DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80203	DATE FILED May 21, 2020 5:11 PM
DANIEL RITCHIE, an individual, COLORADO CONCERN, a Colorado non-profit corporation, Plaintiffs, v. JARED POLIS, in his capacity as Governor of Colorado, and JENA GRISWOLD, in her capacity as Colorado Secretary of State, Defendants.	◆ **COURT USE ONLY** ◆
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GOVERNOR POLIS' RESPONSE TO FORTHWITH MOTION FOR TEMPORARY RESTRAINING ORDER

The Colorado Disaster Emergency Act provides statutory authority for Colorado's governor to suspend regulatory provisions to ensure that no statute or rule hinders the state's efforts to cope with a disaster emergency. Under this authority, and in the face of the historic pandemic gripping Colorado, Governor

Jared Polis has struck a careful balance between the need to facilitate citizens' constitutional right to engage in the ballot initiative process and the current imperative to protect public health by issuing Executive Order D 2020 065. The Executive Order provides further authority to the Secretary of State to implement modest changes to the technical requirements for the collection of ballot initiative signatures in order to keep both petition circulators and signers safe. The Secretary, relying on her expertise, can develop the specific procedures to accomplish this goal consistent with the requirements of Colorado Constitution Article V, § 1.

The Governor's action recognizes the need for petitioning activity to continue while concurrently protecting public health. As with other activities that must carry on while the state copes with the pandemic, the Governor has temporarily suspended the regulatory statutes at issue here that hinder the state's efforts to control disease transmission while simultaneously delegating to the expert in this field (the Secretary) additional tools necessary to facilitate the safe continuation of petitioning activity. The Governor's goal is to minimize or stop the spread of the novel coronavirus while also allowing the initiative process to proceed. That twofold aim is achieved by the Executive Order without undermining any constitutional requirement and fully within the Governor's powers under the Act.

Nothing in the Executive Order reduces the number of signatures required to qualify for the ballot nor specifies where those signatures must come from. Nothing in the Executive Order relieves the burden on initiative proponents to ensure that

petition signatures are valid. And nothing in the executive order removes the potential penalties for unlawful signature-gathering activities. Plaintiffs complain that they may someday be adversely impacted by the passage, if it occurs, of a ballot initiative that may, or may not ever, qualify for the ballot under procedures that have yet to be laid out in new emergency rules that have not yet been enacted by the Secretary. This speculative injury does not support the issuance of an injunction. To the contrary, enjoining the Executive Order will impede the Governor's efforts to protect the rights of citizens to participate in direct democracy while at the same time protecting public health. Plaintiffs' request for a preliminary injunction should be denied.

BACKGROUND

The Governor declared a disaster emergency under the Colorado Disaster Emergency Act, C.R.S. § 24-33.5-701, *et seq*., on March 10, 2020, due to the community spread of a novel coronavirus causing a disease called COVID-19. Since declaring the disaster emergency, the Governor has issued numerous executive orders designed to mitigate the effects of the pandemic, prevent further spread, protect against overwhelming our healthcare resources, while also ensuring as much as is feasible that critical activities in the state may continue.[1]

[1] A compendium of pertinent executive orders issued by Governor Polis during the COVID-19 pandemic is attached here as Polis Ex. A, for ease of reference by the Court. All of these and the Governor's other pandemic executive orders are published and may be found at the Governor's website: https://www.colorado.gov/governor/2020-executive-orders.

Executive Order D 2020 065 (the "Executive Order") was issued on May 15, 2020. As noted therein, this Executive Order followed the earlier issuance of the Governor's "Safer at Home" orders, which mandated that "Vulnerable Individuals" must continue to stay at home and avoid in-person contact with persons outside their immediate household to the greatest extent feasible. *See* Executive Order D 2020 044 (Apr. 26, 2020) (included in Polis Ex. A), §§ II.C. & II.H.5. The various requirements of the "Safer at Home" orders in combination with the continuing risks of the pandemic prompted the Governor to promulgate the at-issue Executive Order to address the "significant and determinative barriers due to state and local public health orders that prevent [petition circulators] from the normal statutory conduct of in-person signature gathering." Executive Order D 2020 065, at 1.

By its terms, the Executive Order suspends those provisions in article 40 of Title I which have the effect of requiring petition circulators be physically present when a registered elector signs an initiative petition. *See id.* §§ II.A. through D. The Executive Order then authorizes the Secretary of State to promulgate emergency rules in the wake of these statutory suspensions to ensure both the protection of public health and the reliability of the petition signatures that are gathered. *See id.* § II.G. As made explicit in the Executive Order, none of its provisions "relieves circulators . . . of the burden to ensure that the signatures on the petitions are valid to the best of their knowledge," nor does the Executive Order suspend "the other

provisions of C.R.S. § 1-40-130, which define the unlawful signature gathering actions and their penalties." *Id.* §§ II.H. and J.

ARGUMENT

To obtain a preliminary injunction, a party must establish that it satisfies the standard outlined in *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982). Thus, Plaintiffs must demonstrate: (1) a reasonable likelihood of success on the merits; (2) a danger of real, immediate, and irreparable injury that may be prevented by injunctive relief; (3) they have no adequate remedy at law; (4) an injunction will not disserve the public interest; (5) the balance of equities favors an injunction; and (6) the injunction will preserve the status quo pending a trial on the merits. *See also Dallman v. Ritter*, 225 P.3d 610, 620 (Colo. 2010); *Kourlis v. Dist. Ct.*, 930 P.2d 1329, 1335 (Colo. 1997).

Plaintiffs fail to meet three of these factors: (1) they are not likely to succeed on the merits, (2) they have no actual injury, and (4) an injunction will harm the public interest. Each factor provides an independent ground to deny their requested injunction.

I. Plaintiffs are not likely to succeed on the merits.

A. The Executive Order is within the Governor's authority under the Disaster Emergency Act.

The Executive Order is well within the Governor's authority under the Colorado Disaster Recovery Act. Under the Act, "[t]he governor is responsible for meeting the dangers to the state and people presented by disasters." C.R.S. § 24-

33.5-704(1). Accordingly, the general assembly delegated to the Governor broad emergency powers and discretion, including the authority to "suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency." C.R.S. § 24-33.5-704(7)(a).

While there is no case law in Colorado interpreting the meaning of "regulatory statute" in the context of the Act, courts in other jurisdictions interpret the phrase as recognizing a distinction between regulatory statutes, which permit conduct under specified conditions in prescribed ways, and criminal statutes, which stand alone to prohibit conduct. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987) (there is a distinction, for purposes of applicability of state laws to Indian reservations, between state "criminal/prohibitory" laws and "civil/regulatory" laws: "if the intent of a state law is generally to prohibit certain conduct," it is criminal, but if "the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory"); *Mashantucket Pequot Tribe v. McGuigan*, 626 F. Supp. 245, 249 (D. Conn. 1986) ("The purpose of regulation is to permit the conduct or activity with limits or restrictions. In contrast, the purpose of a criminal statute, which stands alone, is to prohibit conduct or activity."); *Commonwealth v. CSX Transp., Inc.*, 639 A.2d 1213, 1214 (Pa.

1994) (noting that "[g]enerally, a 'regulatory statute' is the result of the exercise of the state's police power to enact regulations to promote the public health, morals or safety, and the general well-being of the community," and holding that "[t]he imposition of criminal penalties does not change the statute's overall character as a statute regulating certain conduct within the state"). The provisions in Title 40 that are temporarily suspended by the Executive Order are regulatory statutes because they permit the submission of petition signatures to the Secretary of State with certain limits and restrictions.

The notion that the authority to suspend regulatory statutes applies only to statutes governing state conduct, *see* Motion ¶¶ 18, 19, is inconsistent with the fundamental nature of regulatory statutes. The Governor must have the authority to issue orders affecting private action subject to state regulation in order to protect public health and safety. Indeed, it is the Governor himself who is explicitly charged under the Act with this responsibility "for meeting the dangers" of the prolonged pandemic emergency. C.R.S. § 24-33.5-704(1). The Governor has discharged this responsibility in various ways, including by issuing various orders reflecting the use of the power under C.R.S. § 24-33.5-704(7)(a) to suspend regulatory statutes. In so doing, the Governor has sought to cope with the complications created by the pandemic by directing the conduct of private individuals through the lifting of state-law mandates, such as, for example, suspending deadlines for state income tax payments, suspending alcohol license limitations to allow restaurants to sell

takeout alcoholic beverages, suspending the requirement of in-person application for marriage licenses, suspending the requirement that affidavits be signed in the presence of a notary, and many other similar regulatory statutes. *See* Polis Ex. A. Most pointedly, in EO D 2020 038 (Apr. 15, 2020), the Governor suspended numerous provisions in Title 12 that limit the scope of practice permitted for a wide range of medical professionals, ranging from certified nurse aides to veterinarians, thereby facilitating these private professionals to work in inpatient facilities to care for individuals affected by the pandemic even though their current state licenses would not otherwise authorize such conduct. *See id*. These statutory suspensions are quite directly waivers of regulatory statutes to facilitate conduct by private actors, not the state, to cope with the disaster. The suspension of these statutes to facilitate the care of patients with COVID-19 is squarely within the power of C.R.S. § 24-33.5-704(7)(a).

In like fashion, the first executive order the Governor issued after his disaster emergency declaration was Executive Order D 2020 004, which shut down operations of all ski resorts in the state. *See* Polis Ex. A. This order obviously directed the conduct of private individuals as a means of coping with the pandemic. Similarly, the Governor's Executive Order D 2020 009 prohibited hospitals – both private and public – and other medical, dental, and veterinary practitioners from conducting any elective surgeries or procedures, thereby preventing private individuals from securing medical care that could otherwise be postponed for at

least three months. Again, this order thereby directly affected the conduct of private individuals. *See id.* Both of these orders exemplify the Governor's power under the Act to take unilateral action affecting private conduct so as to cope with the disaster emergency.

The Executive Order here is no different. There is a nexus between strict compliance with statutory procedures for gathering petition signatures and the hindering or delaying of the state's efforts to cope with the public health emergency. The Executive Order copes with the problem of virus transmission created through in-person contact by keeping circulators and potential petition signers apart while nevertheless continuing to preserve the right of citizens to engage in the initiative process. *See* Executive Order at 2 (stating purpose of order is to preserve the "constitutional principle of ballot access"). Suspending the statutes mandating in-person presence by a petition circulator during the signing of an initiative petition and authorizing the Secretary to issue emergency rules to ensure the reliability of the signatures gathered outside the physical presence of a circulator is directly related to addressing the effects of the pandemic.

Nothing in the Executive Order relaxes non-technical requirements for gaining access to the ballot. The suspended statutes address the form of a ballot issue, the procedural requirements for filing with the Secretary of State, the requirements that circulators be in the physical presence of registered electors when signing, provisions related to notaries, and the procedures for submitting

affidavits. *See* Executive Order, §§ II.A. through E. The Order does not suspend the requirements that an initiative receive a certain number of verified signatures, the burden of circulators to ensure the validity of signatures, the identifying information that must be provided with each signature, or the cure period for measures that have already been submitted. *See id.* §§ II.H. through K. Thus, the circumstances here are easily distinguished from those addressed in *Griswold v. Warren*, which held that a trial court does not have the authority to lessen strict compliance with the *non-technical* requirements for the number of signatures required for a candidate to qualify for the ballot. 2020 CO 34, ¶ 2.

Finally, Colorado's move to the "Safer-at-Home" status does not mean that safety concerns have gone away. To the contrary, the goal continues to be to minimize or stop the spread of the virus. The Governor's "Safer at Home" orders recognize the continuing threat of the pandemic and prohibit employers from requiring Vulnerable Individuals to have contact with others. *See* Executive Order D 2020 044, § II.C. Vulnerable Individuals are defined as those who are 65 and older, pregnant, immunocompromised, have respiratory issues or serious heart conditions, or who have been identified as being at high risk by a healthcare provider. *See id.* § II.D. Many petition circulators and potential petition signers likely fall within these categories, and they therefore are precisely the people the Governor seeks to protect through the mechanisms of the subject Executive Order.

B. The Executive Order does not suspend requirements mandated by the Constitution.

Plaintiffs are correct that the Governor's authority under the Act does not permit him to suspend constitutional requirements. But, the Executive Order does no such thing. The Executive Order suspends only the technical requirements for the process of gathering and verifying petition signatures and authorizes the Secretary to promulgate temporary emergency rules to allow campaigns which have titles set or pending in the Colorado Supreme Court "to continue collecting signatures in a way that protects public health consistent with the constitutional requirement that some registered elector must attest to the validity of signatures on the petition." Executive Order, § II.G.

When interpreting a constitutional amendment, a court's goal is to "give effect to the electorate's intent in enacting the amendment." *Colo. Ethics Watch v. Sen. Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012) (quoting *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004)). To do so, courts look to the amendment's language. *Id*. at 1253-54. Colorado courts have recognized that the "provisions reserving to the people the right to exercise the initiative process are self-executing …, and therefore must be liberally construed to effectuate their purposes." *Comm. for Better Health Care for All Colo. Citizens v. Meyer*, 830 P.2d 884, 893 (Colo. 1992) (citations omitted).

Article V, § 1(6) of the Colorado Constitution outlines the procedural requirements regarding the petition process to place an initiative on the ballot:

> The petition shall consist of sheets having such general form printed or written at the top thereof as shall be designated or prescribed by the secretary of state; such petition shall be signed by registered electors in their own proper persons only, to which shall be attached the residence address of such person and the date of signing the same. To each of such petitions, which may consist of one or more sheets, shall be attached an affidavit of some registered elector that each signature thereon is the signature of the person whose name it purports to be and that, to the best knowledge and belief of the affiant, each of the persons signing said petition was, at the time of signing, a registered elector. Such petition so verified shall be prima facie evidence that the signatures thereon are genuine and true and that the persons signing the same are registered electors.

A separate provision also indicates that the petition must "include the full text of the measure" and be addressed to and filed with the Secretary within three months of the related election. Colo. Const. Art. V, § 1(2). These two provisions are the only constitutional requirements governing the signature-gathering process. All other requirements are provided by statutes and regulations.

Thus, the Constitution only requires that a petition take the form as designated or prescribed by the Secretary, that it be signed by registered electors "in their proper persons," and include residence address and date of signing. Submitted petitions must attach an affidavit of "some registered elector" that the signature is who it purports to be and the signer was a registered elector to the best of the affiant's knowledge. The "in their proper person" requirement is "fully satisfied when the petition is signed 'by a person representing himself to be identifiable by the name signed to the petition.'" *Case v. Morrison*, 197 P.2d 621,

622 (Colo. 1948) (quoting *Brownlow v. Wunsch*, 83 P.2d 775, 781 (Colo. 1938)). There is no requirement that the petition circulator be in the presence of the elector, and the Constitution does not mandate any particular mechanism by which the affiant must obtain the knowledge needed to swear the necessary representations. It does not specifically require that the affiant be physically present when the signer completes the petition sheet.

As Plaintiffs recognize in their motion, the Colorado Supreme Court has rejected the argument that an affiant must be in the physical presence of the signer. In 1938, the Colorado Supreme Court considered the constitutionally required affidavit and concluded, "the circulator can make a positive affidavit that the signature was the genuine signature affixed by the signer" in one of *two* ways: (1) "by reason of its having been written in his presence," *or* (2) "through his familiarity with the signer's handwriting." *Brownlow*, 83 P.2d at 781. Allowing verification through "familiarity with the signer's handwriting" as an alternative to personal presence necessarily demonstrates that the affiant need not witness the manual execution of the signature in person. Rather, it is enough to be able to recognize the validity of the signature after it is executed. The only cases cited by Plaintiffs as recognizing a requirement of in-person verification do so in a way that expressly connects such a requirement to the statutes, not the Constitution. *See Comm. for Better Health Care*, 830 P.2d at 898 (discussing how the circulator affidavit form at issue "was reasonably calculated to emphasize the importance of

the requirement that circulators personally observe petition signers execute petitions"); *Loonan v. Woodley*, 882 P.2d 1380, 1385 (Colo. 1994) (listing statutory requirements to "form, procedure, and disclosures" for petitions, including § 1-40-111 requiring signature be affixed in circulator's presence). Neither case describes the requirement as a constitutional one, cites to a specific section of the Constitution, or ties in-person signature gathering to constitutional provisions.

Contrary to Plaintiffs' assertion, there are ways other than physical presence to ensure that a circulator can attest to the identity of signatures consistent with the purpose of the signature verification procedure to "maintain integrity in the initiative process and to comply with the constitutional requirements." *Buckley v. Chilcutt*, 968 P.2d 112, 116 (Colo. 1998) (citations omitted). Although the Secretary has not yet developed the emergency rules necessary to implement the Executive Order, such rules could include safeguards like requiring submission of an affidavit of a witness either physically present with the signer or with knowledge of the signer's identity, video or other virtual tools, or other verification methods to be devised by the Secretary. There is nothing in the Constitution that requires in-person or any other particular form of signature verification.

II. Plaintiffs have no irreparable injury, or indeed any injury.

Plaintiffs cannot establish irreparable injury because they have not demonstrated that they have suffered *any* cognizable injury that is ripe for judicial determination. Courts generally do not consider "uncertain or contingent future

matters" because the injury is speculative and may never occur. *Stell v. Boulder Cty. Dep't of Soc. Servs.*, 92 P.3d 910, 914-15 (Colo. 2004), as modified on denial of reh'g (July 12, 2004) (citations omitted). In deciding ripeness, courts look to the hardship on the parties of withholding court consideration and the fitness of the issues for judicial decision. *Id*. There must be an adequate record to permit effective review. *Id*. A declaratory judgment "calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present rights upon established facts." *Bd. of Dir., Metro Wastewater Reclamation Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 105 P.3d 653, 656 (Colo. 2005) (quoting *Cacioppo v. Eagle Cty. Sch. Dist. Re–50J*, 92 P.3d 453, 467 (Colo. 2004)). A court should exercise jurisdiction in such actions "only if the case contains a currently justiciable issue or an existing legal controversy, rather than the mere possibility of a future claim." *Id*.

Plaintiffs describe their injury in speculative terms: "With the substantive requirements of both the Colorado Constitution and Article 40 suspended, Plaintiffs are more likely to be adversely impacted by the unconstitutional qualification of ballot measures, which will adversely impact them if adopted." Motion ¶ 34. Leaving aside the incorrect assertion that any constitutional requirements are suspended – because none are – this is precisely the kind of hypothetical injury that is not ripe for judicial determination, and is certainly not appropriate for a preliminary injunction. The Secretary has not yet promulgated the rules that will implement the Executive Order. None of the potential ballot measures that

Plaintiffs claim will cause them injury have even submitted petitions for sufficiency review, let alone been granted access to the ballot. Plaintiffs have presented no evidence that they have suffered any non-speculative harm. *See, e.g., Developmental Pathways v. Ritter*, 178 P.3d 524 (Colo. 2008) (as-applied challenge to gift ban provision of ethics in government amendment to Colorado Constitution was not ripe for review, where the commission in charge of enforcing ban was not in existence yet and had not yet acted in furtherance of the amendment's provisions); *Theobald v. Bd. of Cty. Comm'rs, Summit Cty.*, 644 P.2d 942 (Colo. 1982) (claims were not ripe for review where landowners, who sought a declaratory judgment that zoning code was invalidly adopted by the planning commission, did not allege that they had applied for and been denied proposed uses of their properties, and master plan did not have an actual impact on their property interests); *Save Cheyenne v. City of Colorado Springs*, 2018 COA 18, ¶ 63, cert. denied, 18SC199 (Colo. Sept. 24, 2018) (case concerning potential zoning violation was unripe because final zoning decision had not been made and plaintiff did not allege a zoning violation currently existed).

Moreover, Plaintiffs have a remedy available to them if any measures are approved for the ballot under the Secretary's yet-to-be-issued rules. The Executive Order does not suspend the right to protest the sufficiency of signatures under C.R.S. § 1-40-118. This provision ensures that Plaintiffs will always have an opportunity to challenge the validity of any signatures or the sufficiency of the signature gathering process through a petition protest.

III. An injunction would not serve the public interest.

Enjoining the Executive Order would be contrary to the public interest. The Order does not eviscerate basic constitutional requirements; all constitutional requirements for ballot qualification remain in place. The statutory suspensions strike a careful balance that facilitates petition circulation while protecting public health, especially for "Vulnerable Individuals." An injunction would interfere with citizens' ability to engage in the petition process, which must be liberally construed.

Importantly, requiring in-person signature gathering is not in the public interest during this historic pandemic. Instead, the public interest is best served by allowing Colorado's citizens to continue to engage in the important democratic process for accessing the ballot in a manner that protects both Vulnerable Individuals and the public at large from potential lethal infection.

CONCLUSION

Plaintiffs are not entitled to an order enjoining the Governor from exercising his authority under the Colorado Disaster Emergency Act or enjoining the Secretary from promulgating emergency rules implementing the Executive Order. Not only is the Governor's action here fully consistent with his authority under the Disaster Emergency Act and the mandates of Article V, § 1 of the Colorado Constitution, Plaintiffs have articulated no non-speculative injury, let alone the kind of injury that could outweigh the important public health interests served by the Executive Order. The Governor asks that the Court deny Plaintiffs' motion.

Dated this 21st day of May, 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on this 21st day of May, 2020, a true and correct copy of the foregoing RESPONSE TO FORTHWITH MOTION FOR TEMPORARY RESTRAINING ORDER was duly served through the Colorado Court E-Filing System/CCES, addressed as follows:

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