

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

DATE / TIME	July 2, 2020 / 1:30 p.m.	DEPT. NO.	17
JUDGE	James P. Arguelles	CLERK	Slort
MARK MACARRO et al., Petitioners, v. ALEX PADIILA, in his official capacity as Secretary of State of the State of California, Respondent.		Case No.: 34-2020-80003404 [Related Case No. 34-2020-80003413]	
Nature of Proceedings:		Petition for Writ of Mandate – Tentative Ruling	

** If oral argument is requested, it will be conducted remotely through the Zoom application and live-streamed on the court’s YouTube page. See further instructions and information at the end of this tentative ruling. **

The petition is GRANTED.

Petitioners’ request for judicial notice (RJN) of official records is GRANTED.

Background

Petitioners propose an initiative measure to amend the California Constitution and enact related statutory provisions. The initiative, entitled the California Sports Wagering Regulation and Unlawful Gambling Enforcement Act, would legalize sports wagering at tribal casinos and existing horse racetracks. It would also fund problem gaming and mental health research programs, bar wagering on high school athletics, limit wagering at racetracks to those 21 years of age and older, and prohibit the advertising or marketing of sports wagering to persons under 21.

To qualify their initiative for the ballot, Petitioners must circulate petitions and obtain a minimum number of registered voters’ signatures. At this time, the minimum number of qualifying signatures for a constitutional amendment is 997,139, which is eight percent of all votes cast in the last gubernatorial election. (See Cal. Const., art. II, § 8(b); Paparella Decl., ¶ 7.)

Because election officials always reject some signatures as invalid for various reasons, (Paparella Decl., ¶ 8), Petitioners plan to collect and submit a surplus of signatures.¹

California voters may not sign an initiative petition electronically. (See Elec. Code §§ 354.5, 9020.) Instead, individuals acting as circulators of petitions must personally attest that they witnessed each voter affix a signature. (See § 9022.) As a result, the process of gathering signatures is essentially a face-to-face process requiring close proximity between circulators and voters. (Paparella Decl., ¶ 14.) Distributing petitions by mail or email is theoretically possible but is either prohibitively expensive (in the case of regular mail) or unreliable (in the case of email.) (See *id.*, ¶ 24.) Circulators typically gather signatures near businesses, public events and other places where crowds gather. (*Id.*, ¶ 14.)

Pursuant to Section 9004, Petitioners in this case received an “official summary date” of January 21, 2020. Petitioners are required to submit the requisite number of signatures within 180 days of the official summary date, which is July 20, 2020. (See § 9014(b).) Existing state law does not authorize extensions. (See *id.*, §§ 9014-9015.)

Between January 21 and mid-March of this year, Petitioners obtained approximately 971,000 signatures in support of their initiative. (Paparella Decl., ¶ 10.) Petitioners spent over \$7 million in this effort. (*Id.*) On March 16, 2020, however, several counties in the Bay Area responded to the Covid-19 pandemic by ordering residents to shelter in place. (*Id.*, ¶ 11.) Three days later, Governor Newsom and the State Public Health Officer ordered all residents in the state to shelter in place, i.e., stay home or at another place of residence. (See RJN, Exhs. A, D.) Although the shelter-in-place directives contained exceptions for services deemed essential, political petitioning such as Petitioners’ did not fall within the exceptions. (See *id.*, Exh. D.) Consequently, the in-person signature gathering in which Petitioners were engaged came to a halt.

¹ Petitioners’ original goal was to gather 1.6 million signatures. That figure was selected with the hope of qualifying expeditiously for the November 2020 ballot via the random sampling method described in Elections Code section 9030. (Undesignated statutory references will be to the Elections Code.) Under that section, if a random sample shows that 110% of the minimum number of qualifying signatures was collected, then the initiative qualifies for the ballot without further signature certification. At this time, 110% of the minimum qualifying number amounts to 1,096,853 signatures. (Paparella Decl., ¶ 8.) Throughout the instant proceeding, Petitioners have asserted that, due to shelter-in-place and social-distancing requirements associated with the Covid-19 pandemic, they will not obtain enough signatures to qualify in this manner for the November 2020 ballot. Petitioners’ new plan is to qualify their initiative for the November 2022 ballot. (See § 9017 [failure to submit a proposed initiative to the voters at the next election does not bar submission at a subsequent election].) Petitioners no longer plan on qualifying with a random sample disclosing 110% of the required number of qualifying signatures. (See § 9031 [if random sampling discloses between 95% and 110% of the required number of qualifying signatures, then county election officials must review and certify each signature submitted].) As a result, Petitioners now estimate that they need to secure 1.4 million signatures before submitting them to election officials. (See Paparella Decl., ¶ 8.)

The Executive Branch subsequently announced a four-stage plan to re-open businesses and gradually ease shelter-in-place rules. In an order dated May 7, 2020, the State Public Health Officer authorized, but did not require, all counties to move to “stage 2,” which allowed designated “lower risk” workplaces and other spaces to re-open subject to mandatory social distancing and hygiene measures. (RJN, Exh. E.) The May 7 also order authorized eligible counties to open some additional low-risk businesses (“expanded stage 2”). Nonetheless, the order affirmed: “[t]o the extent that such sectors are re-opened, Californians may leave their homes to work at, patronize or otherwise engage with those businesses, establishments or activities and must, when they do so, continue at all times to practice physical distancing ... [the] March 19, 2020 Order otherwise remains in full effect.” (*Id.*)

Most, but not all, counties moved to expanded stage 2 in May 2020. On June 5, 2020, the Executive Branch issued guidelines for possible transition to stage 3, i.e., re-opening of higher-risk businesses, beginning June 12, 2020. (See Opening Brf. at 10:9-10.) Around the same time, the state’s Covid-19 website was updated to indicate under “How Do I vote?” that permissible activities included “the collection of signatures to qualify candidates or measures for the ballot.” (*Id.* at 10, fn. 2.) The same update cautioned people to adhere to physical distancing.

Since stage-2 of the re-opening plan, Petitioners have collected signatures roughly at a rate of 10 percent the rate they gathered signatures between January 21 and mid-March 2020. (Paparella Decl., ¶ 25.) Large public venues remain closed, and many voters whom Petitioners’ circulators attempt to engage elsewhere refuse to interact. In addition, because several county elections offices have been closed to the public, Petitioners have been unable to inspect many of the voter files typically used to ensure a favorable validity rate for signatures gathered. (*Id.*, ¶ 22.) Also, far fewer persons are willing to act as circulators. (*Id.*, ¶ 23.)

Petitioners assert that local and statewide stay-at-home and social-distancing orders have prevented them from gathering enough signatures to qualify the initiative for the November 2020 ballot. This is so because the deadline to qualify is 131 days before the election (which was June 24, 2020 for the upcoming election). (Cal Const., art. II, § 8(c).) Nonetheless, if Petitioners gather enough signatures within the 180-day period ending on July 20, 2020, they can still qualify the initiative for the November 2022 ballot. (See § 9017.) But Petitioners assert that, despite their efforts, they are unlikely secure enough signatures before July 20, 2020.

Petitioners filed the instant action on June 9, 2020. Pursuant to Code of Civil Procedure section 1085 and Elections Code section 13314, Petitioners seek a peremptory writ of mandate extending the 180-day period for at least 90 days. In the alternative, they seek a writ enjoining Respondent Alex Padilla, in his capacity as the California Secretary of State, (Respondent) to suspend the 180-day period for a period beginning March 19, 2020 through the point at which all counties in the state have been authorized to move to stage 3 of the re-opening guidelines.

Given the July 20, 2020 deadline facing Petitioners, the court set a merits hearing on an expedited briefing schedule. The parties agreed that such a schedule was appropriate under

the circumstances. The parties also agreed that county election officials were not necessary parties.

There is no opposition from Respondent.²

By order dated June 30, 2020, this case was related to Case No. 34-2020-80003413.

Legal Authority for Writ Relief

“Code of Civil Procedure section 1085 declares that a writ may be issued ‘by any court ... to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station’ The availability of writ relief to compel a public agency to perform an act prescribed by law has long been recognized. [Citation.]

“What is required to obtain writ relief is a showing by a petitioner of ‘(1) A clear, present and usually ministerial duty on the part of the respondent ... ; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty’ [Citation.] Mandamus is available to compel a public agency's performance or correct an agency's abuse of discretion whether the action being compelled or corrected can itself be characterized as ‘ministerial’ or ‘legislative[.]’” [Citation.]

(*Mission Hosp. Reg'l Med. Ctr. v. Shewry* (2008) 168 Cal.App.4th 460, 478-479, underlining omitted.)

In addition, Section 13314(a) provides:

(1) An elector may seek a writ of mandate alleging that an error or omission has occurred, or is about to occur, in the placing of a name on, or in the printing of, a ballot, county voter information guide, state voter information guide, or other official matter, or that any neglect of duty has occurred, or is about to occur.

(2) A peremptory writ of mandate shall issue only upon proof of both of the following:

(A) That the error, omission, or neglect is in violation of this code or the Constitution.

² The court directed Respondent to file any opposition by June 29, 2020. On June 30, Respondent's counsel informed the court that the attorney assigned to this matter had experienced a personal emergency on June 29. Respondent's counsel subsequently filed a statement indicating that Respondent would not be filing an opposition brief and would attempt instead to negotiate a stipulation and order granting the petition. The court has not received a stipulation and order.

(B) That issuance of the writ will not substantially interfere with the conduct of the election.

(3) The action or appeal shall have priority over all other civil matters.

(4) The Secretary of State shall be named as a respondent or a real party in interest in any proceeding under this section concerning a measure or a candidate described in Section 15375,³ except for a candidate for judge of the superior court.

Discussion

Petitioners have established that an order extending the 180-day deadline in Section 9014(b) will not interfere with any election. Petitioners no longer wish to qualify their initiative for the November 2020 ballot, and nothing before the court indicates that an extension will threaten any election.

Petitioners have also established that a constitutional violation will occur absent an order extending the 180-day deadline.

The right of initiative is among the most precious rights in the California democratic process, and courts must guard it jealously for the people. (See *Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1168.) Where, as here, a state authorizes initiative measures, state action burdening that authority implicates free speech and petitioning activity guaranteed under the First Amendment to the Federal Constitution:

The [United States] Supreme Court has identified at least two ways in which restrictions on the initiative process can severely burden "core political speech." *Meyer v. Grant*, 486 U.S. 414, 422, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988). First, regulations can restrict one-on-one communication between petition circulators and voters. See *id.* at 422-23. Second, regulations can make it less likely that proponents will be able to garner the signatures necessary to place an initiative on the ballot, "thus limiting their ability to make the matter the focus of statewide discussion." *Id.* at 423.

(*Angle v. Miller* (9th Cir. 2012) 673 F.3d 1122, 1132, underlining omitted.) In the context of restrictions on ballot initiatives, the *Angle* court determined that strict judicial scrutiny applies where (1) the proponents have been reasonably diligent as compared to other initiative proponents, and (2) the restrictions significantly inhibit the proponents' ability to place the initiative on the ballot. (673 F.3d at 1133; see also *Fair Maps Nevada v. Cegavske* [*Fair Maps*] (D. Nev. 2020, May 29, 2020) 2020 U.S. Dist. LEXIS 94696, *31 [following *Angle*].) To survive strict scrutiny, the restrictions must advance an overriding state interest and must be narrowly

³ Section 15375 requires elections officials to "send to the Secretary of State within 31 days of the election ... one complete copy of all results as to all of the following: [¶¶] (e) All statewide measures."

drawn to avoid unnecessary intrusion on First Amendment rights. (*See Planning & Conservation League, Inc. v. Lungren* (1995) 38 Cal.App.4th 497, 507.)

The recent decision in *Fair Maps* involved facts similar to those at bench. Before the Covid-19 pandemic arose, the plaintiffs in *Fair Maps* filed an initiative petition to amend the Nevada Constitution. (2020 U.S. Dist. LEXIS 94696, *8-9.) They began gathering signatures in early 2020, but stay-at-home and other public-health orders halted their efforts. (*Id.* at *9-10.) The plaintiffs asked the Nevada Secretary of State (1) to extend the statutory deadline on their signature gathering and (2) to waive statutory requirements on their circulators personally to sign the petitions and observe voters affixing signatures. The Secretary declined on the ground that she lacked authority to take the requested actions.

The *Fair Maps* plaintiffs then brought an as-applied First Amendment challenge to the deadline and circulator requirements. (*Id.* at *27.) On plaintiffs' motion for a preliminary injunction, the district court applied strict scrutiny. The court concluded that, given the stay-at-home orders issued in response to Covid-19, Nevada's statutory deadline on signature gathering did not advance a compelling interest. The deadline was not constitutionally required and, at most, would severely inconvenience election officials trying to prepare for the upcoming election. The avoidance of severe inconvenience was not a compelling interest given that, without an extension, the plaintiffs would be unable to place their initiative on the next ballot. (*See id.* at *42-43.) Similarly, the deadline was not narrowly tailored because election officials could perform all their pre-election work even with an extension. Although the court did not impose an extension, it assumed that its ruling would cause the statutory deadline to revert to an extended deadline under the Nevada constitution, or that the parties would stipulate to another accommodation. Elsewhere the court found that Nevada's in-person circulator requirements survived strict scrutiny because they were narrowly tailored to the compelling state interest in preventing voter fraud. (*Id.* at *47.)

Like the plaintiffs in *Fair Maps*, Petitioners in the instant case have established circumstances warranting the application of strict scrutiny. Compared with other proponents of initiatives, Petitioners have been reasonably diligent – if not extremely diligent – in gathering signatures during the 180-day period. (*See Paparella Decl.*, ¶ 26.) In addition, despite Petitioners' diligence, the 180-day deadline coupled with Executive Branch orders responding to the Covid-19 pandemic significantly inhibits Petitioners' ability to place their initiative on the November 2022 ballot.

Citing the legislative history of statutory deadlines on signature gathering for California initiatives, Petitioners argue that the 180-day deadline in Section 9014(b) does not serve any compelling state interest. The deadline is not constitutionally prescribed. Nonetheless, the court need not decide whether the deadline advances any compelling state interest, since the deadline is not narrowly tailored (i.e., is unduly restrictive) when applied to current circumstances. To avoid a First Amendment violation, the 180-day deadline must be extended.

Petitioners propose alternative remedies. On the one hand, they suggest extending the July 20, 2020 deadline to an unspecified date when all counties have moved to stage 3 re-opening. The court will not order such an indefinite extension.

On the other hand, Petitioners propose a 90-day extension to account for time within the 180-day period in which official shelter-in-place and social-distancing orders have impeded their efforts to gather signatures. Between March 19, 2020 and May 7, 2020, Petitioners were virtually if not literally barred from collecting any signatures to support their initiative. The court has no trouble ordering an extension of the 180-day period by an equivalent period of 49 days. That moves the deadline to submit signatures under Section 9014(b) to September 7, 2020.

The remaining question is whether to extend the deadline further to account for government restrictions impeding Petitioners' activities since re-opening began on May 7. Between May 7 and June 18, Petitioners gathered signatures at approximately 10 percent their prior rate and notwithstanding their diligent efforts. The court finds that the rate reduction is the result of government restrictions responding to the Covid-19 pandemic. To make Petitioners whole, the court will order a further extension equal to 90 percent of the same time period, or 35 additional days. This further extension moves the deadline to submit signatures to October 12, 2020.

The court will not order a further extension at this time. The degree to which official Covid-19 restrictions will thwart Petitioners' ability going forward to qualify their initiative for the November 2022 ballot is speculative, and the court will not move the deadline absent a showing that a constitutional violation is likely to occur. The court, however, will retain jurisdiction in this matter so that the parties may seek further judicial relief without having to file a new case.

Disposition

The petition is granted.

For the reasons above, the July 20, 2020 deadline by which Petitioners must submit signatures to support the initiative is HEREBY ORDERED EXTENDED to and including October 12, 2020. Respondent shall abide by the new deadline.

The court shall retain jurisdiction in this matter.

Consistent with Local Rule 1.06(B), parties requesting oral argument must call the court and opposing party, and email the court (Dept17@saccourt.ca.gov) and the opposing party(ies), by 4:00 p.m. on the court day before the hearing. If you do not call and email the court and the opposing party(ies) by 4:00 p.m. the court day before the hearing, no hearing will be held, and the tentative ruling shall become the final order of the court.

If a hearing is requested, it will be conducted remotely through the Zoom application and live-streamed on the court's YouTube page. The clerk will email the Zoom ID to counsel once a hearing is requested. The YouTube page is accessible from the Sacramento County Superior Court's public website.

Although any hearing will be live-streamed on the court's YouTube page, the broadcast will not be saved. Thus, if any party wishes to preserve the hearing for future use, a court reporter will be required. Any party desiring a court reporter shall so advise the Department 17 Clerk no later than 4:30 p.m. on the day before the hearing. The reporter's fee is \$30.00 for civil proceedings lasting under one hour, and \$239.00 per half day for proceedings lasting more than one hour. (Local Rule 1.12 and Government Code § 68086.)