No 21-7396

ORIGINAL

SUPREME COURT OF UNITED STATES

Hung M Nguyen
(Petitioner – Pro Per Se)
V.
Yolo County District Attorney Office – Public Entity
(Respondent)

Supreme Court, U.S.
FILED
MAR 10 2022
OFFICE OF THE CLERK

On Petition for Writ of Certiorari to the United States Court of Appeals of 9 Circuit for Eastern District Court of Sacramento

Petition of Writ of Certiorari

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28 USC 451 this court shall certify the Attorney General pursuant 28 USC 2403 (a) – Constitutionality of the United States or The Act of Congress is drawn into the Federal Question as Rule 29.4 (b)

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I. Question presented

Does Yolo County District Attorney Office as **Public Entity** have any liabilities or qualify for prosecutory immunity due to negligence or reckless relating to the policymaker or customs which caused the alleged The United States Constitutional deprivations under 14th amendment with Equal Protection Clause and Due Process Clause under cited (**Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division, 276 F.3d 808, 813- 16, 817 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002)?**

II. Table of Contents

III. Table of authorities

Case Laws

Statutes

42 USC 1985 (3), 42 USC 1983, 42 USC 1986, 42 USC 12132 , 42 USC 12131 (1) (A) (2) – **PUBLIC ENTITY,** 42 USC 5122 (10) (C) – **PUBLIC FACILITY**

42 USC 12101, 42 USC 12102 (1) (A), 42 USC 12132

Constitutional Provision

Constitution of United States – 14 Amendment with Due Process Clause and Equal Protection Clause.

Act of Congress for ADA 1990 Title II

IV. Petition for Writ of Certiorari

Hung M Nguyen, the petitioner for this matter has been denied the matter of jurisdiction over Yolo County District Attorney Office as **Public Entity** (Cited as **Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division, 276 F.3d 808, 813- 16, 817 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002)** by United States of Appeal 9 Circuit Court for Eastern District of California Sacramento division, respectfully petitions to Supreme Court of United States for the Writ of Certiorari to review the memorandum issued by 9 Circuit member (3 panels) on 01/27/2022. (See Appendix A for evident).

V. Opinions Below

The decision by the United States Court of Appeal 9 Circuit is reported as Hung M. Nguyen v. Yolo Cnty. Dist. Attorney Office, No. 21-15698 (9th Cir. Jan. 27, 2022). The 9 Circuit Court of Appeal denied Hung M Nguyen (Petitioner) 's appeal for matter jurisdiction to Yolo County District Attorney Office as **Public Entity** (Cited as **Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division, 276 F.3d 808, 813- 16, 817 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002).**

The memorandum of 3 panel judges is attached as appendix A for evident.

VI. Jurisdiction

Hung M Nguyen (Petitioner) 's appeal for matter jurisdiction to Yolo County District Attorney Office as Public Entity in California Eastern District Court Sacramento division from United States Court

of Appeal 9 Circuit was denied and issued on 01/27/2022. Hung M Nguyen (Petitioner) invoked this Court's jurisdiction under 28 USC 1257, having timely filed this petition for a writ of certiorari within ninety days of United States Court of Appeal for 9 Circuit' s memorandum issued on 01/27/2022.

VII. Provisional Constitution Involved

United States Constitution – 14th Amendment with Due Process Clause and Equal Protection Clause.Congress Act for ADA 1990 Title II- The Americans with Disabilities Act (ADA) **prohibits discrimination against people with disabilities in several areas**, including employment, transportation, public accommodations, communications and access to state and local government' programs and services.

VIII. Statement of the case

1. Legal Background of the Words of Congress for the Nation and ADA 1990 Title II

THE REAL WORDS AND WILLS OF CONGRESS MATTER TO THE NATION AND FEDERAL STATUTE LAWS AND AUTHORITIES THROUGH THE LEGISLATURE

A. It is the sense of CONGRESS (National Treasury Employees Union v. Chertoff, 452 F.3d 839, 846 (D.C. Cir. 2006) when Congress assembled to speak with all the pomp and ceremony of a statutory enactment, It must presume its language mandates something (Coleman v. Block, 562 F. Supp. 1353, 1361 (D.N.D. 1983). The word of CONGRESS is our best guides (Peck Housing Authority v. U.S. Dept. Housing, Nos. 06-1425 06-1447, at *12 (10th Cir. Feb. 19, 2010). In writing statutes, Congress chooses its words carefully (Operation Rescue National v. U.S., 147 F.3d 68, 70 (1st Cir. 1998), and these are the words of the legislature (Metro Seattle v. O'Brien, 86 Wn. 2d 339, 343 (Wash. 1976) but the words used by Congress matter (Merck & Co. v. U.S. Dep't of Health & Human Servs., 385 F. Supp. 3d 81, 90 (D.D.C. 2019). The words which Congress has used are not ambiguous (In re Beaty, 306 F.3d 914, 929 (9th Cir. 2002) "[T]he import of the words Congress has used is clear (Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1304 (11th Cir. 2015) (Harris v. Garner, 216 F.3d 970, 976 (11th Cir.2000) (en banc), and as always, the words of the Congress are the best indications of its intention (Bibbs

v. Block, 778 F.2d 1318, 1322 (8th Cir. 1985). The specific words of Congress are what we are required to be construed (McComb v. Hunt Foods, 167 F.2d 905 (9th Cir. 1948). Whatever the nuances of expressions by individual members of the Congress in the so-called legislative history, the words of Congress are explicit and decisive (Mobil Oil v. F.E.R.C, 885 F.2d 209, 231 (5th Cir. 1989). Congressional meaning is of course ordinarily to be discerned in the words Congress uses (N.L.R.B. v. Inter. Broth. of Boilermakers, 581 F.2d 473, 475 (5th Cir. 1978). Therefore, we are bound to take Congress at its word (Oubre v. Entergy Operations, Inc., _____ U.S. _____, 118 S. Ct. 838, 841 (1998)). These are the words of the legislature (Metro Seattle v. O'Brien, 86 Wn. 2d 339, 343 (Wash. 1976), and the legislature clearly has the last word (Busik v. Levine, 63 N.J. 351, 394 (N.J. 1973).

B. The district court shall look to the specific language at issue, the context in which the language is used, and the broader context of the statute as a whole, not just one part of the language of the statute (Robinson v. Shell Oil Co., 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). The language of the statute should be conclusive of Congress's intent where the language is 'expressed in reasonably plain terms (Griffin v. Oceanic Contractors, Inc. 458 U.S. 564, 570, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982). In particular, where determining whether Congress intended to create a private right of action under a federal statute without saying so (United States v. Thomas, 939 F.3d 1121, 1129 (10th Cir. 2019), **and in this case, the Federal Statute are 28 USC 1343 a (1,2,3,4)- Civil right and elective franchise states that (a)The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person (3)to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; 42 USC 12202, 28 USC 1685 (a), 28 USC 1331 Federal Question.** These Federal languages of statutes clearly have declared the REAL WORDS AND WILLs OF CONGRESS through their legislature for district court jurisdiction over plaintiff's matter (Kreines v. U.S., 33 F.3d 1105, 1108 (9th Cir. 1994)

(Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982) (citing Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766). Congress must use 'unmistakable language in the statute itself (Ussery v. Louisiana ex rel. Department of Health & Hospitals, 962 F. Supp. 922, 926 (W.D. La. 1997) (Atascadero, 473 U.S. at 243, 105 S.Ct. at 3148, 87 L.Ed.2d at 180). Here, however, Congress has spoken in clear and definite language of Federal statutes (Reyes v. Sessions, 342 F. Supp. 3d 141, 148 (D.D.C. 2018)). Moreover, even if the statute were ambiguous, courts "do not resort to the rule of lenity where, as here, we can otherwise resolve the ambiguity of the statute (Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 409, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003) (Stanko, 491 F.3d at 414 n.5 (citation omitted).

C. The Supreme Court has stated repeatedly that the plain language of a statute is the best evidence of Congressional intent (Perrodin v. U.S., 350 F. Supp. 2d 706, 5 (D.S.C. 2004). [W]hen the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is clearly evident and bound by district court (Holloway v. United States, 526 U.S. 1, 6, 119 S.Ct. 966, 143 L.Ed.2d 1 (1999). That is the full extent of Congress' statutory command (United States v. Thomas, 939 F.3d 1121, 1129 (10th Cir. 2019), and the Congress has spoken, and I am bound (United States v. Countryside Farms, Inc., 428 F. Supp. 1150, 1159 (D. Utah 1977). In these instances, Congress speaks to the court and speaks clearly (U.S. v. Welton, 583 F.3d 494, 502 (7th Cir. 2009). But whatever may have been said in congressional debates, courts are bound by what is written into legislation (Pipefitters v. United States, 407 U.S. 385, 446 (1972), and district court is 'bound to enforce only the language that Congress and the President enacted through the Federal Statutes (U.S. v. Shellef, 756 F. Supp. 2d 280, 16 (E.D.N.Y. 2011) Nevertheless, the Court must follow the word of Congress (Kentucky Heartwood, Inc. v. Worthington, 20 F. Supp. 2d 1076, 1085 (E.D. Ky. 1998)

THE REAL WORDS AND WILLS OF CONGRESS FOR DISABILITIES – ADA 1990 Title II

On the other hand, their power is at all times subject to the will of Congress, at the pleasure of which they act and give effect to their acts (Clarke v. U.S., 705 F. Supp. 605, 612 (D.D.C. 1988). In enacting the ADA, Congress explicitly found that was discrete and insular classes of ADA - 1990 (Trautz v. Weisman, 819 F. Supp. 282, 293 (S.D.N.Y. 1993). Americans with Disabilities Act of 1990 - Pub.L. No. 101-336, 104 Stat. 327 (1990), 42 U.S.C. § 12101 et seq., made effective on July 26, 1990. "Congress invoked § 5 in enacting the ADA -1990 (Reickenbacker v. Foster, 274 F.3d 974, 977 (5th Cir. 2001) (Garrett, 121 S.Ct. at 962. Congress invoked § 5 in enacting the ADA. Id. at 962 n. 3 (citing 42 U.S.C. § 12101(b)(4)). Congress has invoked 14 amendment and regulated to enforce and protect disabled people day by day. The stated purpose of the statute was to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities (Hernandez v. International Shoppes, LLC, 100 F. Supp. 3d 232, 248 (E.D.N.Y. 2015) (See Pub.L. No. 101–336, 104 Stat. 327 8(codified at 42 U.S.C. § 12101 et seq.)

2. Factual Allegation to Complaint and Legal Arguments.

A. **Plaintiff's rights have been violated under United States Constitutions – 14 amendment with Due Process Clause and Equal Protection Clause and The ADA 1990 Title II.**

Introduction of the case:

On 06/29/2019 at approximately 1000 hours, I was wrongfully arrested by Yolo county sheriff office Harbaugh, R Vegas (ID # 5577) in Cache Creek Casino Resort, 1445 Hwy 16 in Capay. I was charged on misdemeanor PC-602K (Trespassing on casino premise). On 9/30/2019 at 9:30 am, I was formally prosecuted by Yolo county district attorney Office on PC -602K (Trespassing on casino premise), and I was arraigned by Judge J. Kent Omala by department 1. On 10/30/2019 at 9:00am, my charge PC-602K had been dismissed entirely by Judge Timothy L. Fall due to no evidences and no probable causes.

Legal arguments:

Plaintiff's case has provided sufficient evidence to create a genuine issue of material fact as to (1) whether Yolo County District Attorney Office was reckless or negligent in performing evidentiary facts and in concluding the case was dismissed due to the no evidence and probable cause. See Galbraith v. County of Santa Clara, 307 F.3d 1119, 1126 (9th Cir. 2002), and (2) whether the Yolo County District Attorney Office independently decided to try the case without significant reviewing or determining on Yolo County Sheriff Office's incident report and statements. See Smiddy v. Varney, 665 F.2d 261, 266-67 (9th Cir. 1981) (en banc).

Plaintiff believed that (1) Yolo County District Attorney Office as Public Entity was a final policymaker or customs for the municipality in the area of written the polices or customs to handle Plaintiff's case by the incident report from Yolo County Sheriff Office. See Pembaur v. City of Cincinnati 475 U.S. 469, 480-83, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), and (2) there is a genuine issue of material fact as to whether the County's lack of training policies or customs and procedures amounted to deliberate indifference to Plaintiff's constitutional rights violation. See Long v. County of Los Angeles, 442 F.3d 1178, 1186 (9th Cir. 2006)

Title II of the ADA under 42 USC 12132 prescribes: **no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity**. The Supreme Court has held that "Yolo County District Attorney Office falls squarely within the statutory definition of `public entity under 42 USC 12131 (1) and 42 USC 5122 (10)(C)," and thus the provisions of the ADA title II shall apply. See Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206, 210 (1998). Accordingly, "programs, services, and activities provided at Yolo County District Attorney Office comes within the scope of the ADA Title II. See Lee v. City of Los Angeles, 250 F.3d 668, 691 (9th Cir. 2001). This includes "mental health services and other activities or services undertaken by Yolo County District Attorney Office and provided by.

In addition, the Sixth Circuit has held that Title II of the ADA validly abrogated Eleventh Amendment sovereign immunity in cases where it is used to enforce Due Process and Equal Protection guarantees. **See Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division, 276 F.3d 808, 813-16, 817 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002).**

B. **Plaintiff challenges the Constitution of United States – 14th amendment with Due Process Clause and Equal Protection Clause with Federal laws under 42 USC 1985 (3), 42 USC 1983, 42 USC 1986 , 42 USC 12132, 42 USC 12131 (1) (A) (2), 42 USC 5122 (10) (C), for Yolo County District Attorney Office violating 14th amendment with due process clause and equal protection clause with Constitutional rights.**

Yolo County District Attorney Office has been as Public Entity or Public Facility under 42 USC 12132, 42 USC 12131 (1) (A) (2) and 42 USC 5122 (10) (C) which regulated by Constitutions of United States of America – 14th amendment with due process clause and equal protection clause which never allowed Yolo County District Attorney Office to carry out their own powers or interpretations to violate or discriminate any individual in the public entity as public facility.

Other hands, With Congress Act for ADA 1990 Title II section -The Americans with Disabilities Act (ADA) **prohibits discrimination against people with disabilities in several areas**, including employment, transportation, public accommodations, communications and access to state and local government' programs and services under 42 USC 12101, 42 USC 12102 (1) (A), 42 USC 12132.

So clearly United States Court of Appeal for the 9 Circuit cited to deny petitioner's appeal for their violations to Constitution of United States –14th amendment with due process clause and equal protection clause and The Act of Congress for ADA 1990 Title II based on qualified immunity deemed to be contrary case cited as **Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division, 276 F.3d 808, 813- 16, 817 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002).**

The whole statements from United States Court of Appeal for the 9 Circuit can wrongfully has been proven that United States never have any enforcements with the Constitutional rights and Federal laws violations fall in 14th amendment with due process clause and equal protection clause which has been passed by the Congress legislature.

3. Direct Appeal to United States Court of Appeal 9 Circuit from Eastern District Court, Division – Sacramento in California

Hung M Nguyen (Petitioner) appealed the final judgement and order to deny matter jurisdiction to Yolo County District Attorney Office as Public Entity to United State Court of Appeal 9 Circuit for review the final judgement and order. Petitioner legal believed that qualified immunity does not apply Yolo County District Attorney Office as Public Entity cited as **Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division, 276 F.3d 808, 813- 16, 817 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002)**.

Title II Appropriately Enforces The Due Process Clause

The Supreme Court indicated, however, with Title II of the Disabilities Act, the Court had granted certiorari to consider the appropriateness of Title II as an exception to Eleventh Amendment immunity, the majority in Garrett reserved judgment on the validity of Title II under Section 5. It concluded that Title II, dealing with "services, programs, or activities of a public entity," "has somewhat different remedial provisions from and is not controlled by the Court's decision restricting due process claims against states. Id. at 960 n. 1. Title II encompasses various due process-type claims with varying standards of liability and is not limited to equal protection claims. In addition to briefly noting differences between the Title II, the Court in Garrett also noted that Section 5 allows Congress to prohibit a "broader swath of conduct" than the courts have themselves identified as unconstitutional. Id. at 963.

The Merits of Plaintiff's Claims under the Disabilities Act

This case, which resulted in punitive damages and damages shall be awarded for plaintiff, was tried in the district court on three basic theories: (1) retaliation by the state domestic relations court against plaintiff for requesting hearing this matter and then filing an complaint with the Eastern District

Court, Sacramento Division under the Title II ADA 1990 Disabilities Act in violation of 42 U.S.C. § 12101, 42 USC 12102 (1) (a), and 42 USC 12132; (2) exclusively discriminated Plaintiff by County's lack of training policies or customs and procedures amounted to deliberate indifference to Plaintiff's constitutional rights violation. See Long V. County of Los Angeles, 442 F.3d 1178, 1186 (9th Cir. 2006) because of plaintiff's disability; and (3) discrimination against plaintiff by denying "an equal opportunity . . . to enjoy the benefits of a service conducted by the public entity [the state court]" and "the opportunity to participate equally in the proceeding pending before the court." Popovich v. Cuyahoga County, No. 98-4100 (N.D.Ohio), charge to jury, April 3, 1998, trial transcript at 770. 42 U.S.C. § 12203, Prohibition against retaliation and coercion under the ADA, states in relevant part: (a) Retaliation No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter, or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

Enforcement of The Equal Protection Clause

But Judge Moore then concludes: However, this possibility does not necessarily mean that Title II exceeds Congress's enforcement power under Section 5 of the Fourteenth Amendment. The Supreme Court has instructed that Congress may enact `reasonably prophylactic legislation' when faced with `difficult and intractable problems [, which] often require powerful remedies. See Kimel v. Florida Bd. of Regents, 528 U.S. 62, 88, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). In enacting the ADA, Congress noted that discrimination against individuals with disabilities was `a serious and pervasive problem,' 42 U.S.C. § 12101(a)(2).

However, Easter District Court of California – Sacramento Division and United States Court of Appeal 9 Circuit denied the facts that matter jurisdiction has barred petitioner's claim or action against Yolo County District Attorney Office and it seemed to be odd cited ((**Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division, 276 F.3d 808, 813- 16, 817 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002).**

IX. Reason for granting the Writ

The United States Court of Appeal 9 Circuit has erred to deny Petition's appeal for lacking of matter jurisdiction based on qualified immunity and claim to the matter above. Their memorandum statements are contrary with cited case (**Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division, 276 F.3d 808, 813- 16, 817 (6th Cir.) (en banc), cert. denied, 537 U.S. 812 (2002).** The United States Court of Appeal also violated the Supreme Court of United States Rule 10 sub (a).

X. Conclusion

For the foregoing reasons, Petitioner – Hung M Nguyen respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the 9 Circuit.

XI. **Appendix** – Memorandum from United State Court of Appeal for 9 Circuit issued on 01/27/2022.

FILED

JAN 27 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HUNG M. NGUYEN, Plaintiff-Appellant, v. YOLO COUNTY DISTRICT ATTORNEY OFFICE, Defendant-Appellee.	No. 21-15698 D.C. No. 2:21-cv-00239-TLN-KJN MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Submitted January 19, 2022**

Before: SILVERMAN, CLIFTON, and HURWITZ, Circuit Judges.

Hung M. Nguyen appeals pro se from the district court's judgment dismissing his action alleging federal and state law claims arising out of his prosecution for trespassing. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim under 28 U.S.C.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§ 1915(e)(2)(B). *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). We may affirm on any basis supported by the record. *Thompson v. Paul*, 547 F.3d 1055, 1058-59 (9th Cir. 2008). We affirm.

The district court properly dismissed Nguyen's claims under 42 U.S.C. §§ 1983 and 1985, and state law, because defendant is entitled to prosecutorial immunity. *See Cousins v. Lockyer*, 568 F.3d 1063, 1068 (9th Cir. 2009) (setting forth the scope of prosecutorial immunity as to § 1983 claims); *Sykes v. California*, 497 F.2d 197, 200 (9th Cir. 1974) (applying prosecutorial immunity to § 1985 claim); *Sullivan v. County of Los Angeles*, 527 P.2d 865, 870-71 (Cal. 1974) (setting forth the scope of prosecutorial immunity under California Government Code § 821.6 as to state law claims).

Dismissal of Nguyen's claim for violation of Title II of the Americans with Disabilities Act ("ADA") was proper because Nguyen failed to allege facts sufficient to show that defendant intentionally discriminated against him because of his disability. *See Duvall v. County of Kitsap*, 260 F.3d 1124, 1135, 1138-40 (9th Cir. 2001) (discussing elements of a Title II claim under the ADA, and the required showing of intentional discrimination to state a Title II claim for damages).

We reject as without merit Nguyen's contentions that the district court was biased and prejudiced against him.

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Nguyen's motion for judicial notice is denied as unnecessary.

AFFIRMED.

Dated this is 10th day of March, 2022.

Respectfully submitted

By: /s/ Nguyen Hung

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

HUNG M NGUYEN,

Plaintiff,

v.

YOLO COUNTY DISTRICT ATTORNEY'S OFFICE,

Defendant.

No. 2:21–cv–00239–TLN–KJN PS

ORDER GRANTING IFP STATUS; ORDER DENYING RECUSAL; FINDINGS AND RECOMMENDATIONS TO DISMISS WITH PREJUDICE

(ECF Nos. 1, 2, 3)

Plaintiff, who proceeds in this action without counsel, has moved for the undersigned to recuse, and has requested leave to proceed in forma pauperis.[1] (ECF Nos. 2, 3.)

Plaintiff's IFP application makes the showing required by 28 U.S.C. § 1915, and so the request to proceed IFP is granted. However, the determination that a plaintiff may proceed in forma pauperis does not complete the required inquiry. Under Section 1915, the court is directed to dismiss at any time if it determines the action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against an immune defendant.

Here, the court finds (I) plaintiff's recusal motion is insufficient, and so is denied; and (II) plaintiff's complaint is brought against an immune defendant and is otherwise frivolous, and so should be dismissed with prejudice.

[1] This case proceeds before the undersigned pursuant to E.D. Cal. Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1).

I. Plaintiff's Motion for Recusal

Legal Standard

Federal law allows a judge to recuse from a matter based on a question of partiality:

> Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. He shall also disqualify himself . . . [w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . .

28 U.S.C. 455(a), (b)(1). A party may seek recusal of a judge based on bias or prejudice:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding . . . The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists[.]

28 U.S.C. § 144. Relief under Section 144 is conditioned upon the filing of a timely and legally sufficient affidavit. A judge who finds the affidavit legally sufficient must proceed no further under Section 144 and must assign a different judge to hear the matter. See 28 U.S.C. § 144; United States v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980). Nevertheless, where the affidavit lacks sufficiency, the judge at whom the motion is directed can determine the matter and deny recusal. See United States v. Scholl, 166 F.3d 964, 977 (9th Cir. 1999) (citing Toth v. Trans World Airlines, Inc., 862 F.2d 1381, 1388 (9th Cir. 1988) (holding that only after determining the legal sufficiency of a Section 144 affidavit is a judge obligated to reassign decision on merits to another judge)); United States v. $292,888.04 in U.S. Currency, 54 F.3d 564, 566 (9th Cir. 1995) (if the affidavit is legally insufficient, then recusal can be denied).

The standard for legal sufficiency under Sections 144 and 455 is "'whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'" Mayes v. Leipziger, 729 F.2d 605, 607 (9th Cir. 1984) (quoting United States v. Nelson, 718 F.2d 315, 321 (9th Cir. 1983)); United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986). To provide adequate grounds for recusal, the prejudice must result from an extrajudicial source. Sibla, 624 F.2d 864, 867. A judge's previous adverse ruling alone is not sufficient for recusal. Nelson, 718 F.2d at 321.

Analysis

Plaintiff's motion for recusal in this case is substantively insufficient, as it alleges bias, prejudice and impartiality based solely on a previous ruling against plaintiff.[2] (See ECF No. 3 at 2-3.) It fails to allege facts to support a contention that the undersigned has exhibited bias or prejudice directed towards plaintiff from an extrajudicial source. Sibla, 624 F.2d at 868. Thus, plaintiff's allegation is not extrajudicial, does not provide a basis for recusal, and results in denial of his motion. Liteky v. United States, 510 U.S. 540, 555 (1994) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion."); Studley, 783 F.2d at 939 ("In and of themselves . . . [judicial rulings] cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal."); Leslie v. Grupo ICA, 198 F.3d 1152, 1160 (9th Cir. 1999) ("Leslie's allegations stem entirely from the district judge's adverse rulings. That is not an adequate basis for recusal.") (citations omitted).

II. Screening of Plaintiff's Complaint under Section 1915

Legal Standards for Screening

A federal court has an independent duty to assess whether federal subject matter jurisdiction exists, whether or not the parties raise the issue. See United Investors Life Ins. Co. v. Waddell & Reed Inc., 360 F.3d 960, 967 (9th Cir. 2004) (stating that "the district court had a duty to establish subject matter jurisdiction over the removed action *sua sponte*, whether the parties raised the issue or not"); accord Rains v. Criterion Sys., Inc., 80 F.3d 339, 342 (9th Cir. 1996). The court must dismiss the case if, at any time, it determines that it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3). A federal district court generally has original jurisdiction

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[2] This prior case and the instant complaint are both tied to the same underlying events. See Nguyen v Cache Creek Casino, 2:20-1748 TLN-KJN PS. In the prior case, plaintiff sued the Yocha Dehe Wintun Nation for his ejectment from casino premises, despite the fact that plaintiff was barred from entering the facility due to previous encounters with casino patrons and staff. The undersigned recommended plaintiff's case be dismissed under tribal sovereign immunity law, and the presiding district judge adopted the undersigned's recommendations in full.

over a civil action when: (1) a federal question is presented in an action "arising under the Constitution, laws, or treaties of the United States" or (2) there is complete diversity of citizenship and the amount in controversy exceeds $75,000. See 28 U.S.C. §§ 1331, 1332(a).

Further, to avoid dismissal for failure to state a claim, a complaint must contain more than "naked assertions," "labels and conclusions," or "a formulaic recitation of the elements of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. When considering whether a complaint states a claim upon which relief can be granted, the court must accept the well-pled factual allegations as true, Erickson v. Pardus, 551 U.S. 89, 94 (2007), and construe the complaint in the light most favorable to the plaintiff, see Papasan v. Allain, 478 U.S. 265, 283 (1986).

Pro se pleadings are liberally construed. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1988). Unless it is clear that no amendment can cure the defects of a complaint, a pro se plaintiff proceeding in forma pauperis is ordinarily entitled to notice and an opportunity to amend before dismissal. See Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987) superseded on other grounds by statute as stated in Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000)) (en banc); Franklin v. Murphy, 745 F.2d 1221, 1230 (9th Cir. 1984). Nevertheless, leave to amend need not be granted when further amendment would be futile, as when the complaint raises legally frivolous claims. See Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 339 (9th Cir. 1996). A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke, 490 U.S. at 327.

Analysis

Plaintiff's factual allegations are rooted in a criminal proceeding initiated against him for trespass on tribal casino grounds, wherein a member of defendant Yolo County District Attorney's office dismissed the charges a few months after plaintiff's ejection and arrest. (See ECF No. 1, Ex. B.) Plaintiff asserts the D.A.'s office wrongfully prosecuted him without any legal evidence or probable cause, and that it worked with the Yolo County Police Department to fabricate the police incident reports. Plaintiff asserts he suffered reputational harm, emotional distress, and disability discrimination (due to an alleged disability).

Liberally construed, plaintiff's complaint raises claims under the following sources of law: violations of his constitutional rights under 42 U.S.C. Sections 1983, 1985(3), 1986, and 12132; state law claims for gross negligence and intentional infliction of emotional distress; and allegations of criminal false statements and fraud under 18 U.S.C. Sections 1001 and 1031. Plaintiff seeks $100 million in compensatory and punitive damages, and requests the court to refer civil and criminal charges to the United States Attorney General. The claims raised, facts alleged in the complaint, facts drawn from the judicially-noticeable documents submitted by plaintiff, all place this case squarely in the realm of prosecutorial immunity and frivolity.

Absolute prosecutorial immunity applies for any action taken within the scope of a prosecutor's adjudicatory duties, including filing charges, initiating prosecution or any conduct integral to the judicial phase of the criminal process. Imbler v. Pachtman, 424 U.S. 409, 421-24 (1976). Further, prosecutors can obtain qualified immunity when they perform administrative or investigative functions beyond their adjudicatory role. Genzler v. Longanbach, 410 F.3d 630, 636 (9th Cir. 2005); see also Lacey v. Maricopa County, 693 F.3d 896, 912 (9th Cir. 2012). Prosecutorial immunity applies to actions under Sections 1983, 1985(3), and 1986. Imbler, 424 U.S. at 421-24 (prosecutorial immunity for § 1983 deprivation of civil rights claims); Sykes v. State of Cal. Dept. of Motor Veh., 497 F.2d 197, 200 (9th Cir. 1974) (prosecutorial immunity for Section 1985(3) conspiracy claims); see also Wagar v. Hasenkrug, 486 F.Supp.47, 50 (D. Mont. 1980) (dismissal of Section 1985 conspiracy claims ipso facto requires dismissal of 1986 claim). Prosecutorial immunity also applies to claims of disability discrimination under Section 12132.

See Edington v. Yavapai County, 2008 WL 169719, at *3 (D. Ariz. January 15, 2008). Additionally, similar claims under California state law are barred under state immunity laws. Cal. Gov't Code § 821.6 ("A public employee is not liable for injury caused by his instituting or prosecuting any judicial . . . proceeding within the scope of his employment, even if he acts maliciously and without probable cause."); see also Pagtakhan v. Alexander, 999 F. Supp. 2d 1151, 1156-60 (N.D. Cal. 2013) (applying Section 821.6 to claims for false prosecution, general negligence, and intentional infliction of emotional distress).

First, defendant has absolute prosecutorial immunity from plaintiff's allegations arising from defendant's decision to prosecute, as well as dismiss his case. Imbler, at 424 U.S. at 431. To the extent plaintiff alleges defendant "worked with" the Yolo County Sheriff's Office to fabricate the incident report, such allegations are entirely conclusory, as the judicially noticeable documents attached to the complaint show defendant was in no way involved in the writing of the incident report at issue. (See ECF No. 1, Ex. A.) (demonstrating the citation was issued by the dispatched deputy with assistance from a casino security supervisor). Once the D.A.'s office became involved, it is clear the prosecution—and not the presiding judge, as plaintiff alleges—elected to dismiss the trespass charge. (See ECF No. 1, Ex. A and B.) Therefore, there is no likelihood that plaintiff can plead any plausible facts suggesting defendants acted beyond their adjudicatory role. As such, plaintiff's federal claims under Sections 1983, 1985(3), 1986, and 12132, as well as his California state claims of "gross negligence" and intentional infliction of emotional distress, are barred by immunity.

Further, to the extent the complaint raises claims for false statements and fraud under 18 U.S.C. Sections 1001 and 1031, plaintiff, as a private citizen, has no authority to bring claims under criminal statutes. See Allen v. Gold Country Casino, 464 F.3d 1044, 1048 (9th Cir. 2006) (no private right of action for violation of criminal statutes), see also Dowdell v. Sacramento Hous. & Redevelopment Agency, 2011 WL 837046, at *2 (E.D. Cal. Mar. 8, 2011) (no private right of action under 18 U.S.C. § 1001).

Finally, given the prosecutorial immunity and frivolity of plaintiff's Section 1983 claims, his request to refer this case to the United States Attorney General should be denied. See 42

U.S.C. § 2000h-2 (stating that in actions "seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution on account of race, color, religion, sex, or national origin, the Attorney General . . . may intervene in such action upon timely application if the Attorney General certifies that the case is of general public importance.").

For these reasons, the court recommends dismissal of plaintiff's claims. Because further amendment would be futile, the dismissal should be with prejudice. Cahill, 80 F.3d at 339.

ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion to proceed in forma pauperis (ECF No. 2) is GRANTED; and
2. Plaintiff's motion to recuse (ECF No. 3) is DENIED.

RECOMMENDATIONS

It is further RECOMMENDED that:

1. Plaintiff's complaint (ECF No. 1) be DISMISSED WITH PREJUDICE; and
2. The Clerk of Court be directed to CLOSE this case.

These findings and recommendations are submitted to the assigned United States District Judge, under 28 U.S.C. § 636(b)(l). Within fourteen (14) days after being served with these findings and recommendations, plaintiff may file written objections with the court. This document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

Dated: March 11, 2021

Kendall J. Newman

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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CERTIFICATE OF SERVICE

The undersigned as Hung M Nguyen – Petitioner hereby certifies that on the 10th day of March 2022, a true and correct copy of this PETITION FOR WRIT OF CERTIORARI was filed via USPS which will serve as notification of such filing to all persons registered in this case.

1. Supreme Court of the United States
   The Office of the Clerk
   One First Street, NE
   Washington, DC 20543

2. Solicitor General Of United States, Room 5616
   Department of Justice
   950 Pennsylvania Ave., N.W.,
   Washington, DC 20530- 0001

Respectfully submitted

By: /s/ Hung M Nguyen

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