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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THOMAS JEFFERSON CARES,
Plaintiff,

No. 2:08-CV-00083-MCE-GGH

v.

MEMORANDUM AND ORDER

DEBRA BOWEN, in her official
capacity as California
Secretary of State; EDMUND G.
BROWN, in his official
capacity as California
Attorney General, et. al.,

Defendants.

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This matter came before this Court on January 31, 2008.
Plaintiff Thomas Jefferson Cares appeared on his own behalf.
Nathan Barankin, Deputy Attorney General, represented Defendants.

Plaintiff Thomas Jefferson Cares brings this action and the
accompanying application for temporary restraining order against
various California public officials and agencies including the
Secretary of State, the Attorney General, and the Registrars or
Clerks of all 58 California counties.

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1 Plaintiff alleges that the Official Ballot Title and Official
2 Ballot Summary for Proposition 93 - both of which were drafted by
3 the Attorney General for the State of California - are
4 intentionally misleading and will cause election results counter
5 to the actual will of the electorate of the State of California.
6 Plaintiff asserts that the manner in which Proposition 93 has
7 proceeded is unconstitutional and denies due process. Plaintiff
8 seeks a pre-election temporary restraining order enjoining the
9 enforcement of Proposition 93 - a measure which has not, and may
10 not, be enacted.

11
12 **BACKGROUND**

13
14 Current California law provides that an individual may serve
15 no more than two (2) four-year terms in the California Senate and
16 three (3) two-year terms in the California Assembly. The net
17 result is that no individual may serve more than fourteen (14)
18 years in the California Legislature. Cal. Const., Art. 4, § 2.

19 Proposition 93 proposes amendments to California law that
20 provide that a California legislator could serve a maximum of
21 twelve (12) years in the California Legislature without regard to
22 the house in which the legislator serves those twelve years.

23 Proposition 93 also proposes amendments such that state
24 legislators in office at the time of enactment would be allowed
25 to continue serving for up to twelve years in the house in which
26 they currently serve, regardless of prior service in the other
27 house.

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1 The Official Ballot Title for Proposition 93 is: "LIMITS ON
2 LEGISLATORS' TERMS IN OFFICE. INITIATIVE CONSTITUTIONAL
3 AMENDMENT." The Official Summary reads:

- 4 • Reduces the total amount of time a person may
5 serve in the state legislature from 14 years
6 to 12 years.
- 7 • Allows a person to serve a total of 12 years
8 either in the Assembly, the Senate, or a
9 combination of both.
- 10 • Provides a transition period to allow current
11 members to serve a total of 12 consecutive
12 years in the house in which they are currently
13 serving, regardless of any prior service in
14 another house.

15 California law requires the Attorney General "prepare a
16 summary of the chief purposes and points of the proposed
17 measure." Cal. Elec. Code § 9004. Further, "[i]n providing the
18 ballot title, the Attorney General shall give a true and
19 impartial statement of the purpose of the measure in such
20 language that the ballot title shall neither be an argument, nor
21 be likely to create prejudice, for or against the proposed
22 measure." *Id.* at § 9051.

23 California elections law provides for a 20-day public
24 display period for the Attorney General's title and summary. *Id.*
25 at § 9092. During this period, voters may review the ballot
26 materials and file suit challenging the ballot materials. *Id.*
27 Plaintiff sought a writ of mandate in Sacramento Superior Court
28 challenging the ballot title and summary.

1 Following oral argument on the matter, the writ was denied.
2 Plaintiff then filed a "Motion to Stay Ballot Pamphlet Printing
3 Pending Appeal" with the Third District Court of Appeal. That
4 motion was denied. Plaintiff then filed a "Petition for Review
5 with Request for Stay" with the California Supreme Court. That
6 petition, too, was denied. Plaintiff now comes before this Court
7 seeking a temporary restraining order invalidating Proposition 93
8 and requiring defendants: discontinue issuing ballots which offer
9 a vote on Proposition 93 and disregard any votes cast for or
10 against Proposition 93. At oral argument, Plaintiff withdrew his
11 requests that related to the ballots and counting of votes. The
12 issue remaining before this Court is Plaintiff's request for a
13 temporary restraining order invalidating Proposition 93 and
14 restraining its enforcement should the California electorate
15 enact the proposition. For a myriad of reasons, the Court finds
16 this issue, and with it Plaintiff's entire complaint, is non-
17 justiciable. For the reasons set forth below, Plaintiff's
18 request is DENIED and this matter is TERMINATED.

19
20 **STANDARD**

21
22 Issuance of a temporary restraining order, as a form of
23 preliminary injunctive relief, is an extraordinary remedy, and
24 plaintiffs have the burden of proving the propriety of such a
25 remedy by clear and convincing evidence. See *Granny Goose Foods,*
26 *Inc. v. Teamsters*, 415 U.S. 423, 442 (1974). In order to warrant
27 issuance of such relief, certain prerequisites must be satisfied.
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1 Under the so-called "traditional" standard, an injunction may be
2 had if the court determines that (1) the moving party will suffer
3 the possibility of irreparable injury if the relief is denied;
4 (2) there is a strong likelihood that the moving party will
5 prevail on the merits at trial; (3) the balance of potential harm
6 favors the moving party; and (4) the public interest favors
7 granting relief. *Johnson v. Cal. State Bd. of Accountancy*, 72
8 F.3d 1427, 1430 (9th Cir. 1995) Under the "alternative"
9 standard, an injunction properly issues when a party demonstrates
10 either: (1) a combination of probable success on the merits and
11 the possibility of irreparable injury if relief is not granted;
12 or (2) the existence of serious questions going to the merits
13 combined with a balancing of hardships tipping sharply in favor
14 of the moving party. *Id.*, see also *Idaho Sporting Congress, Inc.*
15 *v. Alexander*, 222 F.3d 562, 565 (9th Cir. 2000); *Earth Island*
16 *Institute v. U.S. Forest Service*, 442 F.3d 1147, 1158 (9th Cir.
17 2006). The requirement for showing a likelihood of irreparable
18 harm increases or decreases in inverse correlation to the
19 probability of success on the merits, with these factors
20 representing two points on a sliding scale. *United States v.*
21 *Nutri-cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992).

22 The propriety of a temporary restraining order, in
23 particular, hinges on a significant threat of irreparable injury
24 (*Simula, Inc. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999))
25 that must be imminent in nature. *Caribbean Marine Serv. Co. v.*
26 *Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

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1 Further, it is settled law that states are free to design
2 their own elections laws and procedures and these are political
3 questions beyond the reach of the federal courts. A federal
4 court may interfere only when a state election law denies equal
5 protection, abridges the freedom of speech, or violates a federal
6 statute. Federal courts must normally defer to the states'
7 regulatory interests when these federal rights are not
8 implicated. *Bennett v. Yoshina*, 140 F.3d 1218, 1225 (9th Cir.
9 1998) (citations). Plaintiff's complaint makes no mention of any
10 denial of equal protection, nor of any abridgment of free speech,
11 nor of any violation of a federal statute but rather points only
12 to an unarticulated denial of due process. Therefore, the issues
13 raised by this action fall squarely within the State's powers to
14 regulate its elections and this Court must defer to the State's
15 interests. Accordingly, Plaintiff's application for temporary
16 restraining order is DENIED.

17 Moreover, the Court finds that this case is not justiciable.
18 The relief requested - namely, the request to enjoin the
19 enforcement of a law that has not yet been enacted - raises
20 justiciability issues including, but not limited to, whether or
21 not the case is ripe and whether Plaintiff has standing to assert
22 the case at this juncture.

23 Plaintiff has not yet suffered an "injury-in-fact." A
24 plaintiff must have suffered a concrete injury that is actual or
25 imminent, and not merely conjectural or hypothetical. *Nat'l*
26 *Audobon Soc'y, Inc. v. Davis*, 307 F.3d 835, 848 (9th Cir. 2002)
27 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561).

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1 Here, Plaintiff asserts that the state electorate *may* be
2 dissuaded by the ballot summary and that the ballot summary *may*
3 cause electors to cast votes that are contrary to their actual
4 intent. This is not an actual or imminent injury.¹ California
5 voters may defeat Proposition 93, in which case Plaintiff will
6 suffer no injury and the issues raised here will be moot. Should
7 that be the case, any decision this Court were to render on the
8 merits would be merely advisory. This Court is loathe to render
9 an advisory opinion. "Courts must refrain from deciding abstract
10 or hypothetical controversies and from rendering impermissible
11 advisory opinions with respect to such controversies." *Earth*
12 *Island Inst. v. Ruthenbeck*, 490 F.3d 687, 694 (9th Cir. 2007)
13 (citing *Flast v. Cohen*, 392 U.S. 83, 96 (1968)). This is
14 particularly the case where, such as here, the issues raised are
15 purely state law matters. Further, should the California
16 electors enact Proposition 93, Plaintiff's recourse is to
17 challenge that law via the California court system and not in the
18 federal courts. As such, Plaintiff lacks standing to pursue this
19 matter.

20 Further, a pre-election challenge to a proposed change in
21 the law is not a matter that is ripe for judicial review. In
22 determining whether a case is ripe for judicial review, a court
23 may consider: "(1) whether the issues are fit for judicial
24 resolution and (2) the potential hardship to the parties if
25 judicial resolution is postponed."

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28 ¹ Nor is this an irreparable harm sufficient to support the
issuance of a temporary restraining order.

1 Nat'l Audobon Soc'y, 307 F.3d at 850 (citing *Abbott Labs. v.*
2 *Gardner*, 387 U.S. 136, 149 (1967)). Here, the issues are not fit
3 for judicial review. As discussed above, this case does not
4 present the sort of constitutional questions which generally
5 provide for federal review of state election laws. Additionally,
6 as also discussed above, the hardship to the parties of
7 postponing the resolution of this matter is negligible in that
8 Plaintiff is not barred from challenging the validity of
9 Proposition 93, should the voters of California adopt the
10 measure. As such, the case is not yet ripe and it is imprudent
11 for the Court to hear Plaintiff's case at this time.

12 Because this Court finds that this case does not present a
13 justiciable issue, the Court does not address the remaining
14 points addressed in the parties' papers. Based on the foregoing,
15 Plaintiff's request for temporary restraining order is DENIED and
16 this matter is TERMINATED. The Clerk of the Court is directed to
17 close the file.

18 IT IS SO ORDERED.

19 Dated: February 1, 2008

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22 MORRISON C. ENGLAND, JR.
23 UNITED STATES DISTRICT JUDGE
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