NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE STEPHENS, Plaintiff-Appellant, v. STATE OF ALASKA, Alaska Division of Elections, Defendant-Appellee.	No. 22-35707 D.C. No. 1:21-cv-00018-RRB MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
Ralph R. Beistline, District Judge, Presiding

Submitted June 26, 2023**

Before: CANBY, S.R. THOMAS, and CHRISTEN, Circuit Judges.

Joe Stephens appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging violations of the First and Fourteenth Amendments in connection with Alaska's refusal to include his middle name as his nickname on the ballot. We have jurisdiction under 28 U.S.C. § 1291. We review

* 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).

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Filed	Document Description	Page	Docket Text
07/11/2023	35		FILED MEMORANDUM (WILLIAM C. CANBY, SIDNEY R. THOMAS and MORGAN B. CHRISTEN) AFFIRMED. FILED AND ENTERED JUDGMENT. [12752758] (CPA)
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de novo a dismissal under Federal Rule of Civil Procedure 12(b)(6). *Lacey v. Maricopa County*, 693 F.3d 896, 911 (9th Cir. 2012) (en banc). We affirm.

The district court properly dismissed Stephens's First Amendment claim because Stephens failed to allege facts sufficient to show that the denial of his request to have his middle name appear as a nickname on the ballot was not justified by the important state interest of facilitating fairness, simplicity, and clarity in the voting procedure. *See Rubin v. City of Santa Monica*, 308 F.3d 1008, 1017-19 (9th Cir. 2002) (applying balancing test and concluding that limitation on a candidate's status designation on a ballot was constitutional because it did not impose a severe burden on candidate's free speech right and was reasonably related to the legitimate goal of achieving a straightforward, neutral, non-confusing ballot); *see also Lindsay v. Bowen*, 750 F.3d 1061, 1063-64 (9th Cir. 2014) (explaining that there is no "right to use the ballot itself to send a particularized message" (citations and internal quotation marks omitted)).

The district court properly dismissed Stephen's equal protection claim because Stephens failed to allege facts sufficient to show that he was subject to disparate treatment or that the refusal to permit his middle name to appear as a nickname on the ballot was not rationally related to a legitimate governmental purpose. *See United States v. Padilla-Diaz*, 862 F.3d 856, 862 (9th Cir. 2017) (explaining that under rational basis review, the challenger of a classification bears

the burden of "negativing every conceivable basis which might support it" (citation omitted and alteration adopted)); *Van Susteren v. Jones*, 331 F.3d 1024, 1027 (9th Cir. 2003) (to prevail on an equal protection claim, a plaintiff must show that he has been treated differently from others similarly situated); *Rubin*, 308 F.3d at 1019 (applying rational basis review because challenged election restriction did not unconstitutionally burden the right to free speech). We reject as without merit Stephens's contention that the district court should not have treated his equal protection claim as a class-of-one claim because he is a member of a large group of individuals who share his political views.

The district court did not abuse its discretion in denying as premature Stephens's motion to compel. *See Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (setting forth standard of review and describing trial court's broad discretion to deny discovery).

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

UNITED STATES DISTRICT COURT

for the

District of Alaska

JOE STEPHENS
Plaintiff
v.

ALASKA DIVISION OF ELECTIONS, STATE OF ALASKA
Defendant

Civil Action No. 1:21-cv-00018-RRB

AMENDED JUDGMENT IN A CIVIL ACTION

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **DECISION BY COURT.** This action came to trial or decision before the Court. The issues have been tried or determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

THAT Defendant's Motion to Dismiss is GRANTED pursuant to Federal Rule of Civil Procedure 12(b)(1) and, in alternative, Federal Rule of Civil Procedure 12(b)(6). This matter is DISMISSED.

APPROVED:

s/Ralph R. Beistline
Ralph R. Beistline
United States District Judge

Date: December 13, 2022

Brian D. Karth
Brian D. Karth
Clerk of Court

Note: Award of prejudgment interest, costs and attorney's fees are governed by D.Ak. LR 54.1, 54.2, and 58.1.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

JOE STEPHENS,

Plaintiff,

v.

ALASKA DIVISION OF ELECTIONS, STATE OF ALASKA,

Defendant.

Case No. 1:21-cv-00018-RRB

ORDER OF DISMISSAL

I. BACKGROUND

Plaintiff alleges that on June 24, 2021, he legally changed his name from "Joe Black Stephens" to "Joe Trump AKA Not Murkowski Stephens," and sought to have his middle name or "nickname," "Trump AKA Not Murkowski," listed on the ballot in his candidacy for U.S. Senate.[1] The Alaska Division of Elections informed Plaintiff that this "nickname" did not comply with Alaska Stat. § 15.15.030(4), and that he would be listed on the ballot as "Stephens, Joe."[2] Plaintiff argued, without support, "that use of a full legal

[1] Docket 1. Plaintiff also provided an Order for Name Change (Adult) from the Commonwealth of Virginia. Docket 8-1.

[2] Docket 8-1. He was listed as "Stephens, Joe T" as his name was indicated on his initial Declaration of Candidacy. *See* Docket 14-1; Docket 36-1.

name on a ballot is a protected right under the Constitution of the United States of America given no fraud or impersonation is attempted."[3]

The underlying Complaint alleged violations of the United States Constitution in the form of "interfere[ing] with his ability to run for election[.]"[4] In support, Plaintiff argued first that his name was "common," and that there "no doubt" would be voter confusion.[5] Second, he argued that he "changed his middle name to show his support for the former President of the United States, Donald Trump, and to show his lack of support for the current Senator of Alaska, Lisa Murkowski," and asserted that refusal to allow his full name on the ballot causes him "harm by disallowing [him] to show his support of the former President[.]"[6] Alternatively, he argued he should be able to use "Trump AKA Not Murkowski" as a nickname.[7]

Finding the Complaint did not clearly state a federal question, this Court issued an Order to Show Cause requesting Plaintiff to explain "the U.S. Constitutional provision or federal statute that provides this Court with federal question jurisdiction."[8] In response to the Order to Show Cause, Plaintiff cited the First and Fourteenth Amendments.[9] He argued that his legal name change in support of a political candidate is "speech" protected under the First amendment, and that the state's allowance of a

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[3] Docket 1 at 6–7.
[4] Docket 1 at 5.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 6.
[8] Docket 7.
[9] Docket 8.

"nickname" by another candidate (Hill, Sidney "Sid") but not by Plaintiff violated the Equal Protection clause of the Fourteenth Amendment.[10]

On February 10, 2022, this Court dismissed this matter for lack of subject matter jurisdiction because it concluded that Plaintiff's Complaint failed to describe a violation of federal law, and that it instead raised a question of state law (*i.e.*, interpretation of the relevant state statute) best addressed by a state court.[11] The Ninth Circuit reversed and remanded the matter to this Court, finding that this Court must specifically explain why the First and Fourteenth Amendment claims failed to confer subject matter jurisdiction.[12] The Court therefore reopened this case and issued an Order Directing Service and Response.[13]

II. MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

Upon being served, Defendant promptly moved to dismiss this action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, asserting that this Court lacks subject matter jurisdiction, and Rule 12(b)(6), asserting that Plaintiff fails to state a

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[10] *Id.*

[11] Docket 12.

[12] Docket 24.

[13] Docket 27. Plaintiff now suggests that Defendant "attempted to delay Judgment in this case until after the Primary Election," Docket 35 at 4. But the Court notes that this Court's dismissal was issued six months before the primary election, and before Defendant was ever served with the Complaint. However, rather than take the matter to state court, Plaintiff appealed. The matter was not remanded to this Court by the Ninth Circuit until June 23, 2022. Docket 26. One week later the Court ordered that the Complaint be served on Defendant, which Plaintiff had not done previously. Although Defendant could have waived service, it was within its rights to decline to do so. Plaintiff was put on notice as of January 12, 2022, that the State declined to waive service. Docket 35 at 13. Nothing prevented Plaintiff from properly serving Defendant directly. Accordingly, any delay in this matter prior to Plaintiff effecting service is not attributable to Defendant.

claim upon which relief can be granted.[14] Plaintiff opposed the Motion to Dismiss and filed a Second Motion for Summary Judgment.[15]

Meanwhile, the Nonpartisian Alaska primary for U.S. Senate took place on August 16, 2022. Official results indicate Plaintiff received .42 percent of the votes, for a total of 805 votes, coming in at eleventh place in the Senate primary.[16] Accordingly, Plaintiff's name will not appear in any form on the next ballot. The matter is moot as a practical matter. However, as the issue is "capable of repetition, yet evading review," the Court will address the issues identified in the remand.[17]

Plaintiff's First and Fourteenth Amendment arguments are incorporated by reference into the Complaint. The issue before the Court is whether or not the First Amendment or Equal Protection Clause provide federal question jurisdiction in this matter. Plaintiff has the burden of proving that the Court has subject matter jurisdiction over the action,[18] and must support his jurisdictional allegations with "competent proof," equivalent to proof required in the summary judgment context.[19]

A. First Amendment

States possess a broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, which includes state

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[14] Docket 33.

[15] Dockets 35, 36.

[16] *See* Election Results (alaska.gov) (last visited September 6, 2022).

[17] An exception to mootness exists for controversies that are "capable of repetition, yet evading review." *See Hamamoto v. Ige*, 881 F.3d 719, 722 (9th Cir. 2018).

[18] *Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495, 499 (9th Cir. 2001).

[19] *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

control over the election process for state offices.[20] This power is "subject to the limitation that [it] may not be exercised in a way that violates . . . specific provisions of the Constitution," such as the First Amendment rights of the State citizens, including the freedom of political association.[21] Plaintiff argues that his legal name change in support of a political candidate is protected political speech under the First amendment.[22]

But this case is not about permitting Plaintiff to change his name. It is about the discretion of the Division of Elections to determine how and whether a middle name or nickname is included on the ballot. The relevant portion of the Alaska Statute reads:

> The director shall prepare all official ballots to facilitate ***fairness, simplicity, and clarity*** in the voting procedure, to reflect most accurately the intent of the voter, and to expedite the administration of elections. . . . The director may not include on the ballot, as a part of a candidate's name, any honorary or assumed title or prefix but ***may include*** in the candidate's name ***any nickname or familiar form of a proper name*** of the candidate."[23]

The use of the word "*may*" rather than "*must*" allows for some discretion by the director.

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[20] *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008) (internal citations and quotations omitted).

[21] *Id.* (internal citations omitted).

[22] Docket 8.

[23] Alaska Stat. § 15.15.030(4) (emphasis added). Plaintiff argues that "everyone in the United States of America knows what a nickname is. . . . A nickname and a middle name are not defined anywhere in the law to be mutually exclusive." Docket 35 at 10. While the Court would defer to state court on the interpretation of this statute, it is worth noting that a "nickname" suggests a name commonly used by others to refer to an individual, and Plaintiff has not shown that he is routinely referred to as "Trump AKA Not Murkowski" rather than "Joe." Indeed, his name change is dated June 24, 2021, just weeks before his Declaration of Candidacy filed August 10, 2021. Moreover, he does not argue that "Trump AKA Not Murkowski" is a "familiar form of a proper name," such as "Joe" (Joseph) or "Sid" (Sidney). Additionally, although Plaintiff alleges possible "voter confusion" because the names "Joe" and "Stephens" are very common, he does not argue that there is another individual on the ballot with a similar name, which could cause such confusion. The Court takes judicial notice that he was the only "Joe" and the only "Stephens" on the 2022 Primary Election, U.S. Senator, ballot.

The Supreme Court acknowledged that "[e]lection regulations that impose a severe burden on associational rights are subject to strict scrutiny, and we uphold them only if they are 'narrowly tailored to serve a compelling state interest,'" but "[i]f a statute imposes only modest burdens, . . . then the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions on election procedures."[24] In other words, "[i]t is the severity of that burden . . . that determines the standard of review by which we judge the state's interest and, accordingly, decide whether the restriction is unconstitutional."[25] "Courts will uphold as 'not severe' restrictions that are generally applicable, even-handed, politically neutral, and which protect the reliability and integrity of the election process."[26] The Court finds that this case falls into the latter category.

Plaintiff has specifically argued that he intended to use his new legal "middle name" as "an attempt to show support for the former President of the United States, Donald Trump, and to show a lack of support for the current Senator of Alaska, Lisa Murkowski."[27] But "[a] restriction is particularly unlikely to be considered severe when a candidate is given other means of disseminating the desired information."[28] In *Washington State Grange*,[29] the Supreme Court found that "[b]allots serve primarily to elect candidates, not

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[24] 552 U.S. 442, 453 (internal citations and quotations omitted).
[25] *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002).
[26] *Id.*
[27] Docket 8 at 4.
[28] *Rubin*, 308 F.3d at 1014.
[29] 552 U.S. 442, 453.

as forums for political expression."[30] In *Rubin*, the Ninth Circuit explained that a city's prohibition of "status designations" such as "peace activist," "pro-choice activist," and the like did not severely burden a candidate's First Amendment rights, because the regulation was viewpoint neutral, and did not infringe on "core political speech."[31] In other words, there is no First Amendment right to campaign *via* ballot. Plaintiff was free to campaign prior to the primary election, just like the other candidates. As in *Rubin*, Plaintiff was provided with the opportunity to submit a biography/position statement pursuant to Alaska Stat. § 15.58.030. In Plaintiff's biography and position statement, published on the Division of Elections website, Plaintiff stated: "I had my name legally changed to Joe Trump AKA Not Murkowski Stephens," and "My name is legally Joe Trump AKA Not Murkowski Stephens. I changed my name to show my support of Trump and my rejection of the current Senator Murkowski. I Support the Trump initiatives."[32] The Division of Elections was not obligated to include Plaintiff's "middle name" for the purpose of telegraphing Plaintiff's political ideology.

B. Fourteenth Amendment Equal Protection Clause

Plaintiff also argues that the state's allowance of a "nickname" by another candidate (Hill, Sidney "Sid"), but not by Plaintiff violated the Equal Protection clause of the Fourteenth Amendment, because the Division of Elections rules were not enforced

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[30] *Id.* at 453, quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362–63 (1997) ("We are unpersuaded, however, by the party's contention that it has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate.")

[31] *Rubin*, 308 F.3d at 1015.

[32] https://www.elections.alaska.gov/candidates/?election=22prim&candidate=Stephens%2C+Joe+T (last visited September 6, 2022).

equally.[33] The Equal Protection Clause guarantees that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[34] The Supreme Court has recognized that "an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called 'class of one.'"[35] To succeed on his "class of one" claim, Plaintiff must demonstrate that the Division of Elections: (1) intentionally (2) treated Plaintiff differently than other candidates on the ballot, (3) without a rational basis.[36]

The Court finds that Plaintiff was not treated differently than other candidates on the ballot. Candidates who indicated a middle initial (including Plaintiff) were listed with a middle initial. The two candidates who indicated alternative names by which they are known, ("Sid" and "Al") had such names listed in quotation marks after their names. Both were clearly a "nickname or familiar form of a proper name." Unlike Plaintiff's middle name "Trump AKA not Murkowski," neither "Sid" nor "Al" included a phrase, an acronym, the name of a former president, or the name of another candidate on the same ballot.

The Division of Elections "*may include*" a candidate's nickname."[37] It does not say "must include." The statute leaves room for discretion by the Division of Elections

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[33] Docket 8 and Docket 36 at 4. The Court observes that "Merrill, Samuel A. 'Al'" was also included on the ballot.

[34] U.S. Const. amend. XIV, § 1.

[35] *Gerhart v. Lake Cnty., Mont.*, 637 F.3d 1013, 1021–22 (9th Cir. 2011) (citations omitted).

[36] *Id.* (*citing Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

[37] Alaska Stat. § 15.15.030(4) (emphasis added).

in preparing the ballots "to facilitate fairness, simplicity, and clarity . . . and to expedite the administration of elections."[38] Plaintiff has not met his burden to challenge Defendant's decision to omit his middle name/nickname "Trump AKA Not Murkowski" from the Official Election Ballot. The Court observes that the director could justify the omission solely in the interests of "simplicity and clarity."

Even if this Court found that Defendant treated Plaintiff differently than other candidates on the ballot, the Court finds a rational basis for the decision. The rational basis prong of a "class of one" claim turns on whether there is a rational basis for the *distinction,* rather than the underlying government *action.*[39] The question is therefore whether there is a rational basis for singling out Plaintiff's "nickname" for exclusion, when others were included.[40] "Under the rational basis test, a [government] policy survives an equal protection challenge 'if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.' . . . The government doesn't have to articulate the purpose of its policy or the reasons for its classifications. Instead, the party raising an equal protection challenge must negate 'every conceivable basis which might support it.'"[41] Once again, the division's obligation "to facilitate fairness, simplicity, and clarity" justify the exclusion of a politically-oriented phrase masquerading as a nickname on the ballot.

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[38] Alaska Stat. § 15.15.040.

[39] *Id.* at 1023 (emphasis original).

[40] *Id.*

[41] *United States v. Ayala-Bello*, 995 F.3d 710, 715 (9th Cir. 2021), *cert. denied,* 142 S. Ct. 513, 211 L. Ed. 2d 310 (2021) (citations omitted).

III. CONCLUSION

Having concluded that Plaintiff has not made any viable federal claims, this Court lacks subject matter jurisdiction. Accordingly, Defendant's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) is GRANTED, this matter is DISMISSED, and all pending motions are denied as moot.

IT IS SO ORDERED this 7th day of September, 2022, at Anchorage, Alaska.

/s/ Ralph R. Beistline
RALPH R. BEISTLINE
Senior United States District Judge