UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DONALD BLANKENSHIP, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

Case No. 20-cv-04479-RS

ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER & PRELIMINARY INJUNCTIVE RELIEF

I. INTRODUCTION

Plaintiff Donald Blankenship is the 2020 presidential nominee of the Constitution Party.[1] He contends that but for the unconstitutional application of California law, his name would rank among the candidates printed on the California ballot for the upcoming general election. This argument builds upon crisis: because collecting a certain number of signatures before a certain deadline is one way a minor party presidential candidate can secure a spot on California's general election ballot, and because signature collection has been hampered by government-imposed restrictions occasioned by the COVID-19 pandemic, Blankenship insists his access to the ballot faces imminent irreparable harm. With the deadline looming, he now moves to enjoin California from demanding his timely submission of the requisite signatures. California's Governor and

[1] Co-plaintiff Denise Pursche, a registered California voter, is one of his supporters. Because disposition of her claim follows from resolution of Blankenship's claim, a separate discussion of the two is unnecessary. *See Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (observing the Court's role in "minimize[ing] the extent to which voting rights cases are distinguishable from ballot access cases").

Secretary of State oppose the motion in their official capacity, countering that Blankenship's prospective injury springs principally from his own inaction. For the reasons set forth herein, the motion is denied.

II. BACKGROUND

A. The California Elections Code

The Constitution Party, formerly the U.S. Taxpayers Party, is a national political party recognized by the Federal Election Commission. It is not, however, one of California's six ballot-qualified parties, and therefore may not place its nominee automatically on the State's general election ballot.[2] On May 2, 2020, at a virtual convention, the Constitution Party named Blankenship, a former coal executive and West Virginia senatorial candidate, as its presidential nominee for the November election. He now endeavors to appear on the California general election ballot. The State provides two avenues for candidates like Blankenship[3] to achieve this goal: § 8400 and § 5151(c)(1) of the California Elections Code.

Section 8400 instructs a presidential candidate seeking ballot access to provide local officials with "[n]omination papers . . . signed by voters of the state equal to not less in number than 1 percent of the registered voters of the state at the time of the close of registration prior to the preceding general election." Cal. Elec. Code § 8400. Two further requirements attach to a candidate's successful use of this provision. First, each signature gathered must be "wet," meaning handwritten in ink by an eligible voter. Although the traditional method for collecting "wet" signatures is in-person solicitation in high-traffic public areas, California permits candidates to circulate nomination papers to prospective supporters, who may then sign in the presence of a notary or election official. This circulation may occur via traditional or electronic means. Second, "nomination papers shall be prepared, circulated, signed, and delivered . . . for examination no

[2] California's ballot-qualified parties are: (1) the American Independent Party, (2) the Democratic Party, (3) the Green Party, (4) the Libertarian Party, (5) the Peace and Freedom Party, and (6) the Republican Party.

[3] That is, nominees of parties that are not California ballot-qualified.

earlier than 193 days before the election and no later than 5 p.m. 88 days before the election." Cal. Elec. Code § 8403(a)(2). Thus, to avail himself of § 8400 ballot access in the November 3, 2020 general election, Blankenship must submit the "wet" signatures of some 196,964 registered California voters (one percent of the entire number of registered California voters eligible to vote in the last general election) gathered between April 24, 2020 (193 days before the election) and August 7, 2020 (88 days before the election).

Alternatively, § 5151(c)(1) sets forth how the nominee of a party that is not ballot-qualified in California may attain his party's ballot-qualification, thereby ensuring an appearance on the general election ballot. Cal. Elec. Code § 5151(c)(1). Under this provision, a party qualifies for the ballot when "it appears to the Secretary of State . . . that voters equal in number to at least 0.33 percent of the total number of voters registered on the 123rd day before the presidential general election have declared their preference for that party." *Id.* Unlike § 8400, § 5151(c)(1) does not carry a "wet" signature requirement. This means that a minor party candidate hoping to grow his party's ranks to the ballot-qualification threshold may employ a diverse variety of tactics, ranging from traditional in-person solicitation, to direct mail campaigns, to email or social media advertisements. *See* Cal. Elec. Code § 2158(b)(4). Voters swayed by such efforts may register with the candidate's party by filling out either a physical form or the California Online Voter Registration, and need not do so in the presence of a notary or election official. *See id.; see also Frequently Asked Questions*, California Secretary of State Website, https://www.sos.ca.gov/elections/frequently-asked-questions/ (explaining that "[i]n order to change your political party preference . . . [y]ou can re-register to vote by completing a voter registration application online"). Thus, to avail himself of § 5151(c)(1) ballot access in the November 3, 2020 general election, Blankenship would have had to ensure that as of July 3, 2020 (123 days before the election), roughly 62,000 California voters (approximately 0.33% of California's registered voting public as of that date) had registered with the Constitution Party.

Historically, when presented with two such routes to the ballot, candidates have selected

the easier of the two.[4] Because § 5151(c)(1) requires gaining the support of fewer voters by more permissive means, one might therefore expect the nominee of a non-ballot-qualified party to pursue the California ballot through that provision. Blankenship, for whatever reason—litigation related or otherwise—has opted to tie his fortunes exclusively to § 8400, a high hurdle made even more challenging by virtue of the present COVID-19 pandemic.

B. State Response to COVID-19

On March 4, 2020, California Governor Gavin Newsom met the then-emergent COVID-19 public health crisis by declaring a State of Emergency. On March 19, 2020, Governor Newsom issued Executive Order N-33-20 ("the Stay-at-Home Order"), requiring all California residents to comply with the directives of the State's Public Health Officer. Those directives ordered "all individuals living in the State of California to stay home . . . except as needed to maintain continuity of operations of [16 specified] critical infrastructure sectors . . . ." Order of the State Public Health Officer, Mar. 19, 2020, Haddad Decl., Ex. 3, Dkt. 13-1 at 14. Three days later—over a month before the opening of the § 8400 signature-gathering window—the State Public Health Officer issued guidance categorizing "election personnel" as "Essential Critical Infrastructure Workers." Haddad Decl., Ex. 5, Dkt. 13-1 at 41. Through May and June, California's website dedicated to disseminating information about the pandemic labeled "the collection and dropoff of ballots, or other election-related activities" as "essential activity." Quirarte Decl., Dkt. 13-2 at 2-3. Beginning June 5, that same website explicitly identified "the collection of signatures to qualify candidates or measures for the ballot" as a permissible activity, but encouraged signature-seekers to "adhere to physical distancing and other applicable public health directives." *Id.* at 3.

While the California government did all this, Blankenship did little. More specifically, he

[4] *See* Winger Decl., Ex. 3, Dkt. 2-3 at 2 (providing expert opinion that although "presidential nominees of non-ballot-qualified parties have frequently used the independent candidate procedures . . . if the independent procedure were easier," for that same cohort of candidates "[t]he reverse is also true").

did not attempt any "wet" signature solicitation; he did not reach out to any arm of California government for clarification on whether and how he might attempt such solicitation; he did not re-direct any planning or personnel to § 5151(c)(1) efforts; and indeed, the record is silent on any commitment by Blankenship of campaign resources to an effort to appear on the California ballot. Instead, he elected to sue. On July 7, 2020, over two months after the § 8400 signature-gathering window had opened, Blankenship brought an as-applied constitutional challenge to that statute and its accompanying deadline, characterizing the obstacle of "wet" signature collection under Governor Newsom's Stay-at-Home Order as an infringement of his First and Fourteenth Amendment rights. Later that day he filed the instant motion, seeking an order (i) temporarily restraining California from enforcing its "filing deadline and signature requirements,"[5] and (ii) requiring California to extend the deadline and decrease the signature requirement before printing its general election ballot. Pls.' Mot., Dkt. 2 at 18. The State opposes the motion, arguing that because Blankenship has not made an adequate merits showing, he is not entitled to emergency injunctive relief.

III. LEGAL STANDARD

A temporary restraining order may issue upon a showing "that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A). In the usual run of cases, the purpose of such an order is to preserve the status quo and prevent irreparable harm "just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 439 (1974). A request for a temporary restraining order is evaluated by the same factors that generally apply to a preliminary injunction. *See Stuhlbarg Int'l. Sales Co. v. John D. Brushy & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001).

To obtain preliminary injunctive relief in the form of a temporary restraining order, the

[5] Because his complaint and motion are entirely silent as to § 5151(c)(1), it follows that Blankenship only seeks to avoid enforcement in the § 8400 context.

moving party bears the heavy burden of demonstrating 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 Res. Def. Council*, 555 U.S. 7, 20 (2008). Alternatively, if the moving party can demonstrate the requisite likelihood of irreparable harm and show that an injunction is in the public interest, a preliminary injunction may issue so long as there are "serious questions going to the merits and the balance of hardships tips sharply in the moving party's favor." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.2011) (internal quotation marks and citations omitted). Where a plaintiff fails to demonstrate even serious questions going to the merits of his or her claim, the court need not consider the remaining *Winter* factors. *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 944 (9th Cir. 2013).

IV. DISCUSSION[6]

As noted above, Blankenship may prevail if he demonstrates "serious questions going to" the merits of his claim and "the balance of hardships tips sharply" in his favor. *See Alliance for Wild Rockies*, 632 F.3d at 1131-32 (internal quotation marks and citations omitted) (affirming "the continuing vitality of the 'serious questions' approach to preliminary injunctions after *Winter*"). In the delicate constitutional context of a ballot access claim, satisfaction of this standard turns largely on levels of scrutiny. When a ballot access law imposes "severe" burdens on the plaintiff's First and Fourteenth Amendment rights, the law is subject to strict scrutiny, and "must be narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (internal quotation marks and citations omitted). By contrast, when the law presents "only reasonable, nondiscriminatory restrictions," lesser scrutiny applies, and "the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.; see also De La Fuente V. Padilla*, 930 F.3d 1101, 1106 (9th Cir. 2019) (articulating this "less exacting standard").

[6] Although Blankenship raises evidentiary objections to certain testimony offered in support of California's opposition to this motion, none of the statements with which he takes issue are material to the outcome of this order. His objections are therefore overruled.

Because Blankenship's burden is not severe—and because he fails to demonstrate "serious questions" as to the merits of his claim—his motion must be denied.

A. Severity of Alleged Burden

Inquiry into the severity of Blankenship's alleged burden is not a freeform exercise. Rather, it "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, or whether they will rarely succeed in doing so." *Nader v. Brewer,* 531 F.3d 1028, 1035 (9th Cir. 2008). Absent this showing, a plaintiff's burden is not severe. *Libertarian Party of Washington v. Munro,* 31 F.3d 751, 763 (9th Cir. 1994) (overruled on other grounds by *Public Integrity Alliance, Inc. v. City of Tucson,* 836 F.3d 1019 (9th Cir. 2016)); *see also Angle v. Miller*, 673 F.3d 1122, 1133-34 (9th Cir. 2012). As the State persuasively maintains, Blankenship has failed to show he faces a severe burden.

This conclusion flows most readily from Blankenship's inaction. Presented with the State's repeated assertion that he has done, quite literally, *nothing* to secure a place on the California ballot under § 8400, Blankenship provides only the uncertain scope of the Stay-at-Home Order and a fear of COVID-19 transmission in justification for his idleness. To put it mildly, his answer begs the question. While obedience to the law and concern for public health are admirable traits, they do not transform inertia into "reasonable diligence." The ways in which Blankenship might have attempted to reconcile his California ballot hopes with the current crisis are as apparent as they are legion: making inquiries with public officials, attempting (or even planning to attempt) "socially-distanced" in-person signature solicitation, or merely checking the State website explicitly dedicated to delineating the Stay-at-Home Order's scope are all activities one might expect of a reasonably diligent candidate. That Blankenship does not aver doing anything of the sort undercuts his insistence that he confronts a severe burden.[7]

[7] To the degree "reasonable diligence" analysis contemplates the efforts of candidates other than the plaintiff, none are detailed in Blankenship's papers.

The cases agree. Given this unique moment in American history, disputes of this sort are many and multiplying—a fact underscored by Blankenship's extensive briefing. Fatal to his plight, however, is the scarcity of analogous cases finding a severe burden absent any showing of electoral effort expended on the part of the plaintiff. A survey of recent decisions is, on this point, highly illustrative. Over the last few months, district courts in this circuit have held plaintiffs' burdens non-severe where "[p]laintiffs essentially abandoned most of their efforts" upon the arrival of COVID-19, *Common Sense Party v. Padilla*, 2020 WL 3491041 at *6 (E.D. Cal. June 6, 2020), or where "[p]laintiffs have not shown that they exercised reasonable diligence to maximize their efforts to appear on the ballot in November 2020," *Joseph Kishore v. Gavin Newsom*, No. 2:20-cv-05859 at 10 (C.D. Cal. July 20, 2020). Conversely—and moving to other circuits, where the "reasonable diligence" requirement is merely persuasive—trial judges *have* found severe burdens where the plaintiff's "campaign had already collected approximately seven hundred" of the requisite thousand signatures on the day a Stay-at-Home Order was issued, *Esshaki v. Whitmer*, 2020 WL 1910154 at *2 (E.D. Mich. April 20, 2020) (aff'd in relevant part, 2020 WL 2185553 (6th Cir. 2020)); where the (gubernatorial candidate) plaintiff's pre-COVID-19 progress included both collecting "about 21,000 of the required 28,000 signatures" and petitioning local officials for relief, *Garbett v. Herbert*, 2020 WL 2064101 at *1-2 (D. Utah Apr. 29, 2020); where plaintiffs brought suit shortly after having such petitions officially denied, *Libertarian Party of Ill. v. Pritzker*, 2020 WL 1951687 at Dkt. 2, ¶ 79 (N.D. Ill. 2020); and where plaintiffs had either "timely submitted a notice of candidacy and paid [a] $5,220 qualifying fee" or "not yet paid the filling fee or filed a notice of candidacy . . . because the applicable qualifying period" had not yet begun, *Cooper v. Raffensperger*, 2020 WL 3892454 at *2 (N.D. Ga. July 9, 2020).

Nor is this trend meaningfully disrupted by what appears to be the single federal opinion charting a different course. In *Constitution Party of Virginia v. Virginia State Board of Elections*, Blankenship's political party—along with three other minor parties and associated individuals—brought an as-applied challenge to a Virginia law requiring "independent and minor party candidates seeking national office . . . [to] collect . . . a certain number of signatures from qualified

voters to appear on the general election ballot." 2020 WL 4001087 at *1 (E.D. Va. July 15, 2020). Although the Constitution Party stood apart from its co-plaintiffs in that it "ha[d] not tried to gather signatures and . . [would] not let its members gather signatures for its candidate," the court nevertheless found a severe burden on all the plaintiffs' First and Fourteenth Amendment rights. *Id.* at *4-6.

Interpreting that decision to hold that severe burden attaches even to inactive plaintiffs, it would not constitute persuasive authority. In any event, the decision more likely reflects a key distinguishing factor under Virginia law: namely, the absence of an alternative ballot pathway (e.g. a § 5151(c)(1) equivalent) in that state. Because the *Constitution Party of Virginia* plaintiffs were inescapably beholden to a "wet" signature requirement, their posture "in light of the entire [Virginia] statutory scheme regulating ballot access" differed drastically from the one Blankenship now confronts. *Nader*, 531 F.3d at 1035; *see also Angle*, 673 F.3d at 1133 (noting that in cases involving "ballot access restrictions regulating candidates . . . the burden on plaintiffs' rights should be measured . . . in light of *the entire statutory scheme* regulating access") (emphasis added) (internal quotation marks and citation omitted). His reliance on this and other recent cases is consequently misplaced. Under binding Ninth Circuit precedent and a frank reading of other circuits' now-emerging jurisprudence, Blankenship has not demonstrated a severe burden on his associational rights. Accordingly, strict scrutiny does not attach to his claim.

B. *Burdick* Balancing Test

"The right to access the ballot is important to voters, candidates, and political parties alike, but it must be balanced against California's need to manage its democratic process." *De La Fuente*, 930 F.3d at 1106. Under the Supreme Court's ruling in *Burdick v. Takushi*, this balancing is fact-intensive: a court "must weigh the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)) (internal quotation marks omitted).

Where, as here, a less-than-severe burden renders strict scrutiny inapposite, "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 789. The operative issue thus compresses to whether the merits of Blankenship's challenge, taken together with the correspondent level of scrutiny, do or do not occasion "serious question[ing]." *Alliance for Wild Rockies*, 632 F.3d at 1131 (internal quotation marks and citations omitted). As the State correctly urges, they do not.

The State puts forward three weighty and readily-credited interests. First, California points to its "undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot." *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986). Exercising this right furthers the legitimate governmental goals of "preserv[ing] the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion." *Am. Party of Texas v. White*, 415 U.S. 767, 782 n. 14 (1974). Second, the State possesses a related interest in managing elections in a way that honors the choices of its citizenry without assuming "the expense and burden of runoff elections" or upending carefully fashioned electoral timelines. *Nader*, 620 F.3d at 1218. Finally—and blending into the public interest—California is obliged to effectuate the legislatively-expressed will of its people. *See, e.g. Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020).[8]

For his part, Blankenship alleges injuries of unquestionably precious character: violation of "the constitutional right to association and political expression," and deprivation of Californians' ability "to vote for a candidate of their choice." Pls.' Mot., Dkt. 2 at 11. The trouble is with the harm's "magnitude." *Burdick*, 504 U.S. at 434. To grant relief upon the injuries here alleged, a federal court sitting in equity is obliged to look for actual wounds. None are to be found here. As detailed above, Blankenship does not aver to being the victim of thwarted plans (beyond ending

[8] Blankenship's insistence that California retains no urgent interest in "enforcing an unconstitutional regulatory regime" raises a facial constitutional challenge, and does not bear on this consideration of "[a]s-[a]pplied [v]iolation[s] of the United States Constitution." *Compare* Pls.' Mot., Dkt. 2 at 17, *with* Complaint, Dkt. 1 at 5-6.

up on the California ballot, he made none), wasted effort (beyond bringing this lawsuit, he expended none), or discriminatory law. Instead, his setback takes form entirely in the abstract: because he notionally desires to appear on the California general election ballot, California's steadfast application of its election laws notionally causes him harm.

Because he advances them in this manner, Blankenship's alleged injuries are plainly outweighed by California's democratic and electoral interests. States, in defending the rules by which they manage their respective electoral processes, are understood to argue from a position of earnest experience. *See De La Fuente*, 930 F.3d at 1106 (explaining California's less particularized evidentiary hurdle in the context of a ballot access challenge). No such understanding attaches to Blankenship, whose efforts to exercise the rights underpinning his claim have, at least in California, started and stopped with reciting those rights in federal court. Blankenship fails to put forward a colorably meritorious claim, and he is therefore ineligible for preliminary injunctive relief.[9]

V. CONCLUSION

For the foregoing reasons, the motion for a temporary restraining order and preliminary injunctive relief is denied.

IT IS SO ORDERED.

Dated: August 3, 2020

RICHARD SEEBORG
United States District Judge

[9] Crucially, this is not to suggest that California's asserted interests are unyielding, particularly in the face of grave, far-reaching emergencies like the COVID-19 pandemic. Indeed, were the facts of this case different—particularly, were a minor party plaintiff to aver meaningful and detailed burdens on his or her pre-existing in-state election activity—there could well be cause to examine "serious questions" going to the merits of the matter. *Alliance for Wild Rockies*, 632 F.3d at 1131 (internal quotation marks and citations omitted).