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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 BEN EILENBERG,
15
16 Plaintiff,

17 vs.

18 THE CITY OF COLTON; THE
19 COUNTY OF SAN BERNARDINO;
20 THE STATE OF CALIFORNIA; and
21 DOES 1 through 50, inclusive,

22 Defendants

Civil Action No. 8:20-cv-00767-
FMO-DFM

FIRST AMENDED COMPLAINT

COMPLAINT

Plaintiff Ben Eilenberg for his complaint against Defendants THE CITY OF COLTON; THE COUNTY OF SAN BERNARDINO; THE STATE OF CALIFORNIA and Does 1 through 50 (collectively "Defendants") states as follows:

NATURE OF CASE

1. This is an action under 42 U.S.C. 1983 for violation of civil rights. Specifically, Plaintiff is managing an initiative that is planned to be on the November 2020 ballot for the City of Colton, CA. Defendants have refused to allow initiative signature gatherers in the City of Colton, effectively blocking the ability to get the initiative on the ballot. Therefore, Plaintiff was forced to bring this lawsuit.

THE PARTIES

2. Plaintiff Ben Eilenberg is an individual residing in Fullerton, California.

3. Plaintiff Ben Eilenberg is managing the initiative campaign for the initiative entitled "Initiative Measure To Add Food Trucks, Food Truck Commissaries, and Commercial Kitchens As Permitted Uses by Right in the City's Commercial, Mixed-Use and Industrial Zones, Establishing a Food Truck Overlay Zone and a Permitting System for Such Operations."

1 4. Defendant the City of Colton is a general law city in the State of
2 California, County of San Bernardino.

3 5. Defendant the County of San Bernardino is a County in the
4 State of California.
5

6 6. Defendant the State of California is a State in the United States
7 of America.
8

9 **JURISDICTION AND VENUE**

10 7. This Court has subject matter jurisdiction over this dispute
11 pursuant to 42 U.S.C. 1983.
12

13 8. This Court has personal jurisdiction over Defendant City of
14 Colton because it is located within this judicial district, regularly transacts
15 business within this judicial district, and has committed violations of 42
16 U.S.C. 1983 in this district.
17
18

19 9. This Court has personal jurisdiction over Defendant County of
20 San Bernardino because it is located within this judicial district, regularly
21 transacts business within this judicial district, and has committed violations
22 of 42 U.S.C. 1983 in this district.
23

24 10. This Court has personal jurisdiction over the State of California
25 because it is located (in part) within this judicial district, regularly transacts
26
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1 business within this judicial district, and has committed violations of 42
 2 U.S.C. 1983 in this district.

3 11. Venue is proper in this judicial district pursuant to 28 U.S.C. §§
 4
 5 1391(b).

6 **GENERAL ALLEGATIONS**

7 ***The Initiative Process In California***

8
 9 12. “The initiative is the power of the electors to propose statutes
 10 and amendments to the Constitution and to adopt or reject them. (Cal.
 11 Const. art. II, sec. 8(a).)

12
 13 13. In 1911, California voters amended the state Constitution to
 14 provide voters the power to enact initiatives and referenda. This includes
 15 the right to do so on a municipal level.
 16

17 14. The process to qualify an initiative for the ballot is as follows:

- 18 a. Notice of Intent. Voters of the city draft the text of the
 19
 20 measure and file it with the City Clerk along with the notice
 21 of intent to circulate petition. (Cal. Elec. Code § 9202.) The
 22 notice of intent may include a statement of the purpose of
 23 the measure, not to exceed 500 words. The legislative body
 24 may establish a filing fee not to exceed \$200, provided that
 25
 26
 27
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1 the fee must be refunded if, within one year, the city clerk
2 certifies the petition as sufficient.

3 b. Request for Title and Summary. The city attorney must
4 provide a title for the measure and an impartial summary, in
5 fewer than 500 words, within 15 days of the filing of the
6 notice of intent. (Cal. Elec. Code § 9203.)
7

8 c. Publication or Posting. The notice of intention filed with the
9 city clerk and the title and summary prepared by the City
10 Attorney must be published or posted by the proponents.
11 (Cal. Elec. Code § 9205.)
12

13 d. Preparation and Circulation of Petition. After publication or
14 posting, the proponents prepare and circulate the petition.
15 (Cal. Elec. Code § 9207.) Elections Code section 9020
16 provides that the petition “shall be designed so that each
17 signer shall personally affix . . . [h]is or her residence
18 address.” That requirement is intended allow the election
19 official to determine during the verification process that the
20 signer is properly registered at his or her residence address
21 and therefore eligible to sign the petition. (Assembly v.
22 Deukmejian (1982) 30 Cal.3d 638 [petition directing signers
23
24
25
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to write their address as registered to vote violates Elections Code].) In addition, each section of the petition must have a declaration of the circulator, the person soliciting the signatures, who must be qualified to vote in the city, and the declaration must be in a specific form prescribed by law. (Cal. Elec. Code § 9209.) The circulator's declaration must contain the information required by Elections Code section 104. Subdivision (a)(3) of section 104 requires that the declaration set forth "in the circulator's own hand . . . the dates between which all the signatures to the petition or paper were obtained"

- e. Filing. Signatures and sections must be filed with the City Clerk within 180 days of the receipt of the title and summary. (Cal. Elec. Code § 9208.) All sections of the petition must be filed at the same time by one or more of the official proponents or persons authorized in writing by the proponents. (Cal. Elec. Code § 9210.)

15. Plaintiff is required to comply with these requirements or risk not having the initiative qualify for the ballot.

Plaintiff Has Been Blocked From Moving

His Initiative Forward In The City Of Colton

16. On or about November 7, 2019, Plaintiff submitted an initiative to Defendant the City of Colton for Title and Summary. (Exhibit A.)

17. On or about November 21, 2019, Defendant the City of Colton provided a title and summary for the initiative. (Exhibit B.)

18. The issuance of the title and summary began the 180 day deadline to gather signatures for the initiative to qualify it for the November 2020 ballot.

19. Plaintiff then published the initiative in the local newspaper as required under the Election Code.

20. After the publication, Plaintiff hired a signature gathering firm and began gathering signatures.

21. During the signature gathering process, the Covid-19 crises began.

22. Plaintiff wrote to Defendant the City of Colton to confirm that the signature gatherers would continue to be allowed to gather signatures, or in the alternative, that the City would provide an alternative accommodation. (Exhibit C.)

1 23. Defendant the City of Colton replied stating that it would not be
2 allowing any accommodations (such as simply placing the initiative
3 measure on the ballot via the City Council.) (Exhibit D.)
4

5 24. Plaintiff therefore replied to confirm that the signature gatherers
6 would be permitted to move forward with signature gathering, as they are
7 essential workers engaged in a constitutional function. (Exhibit E.)
8

9 25. Defendant the City of Colton replied stating that it would not
10 deem the signature gatherers essential workers. (Exhibit F.)
11

12 26. Defendant the County of San Bernardino manages the
13 elections for Defendant the City of Colton.
14

15 27. Defendant the State of California governs elections statewide.
16 Defendant the State of California also issued the order upon which
17 Defendant the City of Colton bases its belief that signature gatherers are
18 not allowed to gather signatures.
19

20 28. The order upon which the City has relied is the order issued on
21 March 19, 2020. Governor Gavin Newsom issued Executive Order N-33-
22 20 directing all residents to immediately heed current State public health
23 directives to stay home, except as needed to maintain continuity of
24 operations of essential critical infrastructure sectors and additional sectors
25
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1 as the State Public Health Officer may designate as critical to protect health
2 and well-being of all Californians.

3 29. This has left Plaintiff in the position where he cannot gather
4 signatures for the initiative to be placed on the November 2020 ballot.
5

6 **COUNT I – 42 U.S.C. 1983**
7

8 30. Plaintiff incorporates herein the allegations of paragraphs 1
9 through 22 above specifically by reference.

10 31. Section 1983 allows claims alleging the “deprivation of any
11 rights, privileges, or immunities secured by the Constitution and [federal
12 laws].” 42 U.S.C. § 1983.
13

14 32. Defendants, by blocking the ability to gather signatures in the
15 City of Colton and not providing any other accommodation (whether by
16 extending deadlines, placing the matter on the ballot via the City Council, or
17 other accommodation), have deprived Plaintiff of his Constitutional Rights
18 under both the Federal and California Constitutions.
19
20

21 33. Defendants acted under color of statute, ordinance, regulation,
22 custom or usage of California and municipal authority.
23

24 34. Plaintiff has suffered the following damages:
25

- 26 a. Loss of funds and time spent on the initiative prior to the City
27 of Colton’s refusal to allow signature gathering
28

1 b. Loss of moneys that certain properties would be worth if the
2 initiative passes

3 c. Loss of the constitutional right to gather signatures for an
4 initiative.
5

6 d. Loss of the constitutional right to have the initiative placed on
7 the 2020 ballot.
8

9 **COUNT II – Declaratory Relief**

10 35. Plaintiff incorporates herein the allegations of paragraphs 1
11 through 34 above specifically by reference.
12

13 36. Under Executive Order N-33-20, clarified by the State Public
14 Health Officer's list of Essential Critical Infrastructure Workers (Exhibit G),
15 "Elections Personnel" are considered essential workers.
16

17 37. Elections Personnel is not a defined term within the Executive
18 Order, the Essential Critical Infrastructure Workers list, or the California
19 Codes, therefore it is ambiguous.
20

21 38. Plaintiff contends that Elections Personnel naturally includes
22 signature gatherers, as they are a mandatory component of any initiative
23 being placed on the ballot by citizens.
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1 39. As the initiative process is guaranteed by the California
2 Constitution, these workers are essential to effecting the election rights
3 reserved to the citizens of California.
4

5 40. Therefore, Plaintiff respectfully requests the Court issue a
6 judgment holding that initiative signature gatherers are essential workers.
7

8 **COUNT III – Writ of Mandate**

9 41. Plaintiff incorporates herein the allegations of paragraphs 1
10 through 40 above specifically by reference.
11

12 42. Plaintiff has a constitutional right to gather signatures to qualify
13 an initiative.
14

15 43. Defendants have restricted that ability by deeming the
16 Constitutional function of signature gathering not to be essential.
17

18 44. Plaintiff respectfully requests that the Court issue a writ of
19 mandate ordering the Defendants to do any or all of the following:
20

- 21 a. Allow signature gathering within the City of Colton; or
22 b. Place the initiative on the November 2020 ballot for the City
23 of Colton.
24 c. Toll the period of time for signature gathering to include the
25 period between the issuance of the Executive Order and
26 Plaintiff's being allowed to gather signatures.
27
28

1 d. Perform any other necessary act to allow for signature
2 gathering or the initiative to be placed on the 2020 ballot.

3 **PRAYER**
4

5 WHEREFORE, Plaintiff prays for judgment as follows:

- 6 1. For general and actual damages;
7 2. For costs of the suit, including attorneys' fees;
8 3. For injunctive relief;
9 4. For declaratory relief;
10 5. For a writ of mandate;
11 6. For any other, further, or different relief as the Court may deem
12 proper.
13

14 Dated this 4th day of June, 2020
15

16 _____
17 Attorneys for Plaintiff
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VERIFICATION

I, Ben Eilenberg, as Plaintiff, verify under penalty of perjury that I have read the above complaint and its contents. I also verify that, to the best of my knowledge and recollection, the matters stated in the complaint are true and correct.

Executed this 4th day of June, 2020

Ben Eilenberg