is unable to pay the requisite fees and costs.

1 a complaint, or any portion of it, that is frivolous, malicious, fails to state a claim, or seeks
 2 damages from defendants who are immune. *See Lopez*, 203 F.3d at 1126–27. Courts “may
 3 consider facts contained in documents attached to the complaint” to determine whether the
 4 complaint states a claim for relief. *Nat’l Assoc. for the Advancement of Psychoanalysis v.*
 5 *Cal. Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000). “The purpose of [screening]
 6 is ‘to ensure that the targets of frivolous or malicious suits need not bear the expense of
 7 responding.’” *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (citations
 8 omitted).

9 **II. Plaintiff’s Factual Allegations**

10 Plaintiff alleges that when he received forms and documents to declare his intent to
 11 be a write-in candidate in the Ohio 11th Congressional District Special Election, he
 12 “noticed the unconstitutional changes made.” Compl. at 2.³ Plaintiff appears to contend
 13 that the form’s statement that a candidate “[m]ust be an inhabitant of the state from which
 14 elected,” Compl. at 13, violates Article 1 of the U.S. Constitution, which requires that “No
 15 Person shall be a Representative . . . who shall not, when elected, be an Inhabitant of that
 16 State in which he shall be chosen,” U.S. Const. art. I, § 2. Plaintiff appears to take issue
 17 with the omission of the phrase “when elected” from the forms distributed by the Ohio
 18 Secretary of State.

19 Plaintiff states that “after several phone calls and verbal debates, the Office of the
 20 Sec. of State in OHIO corrected the changes.” Compl. at 7. However, Plaintiff contends
 21 that “changing your criminal activity to correct ‘Official Ballot Forms’ during a truncated
 22 Special Congressional Election Cycle does not, I repeat DOES NOT hold you accountable
 23 for the criminal activity of altering the US Constitution Article 1 in accordance with the
 24 10th Amendment.” *Id.* (emphasis in original).

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28 ³ Pin cites to Plaintiff’s complaint and associated exhibits refer to the blue CM/ECF page number stamped at the upper right corner of the page.

1 As the Complaint is currently pleaded, the Court finds that Plaintiff lacks standing
 2 to bring the asserted claims. In order to bring a case in federal court, a plaintiff must
 3 demonstrate he or she has “standing.” U.S. Const., Art. III; *Clapper v. Amnesty Intern.*
 4 *U.S.A.*, 568 U.S. 398, 408 (2013). “The plaintiff must have (1) suffered an injury in fact,
 5 (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely
 6 to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540,
 7 1547 (2016), *as revised* (May 24, 2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S.
 8 555, 560–61 (1992)). “Standing focuses on whether a plaintiff has a ‘personal stake’ in
 9 the action such that she will be an effective litigant to assert the legal challenge at issue.”
 10 *Townley v. Miller*, 722 F.3d 1128, 1135 (9th Cir. 2013). The United States Supreme Court
 11 has explained the concept of standing as follows:

12 To establish Article III standing, an injury must be concrete,
 13 particularized, and actual or imminent; fairly traceable to the
 14 challenged action; and redressable by a favorable ruling.
 15 Although imminence is concededly a somewhat elastic concept,
 16 it cannot be stretched beyond its purpose, which is to ensure that
 17 the alleged injury is not too speculative for Article III purposes—
 18 that the injury is certainly impending. Thus, we have repeatedly
 reiterated that “threatened injury must be certainly impending to
 constitute injury in fact, and that [a]llegations of possible future
 injury” are not sufficient.

19 *Clapper*, 568 U.S. at 409 (internal citations and quotations omitted).

20 It does appear from the Complaint that Plaintiff has a personal stake in this action
 21 because he plans to run for the U.S. Representative seat in Ohio’s 11th Congressional
 22 District, and he currently resides outside Ohio. *See Townley*, 722 F.3d at 1135. Plaintiff
 23 claims that he “withdrew the maximum loan amount from his, David John Thistle, govt.
 24 life insurance policy . . . to pay any and all fees and expenses for the 11th Ohio Special
 25 Election.” Compl. at 2; *see also id.* at 5 (Ohio Inspector General complaint form wherein
 26 Plaintiff listed “Thistle for Congress 11th District” as his employer and his position as
 27 “Candidate for US Congress”). Furthermore, Plaintiff appears to be a resident of La Jolla,
 28 California. *See id.* at 5 (Ohio Inspector General complaint form listing Plaintiff’s address

1 in La Jolla, California). Therefore, it appears Plaintiff is not currently an inhabitant of the
 2 state where he is attempting to run for a congressional seat.

3 However, Plaintiff does not adequately allege injury in fact. Plaintiff does not allege
 4 that the Ohio Secretary of State prevented him from filing his notice of candidacy or
 5 refused his application based on Plaintiff's residency in California. In fact, Plaintiff states
 6 that after he notified the Ohio Secretary of State of the issue, the office "corrected the
 7 changes." *Id.* at 7. As the Complaint is presently pleaded, it does not appear that Plaintiff
 8 has a "concrete, particularized, and actual or imminent" injury because he was not denied
 9 an opportunity to run for Congress based on the language at issue on the forms. *See*
 10 *Clapper*, 568 U.S. at 409. Accordingly, Plaintiff lacks standing to maintain the present
 11 action.

12 CONCLUSION

13 Based on the foregoing, the Court **GRANTS** Plaintiff's Motion to Proceed IFP (ECF
 14 No. 2) and **DISMISSES WITHOUT PREJUDICE** Plaintiff's Complaint. Plaintiff **MAY**
 15 **FILE** an amended complaint that adequately alleges Plaintiff's standing within forty-five
 16 (45) days of the date on which this Order is electronically docketed. Any amended filing
 17 must be complete in itself, without reference to Plaintiff's original Complaint. Any claim
 18 not re-alleged in Plaintiff's amended complaint will be considered waived. *See* S.D. Cal.
 19 Civ L.R. 15.1; *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546
 20 (9th Cir. 1989) ("[A]n amended pleading supersedes the original."); *see also Lacey v.*
 21 *Maricopa Cty.*, 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave
 22 to amend which are not re-alleged in an amended pleading may be "considered waived if
 23 not repled").

24 Should Plaintiff fail to file an amended complaint within the time provided, the Court
 25 will enter a final order dismissing this civil action with prejudice. *See Lira v. Herrera*, 427
 26 F.3d 1164, 1169 (9th Cir. 2005) ("If a plaintiff does not take advantage of the opportunity

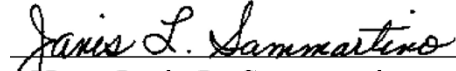
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1 to fix his complaint, a district court may convert the dismissal of the complaint into
2 dismissal of the entire action.”).

3 **IT IS SO ORDERED.**

4 Dated: September 13, 2021


5 Hon. Janis L. Sammartino
6 United States District Judge
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