SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE / TIME **JUDGE**	**November 6, 2020 / 11:00 a.m.** **James P. Arguelles**	**DEPT. NO.** **CLERK**	**17** **Slort**
ORRIN E. HEATLIE and CALIFORNIA PATRIOT COALITION – RECALL GOVERNOR GAVIN NEWSOM, **Petitioners,** **v.** **ALEX PADILLA, in his official capacity as Secretary of State of the State of California,** **Respondent.**		**Cases No.: 34-2020-80003499** [*Related Cases: 34-2020-80003404 and 34-2020-80003413*]	
Nature of Proceedings:	**Petition for Writ of Mandate – Tentative Ruling**		

The petition is GRANTED.

The parties' requests for judicial notice are GRANTED.

The court takes judicial notice of its files in the Related Cases captioned above.

Background

Petitioners have mounted an effort to remove Governor Newsom from office by recall election. (See Cal. Const., art. II, §§ 13-17; Elec. Code § 11000 *et seq.*)[1] To that end, they are in the process of circulating petitions for voters' signatures.[2] On June 10, 2020, Respondent approved Petitioners' petitions for circulation. (See § 11042.) Under article II, section 14 of the California Constitution, Petitioners have 160 days from that date to collect signatures numbering at least 12 percent of the votes cast in the last gubernatorial election. Twelve percent equals 1,495,709 signatures in this case. In addition, Petitioners must collect at least one percent of the last vote from five different counties. (Cal. Const., art. II, § 14(b).) The 160-day deadline facing Petitioners expires on November 17, 2020.

[1] Undesignated statutory references shall be to the Elections Code.

[2] California does not allow voters to sign petitions electronically. (See §§ 354.5, 11043.)

Petitioners commenced their recall effort in February 2020 – just before the Covid-19 pandemic swept the nation. Petitioners timed their initial activities with the hope of gathering signatures during the spring and summer months, when crowds typically gather at large events and outdoor venues. By June 10, 2020, however, Governor Newsom had issued executive orders directing Californians to remain at home and comply with social distancing, directing non-essential businesses to remain closed, and authorizing local jurisdictions gradually to re-open in compliance with standards published by the California Department of Public Health. Despite the initial plan to re-open gradually in four stages, many businesses and other institutions have been ordered closed, and the four-stage plan was replaced altogether with a four-tiered system focused on counties' weekly Covid-19 testing data.

Petitioners nonetheless undertook to collect signatures. They hired a political consulting firm in late June 2020, and the initial plan was to pay circulators to collect signatures. Given the difficulties in obtaining signatures during the pandemic, however, the per-signature cost rose dramatically, and Petitioners opted to proceed with a team of approximately 5,000 volunteer circulators instead. Petitioners' consultant estimates that efforts to collect signatures have yielded approximately 25 percent of the signatures that would be expected in a "normal" election cycle. This estimate is based on experience with initiatives and referenda as well as the effort to recall Governor Davis in 2003. (See Weber Decl., ¶¶ 4, 10.) Another consultant estimates that 25 percent of normal is "at best" the number of signatures garnered to date. (See Olson Decl., ¶ 11.) As of October 15, 2020, Petitioners had collected approximately 675,000 signatures. Between mid-September and mid-October 2020, Petitioners collected more than 50,000 signatures per week. (*Id.*, ¶ 18.)

Petitioners assert that they will not gather the requisite signatures unless the 160-day deadline is extended. In the Related Cases, Nos. 2020-80003404 (*Macarro v. Padilla*) and 2020-80003413 (*Sangiacomo v. Padilla*), the court granted similar extensions to proponents of initiatives. Respondent stipulated to extensions in those cases. Petitioners argue that they should receive an extension like the ones the proponents in the Related Cases received. Respondent disagrees.

Petitioners ask for a writ suspending or extending the 160-day period on signature gathering:

> Petitioners pray … [f]or] a peremptory writ of mandate commanding Respondent Padilla to suspend the November 17, 2020 deadline to circulate and file petitions for the recall of Governor Gavin Newsom until all counties in the State have been authorized to reopen consistent with the State's guidelines for "minimal" risk levels or, alternatively, that the 160-day period to circulate and file recall petitions be extended for a period of not less than 90 days[.]

(Pet. at 18, ¶ 1.) Pursuant to 42 U.S.C. Section 1983, they also seek declaratory and injunctive relief as well as nominal damages.[3] Respondent opposes the petition.

The court set a hearing on shortened time, and issued an expedited briefing schedule, in light of the November 17, 2020 deadline.

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.]
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> "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.
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> (2) A peremptory writ of mandate shall issue only upon proof of both of the following:
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> > (A) That the error, omission, or neglect is in violation of this code or the Constitution.
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> > (B) That issuance of the writ will not substantially interfere with the conduct of the election.
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> (3) The action or appeal shall have priority over all other civil matters.

[3] "As a direct and proximate result of the actions of Respondent, Petitioners have suffered irreparable harm, including the loss of their [First Amendment] rights, entitling them to declaratory and injunctive relief, and nominal damages." (Pet., ¶ 59.)

(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,[4] except for a candidate for judge of the superior court.

Discussion

The parties agree that the circulation of recall petitions, like the circulation of initiative petitions, is core political activity protected by the First Amendment to the United States Constitution. Whether a state's ballot-access restrictions impermissibly infringe upon such activity turns on balancing of the state's legitimate regulatory interests against the affected First Amendment interests:

> [The court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. [Citations.] The results of this evaluation will not be automatic; as we have recognized, there is "no substitute for the hard judgments that must be made."

(*Anderson v. Celebrezze* (1983) 460 U.S. 780, 789-790, 103 S. Ct. 1564, underlining omitted.) If the restrictions impose a severe burden, then they must be narrowly drawn and must advance a compelling state interest. (See *Burdick v. Takushi* (1992) 504 U.S. 428, 434, 112 S. Ct. 2059.) "Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" (*Timmons v. Twin Cities Area New Party* (1997) 520 U.S. 351, 358-359, 117 S. Ct. 1364, additional quotation marks omitted.) "This is a sliding scale test, where the more severe the burden, the more compelling the state's interest must be, such that 'a state may justify election regulations imposing a lesser burden by demonstrating the state has important regulatory interests.'" (*Ariz. Green Party v. Reagan* (9th Cir. 2016) 838 F.3d 983, 988.)

In *Angle v. Miller* (9th Cir. 2012) 673 F.3d 1122, 1133, the Ninth Circuit predicated application of strict scrutiny upon the petitioner's reasonable diligence in gathering signatures. (See also *Fair Maps Nev. v. Cegavske* (D. Nev., May 29, 2020) 2020 U.S. Dist. LEXIS 94696, *31 [applying *Angle*].) Respondent argues that Petitioners cannot demonstrate any severe burden warranting such scrutiny because they were not reasonably diligent. The court disagrees.

Petitioners' 160-day period began on June 10, 2020, and they presented 35,000 signatures to county election officials by July 3, 2020. (See Opp. at 11:18-19.) In addition, they hired a

[4] Section 15375 describes holders of statewide office, such as the Governor.

consulting firm and switched from paid circulators to a team of 5,000 volunteers once the high cost of paid circulation became clear. According to Respondent's data, the 675,000 signatures that Petitioners have collected to date is more than double the number gathered during the last recall effort in 2019. (See Opp. at 5:9-13.) Petitioners have been reasonably diligent.

Respondent nonetheless argues that Petitioners cannot demonstrate reasonable diligence given their failure to submit signatures to county election officials since August 2020. Petitioners counter that county officials asked them not to submit signatures so that officials could focus on the November 2020 election. County officials' need to prioritize the upcoming election is evident: the Governor recently issued an executive order extending deadlines for local officials to process signatures on initiatives slated for the November 2020 ballot. (See Duvernay Decl., Exh. 10.) Further, Petitioners note that they are not legally required to submit signatures to county officials throughout the 160-day period.

Petitioners' arguments are persuasive. The fact that Petitioners stopped submitting signatures to county election officials in August 2020 does not negate a finding that they have proceeded with reasonable diligence.

Turning to the balancing of interests, Respondent identifies the following state interests in support of the 160-day deadline facing Petitioners: (1) the interest requiring a showing of popular support before the costs of a recall election are incurred, and (2) the interest in the integrity of the electoral process, by which the voters elected Governor Newsom for a full four-year term. These are weighty interests. The state's interests in managing the Covid-19 pandemic, and protecting public health through executive orders, are at least as significant. On the other side of the scale are Petitioners' interests in core political speech.

The *Angle* court wrote that ballot-access restrictions impose a severe burden on First Amendment rights where (1) the restrictions hamper one-on-one communication between petition circulators and voters or (2) where the restrictions "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.'" (673 F.3d at 1132, quoting *Meyer v. Grant* (1988) 486 U.S. 414, 423, 108 S. Ct. 1886.) Since June 5, 2020, the state has identified signature gathering as an essential election-related activity in which residents may engage despite stay-at-home orders. (See Calia Decl., Exh. K, ¶ 9.) Because Petitioners' 160-day deadline did not commence until June 10, 2020, Respondent argues that the ballot-access restrictions in question have not hampered one-on-one communication with voters.

But under *Angle* strict scrutiny applies equally to restrictions that can reduce the probability sufficient signatures will be collected. Respondent argues that executive orders requiring residents to stay at home subject to exceptions, limiting large gatherings, and requiring certain businesses to remain closed or at limited capacity do not impact the likelihood Petitioners will meet their goals. This argument does not square with Respondent's position in the Related Cases, which both sides discuss in their legal briefs. In those cases, Respondent stipulated to

extend deadlines on signature gathering. Respondent emphasizes that the initiative proponents in the Related Cases began gathering signatures and sought writ relief in court before the Governor's stay-at-home order provided an exception for signature gathering. Hence, Respondent argues that its stipulations to extend the deadlines in the Related Cases are irrelevant to case at bench.

Respondent paints an incomplete picture. Respondent initially stipulated to extend the deadlines in the Related Cases on July 1, 2020, shortly after signature gathering was designated an essential activity exempt from the stay-at-home order. Most of the signatures the petitioners in the Related Cases had collected before then were collected while signature gathering was considered nonessential. Accordingly, Respondent argues that its initial stipulations were a response to the total ban on one-on-one contact with voters in effect when the Related Cases were filed.

When the court signed the initial stipulated extensions in the Related Cases, it retained jurisdiction so that additional expedited relief could be granted without the need to file a new action. In fact, the petitioners in one of the Related Cases, *Macarro v. Padilla*, sought a further extension of time to gather signatures. The *Macarro* petitioners sought the additional extension in September 2020. Between the time the *Macarro* petitioners obtained the initial extension and the time they sought the additional extension, signature gathering was an essential activity not subject to the Governor's stay-at-home order. Respondent nonetheless stipulated to the additional extension as follows:

> 1. On July 17, 2020, this Court entered judgment extending the deadline for proponents … in light of significant restrictions on petitioners' First Amendment rights caused by the issuance of various COVID-19 stay-at-home orders. […]
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> 2. On July 1, 2020, because of continuing and increased community spread of COVID-19, the California Department of Public Health (CDPH) directed the suspension of indoor operations in various sectors including restaurants, entertainment venues and all bars for those counties on the County Monitoring List. There were 19 counties on the list on that date.
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> 3. By July 13, 2020, the number of counties on the Monitoring List increased to 32 counties. As a result, on that date, CDPH expanded its July 1 directive to apply statewide and implemented additional restrictions for counties on the Monitoring List related to gyms, places of worship, personal care salons and malls. […]
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> [¶]
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> 5. On August 28, 2020, Governor Newsom announced a new four-tier "Blueprint for a Safer Economy" to replace the County Monitoring List … . At the time of his announcement, approximately 87% of the State's population was in "Tier 1," the tier

with the most widespread incidence of COVID-19 and the most restrictions on activities.

6. **The restrictions described above have continued to make it extremely difficult for petitioners to engage in signature-gathering activities for their proposed initiative.** Petitioners represent that the State-imposed restrictions since the date of the Court's previous order have continued to interfere with their ability to exercise their First Amendment rights in the same ways identified by the Court in its July 17, 2020 judgment and order.

7. Petitioners represent that they have made substantial efforts to increase their signature-gathering efforts, but they estimate that between June 18, 2020 … and August 31, 2020, petitioners have only been able to increase the number of signatures from approximately 10% of the signatures they would normally be able to obtain (and were obtaining prior to the State's COVID-19 stay-at-home order in March, 2020) to approximately 16% of the signatures they would normally be able to obtain (and were obtaining prior to the State's COVID-19 stay-at-home order in March, 2020).

8. […] **Based on these circumstances and the Court's previous ruling, the parties agree that it would be appropriate for the Court to amend the July 17, 2020 judgment to extend the October 12, 2020 deadline for signatures therein by 62 days. This represents adding 84% to the 74 days between June 18, 2020 and August 31, 2020 during which petitioners were only able to obtain 16% of normal signatures.** (Emphasis added.)

(See Register of Actions No. 30 in Case No. 34-2020-80003404.) In other words, even after signature gathering was designated an essential activity exempt from the stay-at-home order, Respondent represented to this court that the state's Covid-19 restrictions made it "extremely difficult" for the *Macarro* petitioners to collect enough signatures to place their initiative on the ballot. The same difficulties have been at work during the 160-day period facing Petitioners in the instant action.

Petitioners argue that representations Respondent made to the court in the *Macarro* stipulations judicially estop him to make contrary representations now. (See *The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 841 ["The doctrine of judicial estoppel precludes a party from taking inconsistent positions in separate judicial proceedings"].) Whether or not Respondent is estopped, his stipulations in *Macarro* gravely undermine his current position that state action has not significantly hampered Petitioners' efforts. As those stipulations indicate, even after signature gathering was deemed an essential activity, executive orders have kept swaths of businesses statewide closed or at partial capacity. Social distancing is still required, large gatherings are still barred, and travel outside the home is still restricted. The court finds that these ballot-access restrictions are themselves likely to prevent Petitioners from obtaining the requisite signatures. Coupled with the 160-day deadline, they are virtually guaranteed to do so.

Respondent asserts that factors other than Covid-19 restrictions have thwarted Petitioners' efforts to gather the needed signatures. He contends that the Governor's popularity and Petitioners' lack of funding are the true causes. The court is not convinced.

Respondent also argues that Covid-19 itself, rather than state restrictions responsive to it, is a reason Petitioners have not gathered more signatures. Indeed, voters might avoid circulators for fear that interacting with them will result in exposure to the virus. But it is impossible to separate with precision this impact on voter behavior from the impact of the ballot-access restrictions in place. Nor is such an allocation required. Enforcement of the 160-day deadline to present circumstances, including Covid-19, is itself state action. (See *Bond v. Dunlap* (D. Maine, July 24, 2020) 2020 U.S. Dist. LEXIS 131389, *19, fn. 7 ["Although COVID-19 itself does not constitute state action, Maine's decision to enforce its ballot restrictions is state action, and the reasonableness of such restrictions must be considered against the altered landscape during the pandemic, which includes actions taken by the State in its response,] and collecting authorities. But see *Thompson v. Dewine* (6th Cir. 2020) 959 F.3d 804, 810 ["[W]e cannot hold private citizens' decisions to stay home for their own safety against the State"].) And as noted above, Respondent previously stipulated that ballot-access restrictions significantly burdened efforts to gather signatures.

Applying strict scrutiny, the court inquires whether the state's ballot-access restrictions are narrowly drawn to avoid unnecessary intrusion on First Amendment rights. (*See Planning & Conservation League, Inc. v. Lungren* (1995) 38 Cal.App.4th 497, 507.) As applied to present circumstances, the 160-deadline is not narrowly drawn. Petitioners have only been able to obtain roughly 25 percent of the signatures that their diligent efforts would otherwise yield. It is virtually if not actually impossible for Petitioners to gather enough signatures under current conditions. An order providing Petitioners with a signature-gathering period in which their efforts will approximate unrestricted diligent efforts will preserve the state interests identified above: it will not be easier for Petitioners to recall the Governor than it would be under normal circumstances, nor will it sanction a recall election without a showing of the necessary popular support. Rather, the extended period for signature gathering will account for disabilities that ballot-access restrictions have yielded.[5]

The result would be the same even if the court were to apply something less than strict scrutiny. For ballot-access restrictions that are neither severe nor minimal, the burdens of the restrictions must be weighed against the state interests tendered as justifications, "taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." (*SawariMedia LLC v. Whitmer* (E.D. Mich., June 11, 2020) 2020 U.S. Dist. LEXIS 102237, *15-16, citations and additional quotation marks omitted.) As previously discussed, it is not

[5] When Respondent stipulated to a second extension in *Macarro*, he stipulated to an extension equal to 84 percent of the signature-gathering period because the petitioners had only collected "16 percent of normal signatures." (See Register of Actions No. 30, ¶ 8, in Case No. 34-2020-80003404.) Respondent cannot credibly complain about a similarly calibrated offset in this case.

necessary under the circumstances to require Petitioners to gather almost 1.5 million signatures within 160 days. The state's considerable restrictions on gatherings, business activities and close interpersonal contacts have already burdened Petitioners' efforts. Strict adherence to the 160-day deadline would increase the burden beyond that necessary to uphold the integrity of the political process or assure that any recall election has sufficient popular support.

The court calibrates relief as it did in the Related Cases, i.e., by multiply the signature-gathering period (160 days) by the rate at which signature-gathering was diminished compared with normal circumstances (75%). Accordingly, the court will order a 120-day extension to March 17, 2021.

Disposition

The petition for writ of mandate is granted on the terms above. Respondent shall abide by the new deadline of March 17, 2021.

The court shall retain jurisdiction in this matter.

No other relief is granted.

Pursuant to CRC 3.1312, counsel for Petitioners shall lodge a proposed judgment to which this ruling is attached as an exhibit.

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.)