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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARCOS CASEY GUILLEN, III,
Plaintiff,
v.
SULLIVAN,
Defendant.

Case No. 1:19-cv-00957-DAD-SKO (PC)

**FINDINGS AND RECOMMENDATIONS
TO DENY DEFENDANT’S MOTION TO
DISMISS**

(Doc. 11)

21-DAY DEADLINE

On January 29, 2020, the undersigned screened Plaintiff’s complaint (Doc. 1) pursuant to 28 U.S.C. § 1915A and found that it states a cognizable claim under 42 U.S.C. § 1983. (Doc. 7.) The undersigned issued findings and recommendations, recommending that Plaintiff’s equal protection claim proceed and that all other claims be dismissed. (*See id.*) The assigned District Judge adopted the findings and recommendations on April 3, 2020. (Doc. 15.) This case now proceeds on Plaintiff’s equal protection claim against Defendant. (*Id.*)

Before the Court is Defendant’s motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). (Doc. 11.) Plaintiff filed an opposition to Defendant’s motion on March 6, 2020, to which Defendant filed a reply.¹ (Docs. 12, 13.) For the reasons set forth below, the Court recommends that Defendant’s motion be denied.

¹ Plaintiff filed a reply to Defendant’s reply on March 25, 2020. (Doc. 14.) Plaintiff, as the non-moving party, is not authorized to file a reply. *See* Local Rule 230(l). Therefore, the Court disregards this filing.

1 **I. PLAINTIFF’S COMPLAINT**

2 Plaintiff is incarcerated at California Correctional Institution (CCI) in Tehachapi,
3 California. (See Doc. 1 at 6.) Plaintiff alleges that, pursuant to Title 15 of the California Code of
4 Regulations, each warden at every California prison is required to establish an inmate advisory
5 council (IAC) that is representative of the ethnic groups at the institution. (*Id.*) According to
6 Plaintiff, the “Mexicans, Blacks, ... and Whites ... have inmates on Men’s Advisory Council
7 (MAC) [at CCI] that represent each of their ethnic [or] race group but the Native
8 Americans/Indians ... do not.” (*Id.* at 6-7.) Plaintiff alleges that, pursuant to California
9 regulations, Warden Sullivan “is responsible for the Native American [i]nmates not having a
10 Native American ... representing them in each building like the other ethnic groups.” (*Id.* at 6.)
11 Plaintiff alleges that the lack of representation amounts to racial discrimination. (*Id.*)

12 Plaintiff filed an administrative grievance regarding this matter on September 21, 2018.
13 (*Id.* at 7, 8.) The CDCR Office of Appeals denied Plaintiff’s grievance at the third level of review.
14 (*Id.* at 13.) In CDCR’s second-level response, the reviewer stated that the “selection of IAC
15 representatives is by majority vote by secret ballot to representatives, the general body or
16 executive body, which is monitored by institution staff.... Non-inmates cannot nominate or select
17 IAC representatives.” (*Id.* at 12.) In CDCR’s third-level response, the reviewers stated that,
18 according to the CDCR Operations Manual, “IAC representation shall be provided for all ethnic
19 segments of the general inmate population.... This shall be accomplished through the election of
20 all IAC representatives by the entire inmate population or by only those inmates of each ethnic
21 segment of the population.” (*Id.* at 13.)

22 **II. LEGAL STANDARD**

23 A motion to dismiss under Rule 12(b)(6) “tests the legal sufficiency of a claim.” *Navarro*
24 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In resolving a 12(b)(6) motion, the Court’s review is
25 generally limited to the “allegations contained in the pleadings, exhibits attached to the complaint,
26 and matters properly subject to judicial notice.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519
27 F.3d 1025, 1030-31 (9th Cir. 2008) (internal quotation marks and citations omitted). Dismissal is
28 proper if there is a “lack of a cognizable legal theory or the absence of sufficient facts alleged

1 under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
2 1988) (citation omitted).

3 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
4 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556
5 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court
6 “accept[s] as true all well-pleaded allegations of material fact, and construe[s] them in the light
7 most favorable to the non-moving party.” *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998
8 (9th Cir. 2010) (citation omitted). In addition, the Court construes pleadings of *pro se* prisoners
9 liberally and affords them the benefit of any doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir.
10 2010) (citation omitted). However, “the liberal pleading standard ... applies only to a plaintiff’s
11 factual allegations,” not his legal theories. *Neitze v. Williams*, 490 U.S. 319, 330 n.9 (1989).

12 **III. DISCUSSION**

13 “The Equal Protection Clause [of the Fourteenth Amendment] requires the State to treat
14 all similarly situated people equally.” *Shakur v. Schriro*, 514 F.3d 878, 891 (9th Cir. 2008)
15 (citation omitted). To state an equal protection claim under section 1983, “a plaintiff must show
16 that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon
17 membership in a protected class.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)
18 (citations omitted). “Intentional discrimination means that a defendant acted at least in part
19 because of a plaintiff’s protected status.” *Maynard v. City of San Jose*, 37 F.3d 1396, 1404 (9th
20 Cir. 1994) (emphasis removed) (citation omitted).

21 “The first step in equal protection analysis is to identify the state’s classification of
22 groups.” *Country Classic Dairies, Inc. v. State of Mont., Dep’t of Commerce Milk Control*
23 *Bureau*, 847 F.2d 593, 596 (9th Cir. 1988). “To accomplish this, a plaintiff can show that the law
24 is applied in a discriminatory manner or imposes different burdens on different classes of people.”
25 *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995).

26 “The next step ... [is] to determine the level of scrutiny.” *Country Classic Dairies*, 847
27 F.2d at 595. “Classifications based on race,” for example, “are subject to strict scrutiny,”
28 *Freeman*, 68 F.3d at 1187, whereas classifications based on gender are subject to “intermediate

1 scrutiny,” *Navarro*, 72 F.3d at 716 (citations omitted). Classifications not based on a “suspect”
2 class like race or gender are subject to “rational-basis review.” *Romer v. Evans*, 517 U.S. 620,
3 631 (1996); *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) (citations omitted).

4 “Under strict scrutiny, the government has the burden of proving that racial classifications
5 are narrowly tailored measures that further compelling governmental interests.” *Johnson v.*
6 *California*, 543 U.S. 499, 505 (2005) (internal quotation marks and citation omitted). In the
7 prison context, the “necessities of prison security and discipline ... are a compelling government
8 interest justifying only those uses of race that are narrowly tailored to address those necessities.”
9 *Id.* at 512 (internal quotation marks and citation omitted).

10 Leniently construing his complaint, Plaintiff states a cognizable equal protection claim.
11 Plaintiff alleges that Defendant has denied representation of Native Americans on the IAC or
12 MAC, while providing such representation to other racial or ethnic groups. (Doc. 1 at 6-7.) As
13 stated in section II, *supra*, the Court’s review is limited to the allegations in Plaintiff’s complaint
14 and the exhibits attached to the complaint. *See Manzarek*, 519 F.3d 1025, 1030-31 (9th Cir.
15 2008). Thus, as with screening, the Court is unable to consider the purported governmental
16 interest, if any, in the alleged disparate treatment, whether such treatment is narrowly tailored, or
17 whether such treatment is made without discriminatory intent. *See Johnson*, 543 U.S. 499 at 512;
18 *Freeman*, 68 F.3d at 737. “To survive a motion to dismiss,” Plaintiff must simply allege
19 “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”
20 *Iqbal*, 556 U.S. at 678 (internal quotation marks and citation omitted). Plaintiff states a
21 cognizable claim under this standard.

22 In his motion to dismiss, Defendant contends that there is no “causal connection
23 [between] any of Defendant Sullivan’s actions and the lack of Native American [representation]
24 on the IAC or MAC.” (Doc. 11-1 at 5.) Defendant asserts that, according to the attachments to
25 Plaintiff’s complaint, “[i]nmates, like Plaintiff and other Native American inmates, are
26 responsible for the election of their representatives. Warden Sullivan does not select the inmate
27 representatives.” (Doc. 13 at 3.) Defendant points to CDCR’s third-level response, attached to
28 Plaintiff’s complaint, which provides that the “selection of IAC representatives is by a majority

1 vote via secret ballot to representatives, the general body, or the executive body.... Non-inmates,
2 such as Defendant Warden Sullivan, cannot nominate or select IAC representatives.” (*Id.*)

3 Plaintiff does not dispute that inmates vote for IAC representatives. (*See* Doc. 12.) He
4 instead asserts that “Native Americans were not given the opportunity to participate in the
5 selection process for representatives as much as the other ethnic groups,” and that Warden
6 Sullivan is “in charge” and has “discretion” over the establishment of the IAC. (*See id.* at 1-2.)

7 The Court accepts as true Defendant’s contention that he cannot nominate or select IAC or
8 MAC representatives. Plaintiff does not contest this fact (*see* Doc. 12 at 1-2), and it is explicitly
9 stated in an attachment to Plaintiff’s complaint (Doc. 1 at 12).

10 Even if this is the case, Plaintiff’s complaint nonetheless states a cognizable equal
11 protection claim. The Court can think of a number of scenarios under which the election process
12 may be set up to favor or disfavor particular racial or ethnic groups. The CDCR Operations
13 Manual, cited in the attachment to Plaintiff’s complaint and in Defendant’s reply, states that “IAC
14 representation shall be provided through the election of all IAC representatives by the entire
15 inmate population or by only those inmates of each ethnic segment.” (*Id.* at 13; Doc. 13 at 3.)
16 According to this provision, the election can be set up so that a certain number of representatives
17 are chosen by racial/ethnic subsets of the inmate population while others are not. For example, if
18 inmates are voting for three representatives, the election can be set up so that all White inmates
19 vote for one representative, all Black inmates for another representative, and all other inmates for
20 the third representative. Plaintiff’s complaint does not state whether this is the case, but it is
21 certainly plausible based on its allegations.

22 As set forth above, in resolving Defendant’s motion, the Court is unable to consider
23 evidence outside the pleadings regarding the IAC selection process, *see Manzarek*, 519 F.3d at
24 1030-31 (9th Cir. 2008), or whether the process advances a compelling governmental interest.
25 Based only on the pleading and attachments thereto, and under the liberal pleading standard, the
26 Court concludes that Plaintiff’s complaint states an equal protection claim that is plausible on its
27 face. *See Iqbal*, 556 U.S. at 678; *Hebbe*, 627 F.3d 338, 342. This is sufficient to survive a
28 12(b)(6) motion.

1 **IV. CONCLUSION AND RECOMMENDATION**

2 Based on the foregoing, the Court RECOMMENDS that Defendant’s motion to dismiss
3 (Doc. 11) be DENIED. These Findings and Recommendations will be submitted to the United
4 States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).
5 Within 21 days of the date of service of these Findings and Recommendations, Defendant may
6 file written objections with the Court. The document should be captioned, “Objections to
7 Magistrate Judge’s Findings and Recommendations.” Failure to file objections within the
8 specified time may result in waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839
9 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

10 IT IS SO ORDERED.

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12 Dated: April 14, 2020

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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