**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**
**SOUTHERN DIVISION**

| | |
|---|---|
| BEN EILENBERG,<br><br>Plaintiff,<br><br>v.<br><br>CITY OF COLTON,<br><br>Defendant. | No. SA CV 20-00767-FMO (DFM)<br><br>Order Denying Plaintiff's Ex Parte Application for a Temporary Restraining Order |

## I. INTRODUCTION

On April 20, 2020, Ben Eilenberg ("Plaintiff"), an attorney, filed a pro se civil rights complaint in this court. See Dkt. 1 ("Complaint").[1] On April 29, Plaintiff applied ex parte for a temporary restraining order. See Dkt. 10 ("TRO"). Plaintiff seeks an order prohibiting the City of Colton ("City" or "the City") from preventing signature gatherers from operating within city limits, or, alternatively, an order placing the ballot initiative on the next general election ballot. See id. The City specially appeared and filed an

[1] Plaintiff is currently suspended from the practice of law in California by the Supreme Court of California. See Dkt. 12-1 at 65; see also https://appellatecases.courtinfo.ca.gov/search.cfm?dist=0 (search for Case No. S259914). Plaintiff is currently under disciplinary investigation in this court. See In re Eilenberg, Case No. 2:20-ad-00480-VAP.

opposition with a supporting declaration from their attorney. See Dkts. 12 ("Opp'n"), 12-1 ("Richards Decl.").[2]

## II. SUMMARY OF THE CASE

Ramona Padilla serves as the proponent of the Colton Food Truck Economic Development Act of 2020, a proposed ballot initiative in the City. See Complaint, Ex. A. Plaintiff is an authorized agent for Padilla. See id. at 22.

On November 7, 2019, Plaintiff submitted the proposed initiative for title and summary to the City, as required by California law. See id. ¶ 12. On November 21, 2019, the City provided a title and summary for the proposed initiative. See id. ¶ 13. This began a 180-day window to collect signatures. See id. ¶ 14; see also Cal. Elec. Code § 9208. Plaintiff published the initiative in local newspapers and hired signature gatherers. See id. ¶¶ 15-16.

On March 4, 2020, due to the COVID-19 pandemic, California Governor Gavin Newsom proclaimed a state of emergency. See Richards Decl. ¶ 2, Ex. 1. On March 19, Governor Newsom issued Executive Order N-33-20, which ordered all people living in California, except for those needed to maintain critical infrastructure sectors, to stay at home. See id. ¶ 3, Ex. 2.

On March 23, 2020, Plaintiff asked the City if his signature gatherers could continue gathering signatures or, alternatively, if the City would add his initiative to the City's general election ballot. See Complaint ¶ 18, Ex. C. The City declined to place the initiative on the ballot. See id. ¶ 19, Ex. D. Plaintiff

[2] Both parties ask the Court to take judicial notice of certain extrinsic materials, including state court records, state and county orders, a list of essential workers made by the California Public Health Officer, and documents prepared by public health agencies. Federal Rule of Evidence 201 permits this Court to take judicial notice of matters of public record, including state court records. See United States v. 14.02 Acres of Land, 547 F.3d 943, 955 (9th Cir. 2008). These documents are matters of public record or from sources whose accuracy cannot reasonably be questioned, so the requests are GRANTED.

then asked the City to provide written confirmation that signature gatherers are "essential workers" who can continue to work under Executive Order N-33-20. See id. ¶ 20, Ex. E. The City replied that signature gatherers were not essential workers and that they did not have discretion to vary from the order. See id. ¶ 21, Ex. F. The City ordered Plaintiff and other initiative proponents to refrain from circulating their petitions. See id. This action followed.

## III. LEGAL STANDARD

Rule 65 provides courts with the authority to issue temporary restraining orders and preliminary injunctions. Fed. R. Civ. P. 65(a) & (b). The purpose of a preliminary injunction is to preserve the status quo and the rights of the parties until a final judgment on the merits can be rendered, see U.S. Philips Corp. v. KBC Bank N.V., 590 F.3d 1091, 1094 (9th Cir. 2010), while the purpose of a temporary restraining order is to preserve the status quo before a preliminary injunction hearing may be held. See Wahoo Intern., Inc. v. Phix Doctor, Inc., 2014 WL 2106482, *2 (S.D. Cal. 2014). The standards for a temporary restraining order and a preliminary injunction are the same. See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co., 240 F.3d 832, 839 n. 7 (9th Cir. 2001); Rowe v. Naiman, 2014 WL 1686521, *2 (C.D. Cal. 2014) ("The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction."). Both are "extraordinary" remedies "that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008).

To obtain a preliminary injunction, the moving party must establish that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) that an injunction is in the public interest. See id. at 20. Alternatively, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction,

so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

Preliminary injunctions can take two forms. A prohibitory injunction prohibits a party from taking action and preserves the status quo. A mandatory injunction orders a responsible party to take action. Mandatory injunctions are "particularly disfavored" and, in general, "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 878-79 (9th Cir. 2009) (internal citations and quotation marks omitted).

Whether to grant or deny a TRO or preliminary injunction is a matter within the court's discretion. See Winter, 555 U.S. at 32.

## IV. DISCUSSION

### A. Requirements of an Ex Parte Application for a TRO

A court may issue a TRO without notice to an adverse party or its attorney only if "(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the [movant or his attorney] certifies in writing any efforts made to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b)(1). The Supreme Court and the Ninth Circuit have explained that "the circumstances justifying the issuance of an ex parte [temporary restraining] order are extremely limited[.]" Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1131 (9th Cir. 2006) (citing Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers, 415 U.S. 423, 438-39 (1974)). For example, an ex parte TRO "may be appropriate 'where notice to the adverse party is impossible either because the identity of an adverse party is unknown or because a known

party cannot be located in time for a hearing.'" Id. at 1131 (quoting Am. Can Co. v. Mansukhani, 742 F.3d 314, 322 (7th Cir. 1984)).

Plaintiff has not provided any explanation for why he seeks his temporary restraining order ex parte. Indeed, he appears to have attempted to serve the City, see Dkt. 11, though the City argues this service was improper, see Opp'n at 15. Regardless, Plaintiff has not explained to the Court why normal notice procedures, if expedited, are insufficient. Accordingly, his ex parte application can be denied for this reason alone. Nonetheless, the Court will proceed to consider whether Plaintiff has demonstrated a TRO should be granted under the Winter factors.

## B. Likelihood of Success on the Merits

### 1. Plaintiff May Lack Standing

As an initial matter, the Court has serious concerns about whether Plaintiff has standing to bring the claims asserted in the Complaint. The "'irreducible constitutional minimum' of standing consists of three elements." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (citation omitted). The plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Id.

To establish injury in fact, Plaintiff must show that he suffered "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Id. at 1548 (citation omitted). Additionally, "[c]ourts generally refuse to recognize standing based on economic harm that is merely a consequence of an injury suffered by another party." Duran v. City of Corpus Christi, 240 F. App'x 639, 641-42 (5th Cir. 2007). Here, Plaintiff's primary injury, the violation of his constitutional rights, appear to be suffered by others and are not particular to him. Notably, Plaintiff is not the proponent of the ballot initiative, but merely operates as her

agent. See Complaint, Ex. A. Further, Plaintiff has not specified what, if any, harm he suffered to his properties or what specific economic loss he faces due to the City's actions. But "[i]t is not enough for the agent to allege an injury that is qualitatively different from that suffered by the principal; rather, the agent must allege an injury that does not derive from the injury to the principal." Pagan v. Calderon, 448 F.3d 16, 30 (1st Cir. 2006). The injuries that Plaintiff alleges seem plainly derivative of the harm ascribed to Padilla. Given the lack of details, Plaintiff does not appear to have suffered any concrete harm creating an injury in fact. See Spokeo, 136 S. Ct. at 1548 ("A 'concrete' injury must be 'de facto'; that is, it must actually exist.").

Plaintiff also appears to be unable to demonstrate that his injury is either fairly traceable to the conduct of the City or likely to be redressed by a favorable judicial decision. "A litigant must demonstrate . . . a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the 'case or controversy' requirement[.]" Duke Power Co. v. Carolina Env't Study Grp., Inc., 438 U.S. 59, 79 (1978). To establish redressability, then, a plaintiff must show that it is "'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" M.S. v. Brown, 902 F.3d 1076, 1083 (9th Cir. 2018) (quoting Lujan v. Defs. Of Wildlife, 504 U.S. 555, 561 (1992)).

Here, Plaintiff challenges the City's refusal to allow signature gatherers during the pandemic. But it is the State of California and the County of San Bernardino, respectively, that determined what workers were essential and implemented the rule Plaintiff is challenging. See Richards Decl. ¶ 6, Ex. 5; TRO, Ex. G. As such, the relief Plaintiff ultimately seeks—clarification that signature gatherers are "essential workers"—can only be obtained from those entities, not the City.

**2. Plaintiff Is Unlikely to Succeed on His Claims**

Plaintiff has not demonstrated that he is likely to succeed on the merits. Plaintiff alleges that Executive Order N-33-20 impairs his constitutional right to gather signatures for a ballot initiative. See Complaint ¶ 25. Even if this is the case, Plaintiff fails to recognize the unique situation in which the Executive Order was issued, a global public health crisis. In a public-health crisis, judicial review of state action is limited. See Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905) (limiting judicial review of legislative action to protect public health to determining whether the statute has "real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law"); In re Abbott, 954 F.3d 772, 783-85 (5th Cir. 2020) (applying Jacobson in the context of the COVID-19 pandemic to an executive order and holding "Jacobson remains good law"). As such, in the context of this global pandemic, the Court may only determine whether Executive Order N-33-20 bears a "real and substantial relation" to the object of mitigating the impact of COVID-19. The Court finds that the physical distancing requirements bear a reasonable and substantial relation to preventing the spread of COVID-19 and so Plaintiff is unlikely to succeed on the merits of his case. See Gish v. Newsom, 2020 WL 1979970, at *5 (C.D. Cal. 2020) (applying Jacobson to Executive Order N-33-20 and concluding the order is "a permissible exercise of executive authority during a national emergency"); Cross Culture Christian Center v. Newsom, 2020 WL 2121111 (E.D. Cal. 2020) (applying Jacobson framework and finding that "the State and County stay at home orders being challenged [in that action] bear a real and substantial relation to public health" and that plaintiffs failed to show the "orders are 'beyond all question' a plain, palpable invasion of rights secured by [] fundamental law'"); Givens v. Newsom, 2020 WL 2307224 (E.D. Cal. 2020) (applying Jacobson and denying plaintiffs' – one of which is campaigning for

political office -- TRO request to "enjoin Defendants from enforcing the State stay at home order against their permit applications to hold protests and political rallies at the State Capital" because they failed to demonstrate a likelihood of success on the merits since "the State order, and the [California Highway Patrol's] denial of their permit applications, are within the scope of the State's emergency powers to fight the spread of COVID-19").

To the extent Plaintiff argues that the City misinterpreted Executive Order N-33-20 and signature gatherers qualify as election personnel, he is similarly unlikely to succeed on the merits. As the City noted, see Opposition at 23, California Elections Code § 320 defines "Elections official" as: "(a) A clerk or any person who is charged with the duty of conducting an election. (b) A county clerk, city clerk, registrar of voters, or elections supervisor having jurisdiction over elections within any county, city, or district within the state." Although "personnel" has a broader meaning than "official," it still indicates those who are working on behalf of the government to run elections, especially given its placement in "Other Community-Based Government Operations and Essential Functions." See TRO, Ex. G at 10. It thus appears unlikely that Plaintiff will prevail on his argument that signature gatherers are election personnel.

**C. Irreparable Injury**

"A plaintiff seeking a preliminary injunction must demonstrate that irreparable injury is likely in the absence of preliminary relief. Mere possibility of harm is not enough." Enyart v. Nat. Conference of Bar Exam'rs, 630 F.3d 1153, 1165 (9th Cir. 2011) (citation omitted).

Plaintiff has not met this burden. The Court has already indicated that it has serious questions about whether Plaintiff has standing, in part because his alleged injury is not traceable or redressable in light of his failure to name the State or County as defendants. The City has no apparent power to declare that

the Governor's Executive Order does not apply to signature gatherers. The consequence is that Plaintiff cannot demonstrate that he will likely suffer irreparable injury in the absence of a TRO. See Sierra Club v. U.S. Dep't of Energy, 825 F.Supp.2d 142, 153 (D.D.C. 2011) ("A plaintiff may be irreparably harmed by all sorts of things, but the irreparable harm considered by the court must be caused by the conduct in dispute and remedied by the relief sought."); Arizonians for Fair Elections v. Hobbs, 2020 WL 1905747, at *14 (D. Ariz. 2020) (no irreparable injury where plaintiff challenged state statute but not underlying constitutional provision).

Additionally, it is unclear whether Plaintiff's inability to gather in-person signatures during the pandemic will cause him to fail to secure a place on the November 2020 ballot. Plaintiff does not say how many signatures have been gathered, how many remain to be gathered, or that he will be able to obtain the required remaining signatures if injunctive relief were granted. In the absence of any facts in support, Plaintiff has not demonstrated that it is likely, as opposed to merely possible, that but-for the COVID-19 pandemic, he would have gathered sufficient signatures during the 180-day window in order to qualify for the November 2020 ballot.

Finally, any claim of imminent, irreparable injury is significantly undermined by Plaintiff's unexplained delay in seeking relief. Plaintiff was aware of the City's position by March 25, 2020, see Complaint, Ex. D, but did not file the Complaint until April 20, and the TRO until April 29, over one month later. Plaintiff's lack of diligence makes it difficult to conclude that he would be able to obtain enough signatures by mid-May, the deadline to do so.

**D. Balance of Hardships**

Additionally, the balance of hardships weighs against granting the TRO. The Ninth Circuit has held that when weighing between financial concerns and preventing human suffering, the balance of hardships tilts "decidedly" in

favor of preventing human suffering. Golden Gate Restaurant Ass'n v. City and County of San Francisco, 512 F.3d 1112, 1126 (9th Cir. 2008) (citation and internal quotation marks omitted). Plaintiff has provided little description of the hardship he faces as a result of an inability to collect signatures, but these hardships appear to be primarily economic in nature. See, e.g., Complaint ¶ 27 (alleging losses of funds, time, and money related to declining property values). Further, the proposed initiative appears to be primarily economic in nature, designed to change zoning laws around food trucks and commercial kitchens. See generally id., Exs. A, B. Due to the lack of detail, it is also unclear how much of this alleged hardship is suffered by Plaintiff personally as opposed to others. See Golden Gate Restaurant Ass'n, 512 F.3d at 1126 (considering only the hardship of parties for the balance of hardships).

In all, while Plaintiff's injuries appear entirely economic, the City's injuries include potential human suffering that comes from increased exposure to COVID-19. Therefore, the balance of hardships tips against Plaintiff.

**E. Public Interest**

Finally, the public interest weighs against granting the TRO. Although part of the public interest analysis is subsumed by the hardship analysis, the public interest analysis is not limited to the parties. See Golden Gate Restaurant Ass'n, 512 F.3d at 1126. Once again, Plaintiff has provided few details explaining how his position supports the public interest. The general public certainly has a strong interest in containing the spread of COVID-19. Health care workers in particular stand to benefit from upholding social distancing policies, as fewer infections mean fewer individuals burdening a health care system that is already strained. Accordingly, Plaintiff has not shown the public interest in granting the TRO outweighs the interest in protecting the health and safety of others during this national health crisis. Cf.

id. (recognizing the public's interest in the health of city residents and workers).

## V. CONCLUSION

Plaintiff seeks a disfavored remedy during an unprecedented public health crisis. But he has not established that he is likely to succeed on the merits of his claims, that he will suffer irreparable injury without a TRO, or that the balance of hardships tips in his favor. Accordingly, Plaintiff's Ex Parte Application for a Temporary Restraining Order is DENIED.

Date: May 14, 2020

_____/s/_____
FERNANDO M. OLGUIN
United States District Judge