UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

| Case No. | CV 12–3956 PA (AGRx) | Date | May 21, 2012 |
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| Title | California Justice Committee, et al. v. Debra Bowen | | |

| Present: The Honorable | PERCY ANDERSON, UNITED STATES DISTRICT JUDGE | |
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| Paul Songco | Not Reported | N/A |
| Deputy Clerk | Court Reporter | Tape No. |

| Attorneys Present for Plaintiffs: | Attorneys Present for Defendants: |
|---|---|
| None | None |

**Proceedings:** IN CHAMBERS – COURT ORDER

Before the Court is a Motion for Preliminary Injunction filed by plaintiffs California Justice Committee, the Constitution Party of California, Jeff Norman, Charles Deemer, and John Gabree (collectively "Plaintiffs") (Docket No. 16). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for May 21, 2012, is vacated, and the matter taken off calendar.

## I. Factual Background

Plaintiffs are representatives of the Justice Party and the Constitution Party. Although neither party met California's qualification requirements to participate in the June 5, 2012 primary election, and neither will use the primary election as the basis for selecting their nominees for President and Vice President, both parties seek to list their nominees for President and Vice President on California's ballot for the November 6, 2012 general election. Plaintiffs seek to qualify their parties for the ballot, as opposed to using the procedures to qualify as an independent candidate, so that their candidates can list their party affiliations on the ballot.

Plaintiffs commenced this action on May 7, 2012, against California Secretary of State Debra Bowen ("Defendant" or "Secretary of State"). Plaintiffs challenge the constitutionality of California Elections Code section 5100, which sets forth both a numerical requirement for how many voters must either state an intent to register with a party or sign a petition seeking certification of the party, and a timing requirement for when those numerical requirements must be met for certification by the Secretary of State. Plaintiffs filed a Motion for Preliminary Injunction at the same time they filed their Complaint. As Plaintiffs clarify in their Reply in Support of their Motion for Preliminary Injunction, they seek in this Motion only to enjoin the Secretary of State from enforcing section 5100's timing requirement.

## II. Preliminary Injunction Standard

"A plaintiff seeking a preliminary injunction 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 Resources Defense Council, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). "A preliminary injunction is an extraordinary remedy never awarded as of right." Id. The Ninth Circuit employs a "sliding scale" approach to preliminary injunctions as part of this four-element test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). Under this "sliding scale," a preliminary injunction may issue "when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," as long as the other two Winter factors have also been met. Id. (internal citations omitted). "[A] preliminary injunction 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, 117 S. Ct. 1865, 1867, 138 L. Ed. 2d 162 (1997).

As a preliminary matter, Defendant contends that Plaintiffs' Motion for Preliminary Injunction should be denied because Plaintiffs waited approximately four months after the Secretary of State's January 31, 2012 announcement that they had not been certified as political parties before instituting this action and seeking injunctive relief. A plaintiff's delay in seeking relief weighs against granting a temporary restraining order or preliminary injunction. See Oakland Tribune, Inc. v. Chronicle Publ'g 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"); Lydo Enters., Inc. v. City of Las Vegas, 745 F.2d 1211, 1213 (9th Cir. 1984) ("A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief"). Here, however, Plaintiffs and their counsel were engaged in negotiations with the Secretary of State throughout April 2012 seeking relief from section 5100's requirements. Plaintiffs promptly instituted this action just days after they were told on May 3, 2012, that the Secretary of State would not promulgate an emergency regulation that would have provided Plaintiffs with additional time to qualify as political parties. The Court therefore concludes that Plaintiffs have not impermissibly delayed in seeking injunctive relief.

III. Analysis

The California Elections Code defines a political "party" as a "political party or organization that has qualified for participation in any primary election." Cal. Elec. Code § 338. Section 5100 lists the requirements for a party to qualify for participation in a primary election:

> A party is qualified to participate in any primary election under any of the following conditions:
>
> (a) If at the last preceding gubernatorial election there was polled for any one of its candidates for any office voted on throughout the state, at least 2 percent of the entire vote of the state.
>
> (b) If on or before the 135th day before any primary election, it appears to the Secretary of State, as a result of examining and

> totaling the statement of voters and their political affiliations transmitted to him or her by the county elections officials, that voters equal in number to at least 1 percent of the entire vote of the state at the last preceding gubernatorial election have declared their intention to affiliate with that party.
>
> (c) If on or before the 135th day before any primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the state at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have participate in that primary election. This petition shall be circulated, signed, verified and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county elections officials substantially as provided for initiative petitions.

Cal. Elec. Code § 5100.

Given the number of votes cast in the 2010 gubernatorial election, section 5100 requires that Plaintiffs each obtain 103,004 signed voter registrations or 1,030,040 signed petitions. Because section 5100 provides that the Secretary of State shall certify the parties eligible to participate in the primary election 135 days prior to the primary election, and the information upon which the Secretary of State bases that determination must be submitted to each county's election officials at least 154 days before the primary pursuant to section 2187(d), Plaintiffs were required to submit a sufficient number of voter registrations or petitions no later than January 3, 2012, to qualify as parties so that their candidates for President and Vice President could appear on the November 6, 2012 ballot with their party affiliations listed.

According to Plaintiffs, given the expense of gathering a sufficient number of petition signatures, neither party attempted to qualify through the procedure outlined in section 5100(c). Instead, Plaintiffs sought to obtain signed voter registration cards pursuant to section 5100(b). As of January 3, 2012, the Constitution Party had obtained 121 registrations in California and the Justice Party had obtained 183 registrations. The Secretary of State announced on January 31, 2012 the parties that had qualified for the 2012 primary election. Neither the Justice Party nor the Constitution Party qualified, but Americans Elect, a newly-established party, became the first new party since 1995 to qualify as a party by submitting the required number of petitions after a costly signature-gathering campaign. Plaintiffs contend that section 5100's numerical thresholds and timing requirements violate their First and Fourteenth Amendment rights to associate for the advancement of political beliefs and the rights of qualified voters to cast their votes effectively.

"[I]n considering a constitutional challenge to an election law, a court must weight 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments' against 'the precise interest put forward by the State as justification for the burden imposed by its rule.'" Nader v. Brewer, 531 F.3d 1028, 1034 (9th Cir. 2008) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789, 103 S. Ct. 1564, 1570, 75 L. Ed. 2d 547 (1983)). In Burdick v. Takushi, 504 U.S. 428, 434, 112 S. Ct. 2059, 2063, 119 L. Ed. 2d 245 (1992), the Supreme Court clarified that the rigorousness of the inquiry "depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." "[W]hen those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" Id. (quoting Norman v. Reed, 502 U.S. 279, 289, 112 S. Ct. 698, 705, 116 L.Ed.2d 711 (1992). "But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." Id., 112 S. Ct. at 2063-64 (quoting Anderson, 460 U.S. at 788, 103 S. Ct. at 1569-70).

Defendant contends that Plaintiffs are not entitled to the preliminary injunction they seek because they cannot establish a likelihood of success on the merits based on the fact that they are exceedingly unlikely to obtain a sufficient number of voter registrations no matter what deadline might apply. That argument erroneously shifts the focus from the likelihood that Plaintiffs will succeed in establishing the unconstitutionality of section 5100, the legal issue before the Court, to the likelihood that Plaintiffs will ever meet the qualification requirements that the Court might conclude are constitutional. Because the issue presented in the pending Motion for Preliminary Injunction is the likelihood that Plaintiffs will succeed on the merits of their constitutional challenge to section 5100's timing requirement, the Court must assess the severity of that restriction against the justifications for it proffered by the Secretary of State.

Although Americans Elect recently met section 5100(c)'s requirements for qualification as a political party in advance of California's June primary election, it was the first new party to do so since 1995. Faced with similar circumstances, the Ninth Circuit has concluded that a deadline of 90 days prior to the primary election for an independent candidate to qualify for the general election ballot imposed "a severe burden" that required application of strict scrutiny. Nader, 531 F.3d at 1039. In Opposition to Plaintiffs' Motion for Preliminary Injunction, the Secretary of State contends that California "has a significant interest in protecting the integrity and fairness of the election process and avoiding voter confusion by ensuring that minor parties given access to the ballot have established bona fide support" and that the qualification deadline 135 days prior to the primary election "is a reasonable regulation of the process by which new parties and their candidates are added to an election ballot." (Opposition 12:27 to 13:13.) These concerns, however, are far more relevant to support section 5100's numerosity requirement, which Plaintiffs are not challenging in this Motion, than the timing requirement.

At least at this stage of the proceedings, and although the Court acknowledges that the Secretary of State and county election officials obviously require a reasonable amount of time in advance of an

election to certify that a candidate or party have satisfied the eligibility requirements for inclusion on the ballot and to prepare election materials, the Secretary of State has failed to explain why it is reasonable for that deadline to be 135 days prior to the primary election for a party that seeks only to appear on the general election ballot. Specifically, the Secretary of State has not proffered a sufficient or credible justification for section 5100's timing requirement, let alone evidence that the timing requirement is "narrowly drawn" to justify the severe restriction it places on Plaintiffs. See Burdick, 504 U.S. at 434, 112 S. Ct. at 2063.

The Court therefore concludes that Plaintiffs have satisfied their burden to establish a likelihood of success on the merits in support of their claim that the timing requirement of section 5100 violates their First and Fourteenth Amendment rights. The Court further concludes that Plaintiffs have met their burden to show that they will suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest. See id. at 793-94, 103 S. Ct. at 1572-73 ("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. It discriminates against those candidates and -- of particular importance -- against those voters whose political preferences lie outside the existing political parties. By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas.").

## CONCLUSION

For all of the foregoing reasons, the Court grants Plaintiffs' Motion for Preliminary Injunction. The Secretary of State is enjoined from enforcing against Plaintiffs the requirement in California Elections Code sections 5100(b) and 5100(c) that Plaintiffs must satisfy the party-qualification requirements at least 135 days prior to the primary election. Because Plaintiffs have requested that the Court issue the injunction without the posting of a bond, and the Secretary of State has not opposed that request, the Court concludes that no bond is necessary. See Fed. R. Civ. P. 65(c).

In issuing this injunction, the Court declines, on this record, to impose an alternative deadline in advance of the November general election by which Plaintiffs must satisfy the numerosity requirements of sections 5100(b) or 5100(c). However, Plaintiffs do not have an unlimited amount of time to qualify for the November general election. Nothing in this Order precludes the Secretary of State from establishing an alternative deadline prior to the November general election. Nor does this Order alter or otherwise modify any other deadline related to the certification and preparation of election and ballot materials for the November general election contained within the California Elections Code or established by the Secretary of State.

IT IS SO ORDERED.