DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
Plaintiffs: DANIEL RITCHIE et al., v. **Defendant:** JARED POLIS et al.	▲ Court Use Only ▲
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BRIEF OF CROSS-IDEOLOGICAL, NONPARTISAN GROUP COMMITTED TO THE RULE OF LAW IN COLORADO AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS	

INTRODUCTION

This is a classic case of executive overreach. Last Friday night, Governor Jared Polis issued Executive Order D 2020 65 ("Executive Order"), Ex. 1, which has two main features. First, it purports to suspend various statutory requirements governing Colorado's citizen-led ballot-initiative process, a cornerstone of Colorado's democratic process enshrined in the Colorado Constitution since 1910. Second, it commands the Colorado Secretary of State to promulgate regulations that, among other things, must allow registered electors to sign proposed ballot initiatives by e-mail or by mail and without a petition circulator being present.

Both features are unlawful. The Governor has no authority under the Colorado Disaster Emergency Act to suspend the ballot-initiative statutes listed in the Executive Order. And the regulations the Governor has commanded the Secretary to promulgate would run headlong into the plain text and settled meaning of article V of the Colorado Constitution—which demands that ballot-initiative signatures be collected *in person*.

The Governor's decision to countermand a plain mandate of the Colorado Constitution is all the more puzzling because it comes as he is simultaneously moving to reopen the state under a "Safer at Home" phase-in process.[1] According to the Governor, you can safely provide an in-person receipt signature during a Target run. You can safely provide an in-person signature to the UPS delivery driver. But apparently you cannot safely exercise the "fundamental right" to participate in the initiative process under "the minimum requirements set out in the Constitution"—

[1] Colo. Dep't of Pub. Health & Env't, Safer at Home, https://covid19.colorado.gov/safer-at-home.

i.e., by signing a proposed ballot initiative in person. *Buckley v. Chilcutt*, 968 P.2d 112, 118–19 (Colo. 1998). That makes no sense.

Amici thus agree that immediate relief is warranted for the reasons Plaintiffs have cogently explained. Amici submit this brief to provide the Court with more context showing the importance of protecting these core rule-of-law limits for all Coloradans.

ARGUMENT

1. Amici represent a broad, nonpartisan coalition facing imminent and irreparable harm from the Executive Order.

Amici share a diverse, cross-ideological, and nonpartisan reaction to the Executive Order's obvious and consequential overreach. By invoking the specter of COVID-19, months after declaring an emergency, to suspend and rewrite key statutory and constitutional protections that have ensured the integrity and validity of Colorado's citizen-ballot initiative for 110 years, the Executive Order threatens not only immediate confusion and disruption among the electorate but also long-term structural harm to Colorado's democratic system. Neither the Governor nor the Secretary can rewrite the Colorado Constitution, in this case its requirement that signatures on ballot initiatives be collected in person. The power to alter or relax that in-person requirement belongs to exactly one group: the people of the State of Colorado. *See* Colo. Const. art. II, § (1) (stating that "[a]ll political power is vested in and derived from the people").

This is not a partisan issue. All Coloradans—no matter their political and ideological convictions—share an interest in ensuring that Colorado's democratic system functions properly. Constitutional amendments come from a vote of the people, not gubernatorial fiat.

Fundamental changes of this sort are not the province of executive directives for good reason. As the Denver Metro Chamber of Commerce explained in a letter to the Governor on behalf of a similar coalition of three dozen affected industry groups and nonprofits with members statewide, a departure from established and constitutionally mandated in-person signature and verification requirements in favor of e-signatures and digital petitions poses serious and difficult challenges of electoral integrity and equitable access. *See* Ex. 2. Permitting these new measures while suspending established safeguards threatens a flood of effectively unverifiable electronic signatures purporting to be those of registered electors. At the same time, these changes will also disadvantage Colorado citizens who have limited or no internet access, and disproportionately affect the tens of thousands of Coloradans who live in rural areas. *See id*. The Executive Order's unilateral directives fail to acknowledge, much less resolve, these intractable problems.

2. Enforcing fundamental limits on the Governor's emergency powers over electoral procedures is essential.

Neither the Colorado Constitution nor the Colorado Disaster Emergency Act, Colo. Rev. Stat. §§ 24-33.5-701 to -716, grants the Governor carte blanche in uncertain, trying times. Just the opposite. To be sure, the global pandemic has upended normal life and has required significant changes to our daily lives. Many of these changes are likely to be in place for some time. The Governor has both great power and great responsibility to ensure that Colorado's responses to the pandemic be effected safely and effectively. But he cannot exceed the bounds of his constitutionally and statutorily limited authority. Indeed, it is precisely in times like these, when the tempta-

tion to overstep is greatest, that enforcing established bounds on executive authority proves most critical to safeguarding the rule of law.

Courts should be particularly vigilant when the executive branch invokes emergency powers to change longstanding electoral procedures. That much follows from the Colorado Supreme Court's recent confirmation that there is no COVID-19 exception in the state's election laws. In *Griswold v. Ferrigno Warren*, the Court rejected a United States Senate candidate's bid to be placed on the June Democratic primary ballot when she was "unable to collect the statutorily required 1,500 signatures in six of the seven required congressional districts." 2020 CO 34, ¶ 1 (per curiam). Although the Court "recognize[d] the uniqueness of the current circumstances," the threshold signature requirement "is a mandate requiring strict compliance" that "the legislature alone has the authority to change." *Id.* ¶ 2; *see id.* ¶ 24 ("While we recognize that the circumstances that made signature collection more difficult this year are unprecedented, we do not have the authority to rewrite the Election Code in response to the COVID-19 virus. Only the General Assembly can do that."). That reasoning applies all the more powerfully when, as here, preexisting legal requirements are enshrined in article V of the Colorado Constitution and can be altered only by the formal amendment process. *See Yenter v. Baker*, 248 P.2d 311, 314 (Colo. 1952) (holding that the initiative process in the Colorado Constitution is a "higher form of statutory law" that cannot be modified by legislation).

Unfortunately, the Governor is not the first to try to evade constitutionally mandated in-person signature-and-verification requirements during pandemic times. Fortunately, courts in at least two other states have prevented those attempts. This Court should do the same.

Three weeks ago, an Ohio trial court rejected claims that article II of the Ohio Constitution, which (like Colorado) requires both in-person signatures and an affidavit from a petition circulator, could be temporarily relaxed or ignored because of COVID-19. While that court was "mindful that the current public health pandemic creates an extremely unique situation," the relevant "constitutional language does not include an exception for extraordinary circumstances or public health emergencies," nor do courts "have the power to order an exception or remedy that was not contemplated or intended by the plain language of the Ohio Constitution." *Ohioans for Raising the Wage v. LaRose*, No. 20 CV 2381 at 7–8 (Franklin Cty., Ohio Ct. Common Pleas Apr. 28, 2020) (Ex. 3).

Similarly, just last week the Arizona Supreme Court rejected a combined petition from various initiative proponents seeking a ruling that e-signatures were in substantial compliance with article IV of the Arizona Constitution. Order, *Arizonans for Second Chances v. Hobbs*, No. CV-20-0098-SA (Ariz. May 13, 2020) (noting that "[a]n opinion will issue in due course") (Ex. 4); *see also* Order, *Arizonans for Fair Elections v. Hobbs*, No. 2:20-cv-00658-DWL, slip op. at 7–8 (D. Ariz. Apr. 14, 2020) (dismissing First and Fourteenth Amendment challenges to Arizona statutory provisions requiring in-person signatures when the plaintiffs "have not challenged the provisions of article IV of the Arizona constitution that, by and large, impose the same requirement") (Ex. 5).[2]

[2] On Tuesday, in an unrelated proceeding, a federal district court in Ohio granted, in part, a motion for preliminary injunction that suspends, under the First and Fourteenth Amendments to the U.S. Constitution, certain in-person signature-gathering requirements and deadlines as to three individuals for whom Ohio's Stay-at-Home Orders "made it impossible for Plaintiffs to sat-

These cases reveal the judiciary's vital role in safeguarding the rule of law in these extraordinary, challenging times. That is this Court's role here.

3. There is a clear, clean path for ruling in Plaintiffs' favor.

The Executive Order is unlawful for two simple reasons: (1) the Governor has no authority under the Colorado Disaster Emergency Act to suspend the ballot-initiative statutes referenced in the Executive Order; and (2) the Executive Order violates article V, section 1 of the Colorado Constitution.

3.1 The Governor exceeded his authority under the Colorado Disaster Emergency Act in purporting to temporarily suspend the ballot-initiative statutes listed in paragraphs II(A)–(E) of the Executive Order.

The Act gives the Governor the authority to "[s]uspend 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." Colo. Rev. Stat. § 24-33.5-704(7)(a). The Executive Order oversteps that authority in two ways.

First, the ballot-initiative statutes that the Governor purports to suspend are not within the class of statutes that can be suspended. The Act does not authorize the Governor to suspend *any*

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isfy Ohio's signature requirements." *Thompson v. DeWine*, No. 2:20-cv-02129-EAS-CMV, slip op. at 26 (S.D. Ohio May 19, 2020), *appeal docketed*, No. 20-3526 (6th Cir. May 21, 2020). That as-applied ruling, whatever its merits, is both factually and legally distinguishable from this case, which involves no similar factual "impossibility" claim and challenges only the Governor's legal authority under the Colorado Disaster Emergency Act and the Colorado Constitution.

statute;[3] it authorizes him to suspend only those statutes "prescribing the procedures for conduct of state business." *Id.*[4] But the state is not in the business of collecting signatures for ballot initiatives. The people do that. Put in statutory terms, the ballot-initiative statutes suspended by the Executive Order do not regulate the "conduct of *state* business"; they regulate only how citizens in their *private* capacities engage Colorado's ballot-initiative process. Thus, because the ballot-initiative statutes here do not "prescrib[e] the procedures for conduct of state business," they are not susceptible to the Governor's suspension powers under the Act.

Second, even assuming the ballot-initiative statutes here fall within the scope of the Governor's suspension powers, the Act still does not apply. The Governor could suspend these statutes only if complying with them would "prevent, hinder, or delay necessary action in coping with the emergency." Colo. Rev. Stat. § 24-33.5-704(7)(a). That is not the case here. For starters, if complying with these statutes conflicts with dealing with COVID-19, then why did the Governor allow them to remain in force for weeks, throughout the state's response to the pandemic, until last

[3] If the Governor argues that the Act authorizes him to suspend any statute, the Court should reject that interpretation because it would write the modifying language "prescribing the procedures for conduct of state business" out of the statute. *See Wolford v. Pinnacol Assurance*, 107 P.3d 947, 951 (Colo. 2005) (holding that courts "must interpret a statute to give effect to all its parts and avoid interpretations that render statutory provisions redundant or superfluous").

[4] There are a wide range of statutory provisions "prescribing the procedures for conduct of state business." *See, e.g.*, Colo. Rev. Stat. § 10-1-127 (setting requirements for hearings before the Insurance Commissioner); *id.* § 24-50-125(c) (requiring hearings for certain state-personnel disciplinary matters); *id.* § 24-60-804 (governing hearings of the state parole board under the Western Interstate Corrections Compact). Indeed, the Governor months ago issued executive orders doing precisely that in response to the COVID-19 pandemic. *See, e.g.*, Ex. 6 (temporarily suspending the statutory deadline for filing state income taxes); Ex. 7 (temporarily suspending certain requirements governing the issuance of marriage licenses).

Friday? Indeed, the Executive Order itself undermines the stated intent, acknowledging that there is *no* tension between in-person signature-gathering and preserving public health. It does not ban in-person signature-gathering. It in fact directs the Secretary and the Colorado Department of Public Health and Environment "to work collaboratively" and "develop guidelines" that will permit "safe circulation of petitions in-person following state public health orders and state and local social distancing guidelines," in line with the Governor's broader re-opening efforts. Ex. 1, at 3, ¶ II(F). While initiative proponents may well need to change some aspects of their preexisting practices and strategies to safely gather and verify signatures in person,[5] that alone cannot justify the suspension of these requirements.

Leaving the Executive Order in place would also create bizarre outcomes. You can safely sign your takeout order in person. You can safely sign for that FedEx package in person. And you can safely sign an initiative petition for an upcoming municipal election. But according to the Executive Order, the one thing you cannot safely sign in person is a statewide ballot initiative. That cannot be right. These examples demonstrate that complying with the ballot-initiative statutes that the Executive Order purports to suspend would in no way undermine Colorado's ability to safely cope with COVID-19. The Governor thus had no authority to suspend those statutes under the Act.

[5] The proponents of Initiative 120 seem to have done precisely that. *See* https://respectlifedenver.org/sign120map/.

3.2 The Executive Order is unconstitutional.

The Governor exceeded his authority not only by suspending the ballot-initiative statutes referenced in the Executive Order but also by commanding the Secretary to promulgate regulations that will allow "registered electors to sign petitions by a means that does not require a petition circulator, including but not limited to providing electronic mail and mail-in options." Ex. 1, at 3, ¶ II(G)(a). The Governor has, in effect, ordered the Secretary to promulgate unconstitutional rules. This Court should put a stop to that.

The Executive Order cannot be squared with the Colorado Constitution. In the seminal case interpreting article V, the Colorado Supreme Court made clear that, although there is some latitude in adopting implementing statutes and regulations, there are certain irreducible features "necessary to fairly guard against fraud and mistake in the exercise of the people of this constitutional right" that preserve the fundamental integrity of the ballot-initiative process. *Brownlow v. Wunsch*, 83 P.2d 775, 777 (Colo. 1938); *see Clark v. City of Aurora*, 782 P.2d 771, 779 (Colo. 1989) (upholding requirement that signatures be accompanied by printed name to allow "the clerk to determine the identity of the signer and to check the signature on the petition against the voter registration record" because that requirement serves "to guard against fraud in the petition process" and prevents "the invalidation of an otherwise illegible or partially legible signature").

Chief among these irreducible protections are the requirements (1) that only those eligible to participate in the initiative process—"registered electors"—are permitted to do so, and (2) that petitions "shall be signed by registered electors in their own proper persons" as "verified" by "an affidavit of some registered elector"—the petition circulator—attesting that "each

signature thereon is the signature of the person whose name it purports to be *and* that, to the best of the [circulator's] knowledge and belief" that the signatory "was, at the time of signing, a registered elector." Colo. Const. art. V, § (1)(2), (6) (emphasis added). The Colorado Supreme Court, giving effect to the text's plain meaning, concluded that under article V, a petition circulator must "make a positive affidavit that the signature was the genuine signature affixed by the signer" either (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; *see Comm. for Better Health Care for All Colo. Citizens v. Meyer*, 830 P.2d 884, 898 (Colo. 1992) (explaining that article V's affidavit requirement "provides a strong basis" to conclude that "the circulator in fact *witnessed* the petitioners' execution of the corresponding petition" (emphasis added)); *Fabec v. Beck*, 922 P.2d 330, 343 (Colo. 1996) (explaining that requirement that circulators date their affidavits is important for "preventing abuse, mistake, or fraud in the initiative process" because a "variance" between the date sign and the date an affidavit is notarized "casts doubt" on the proprietary of that affidavit). Article V thus, at a minimum, requires an affidavit, submitted by someone with personal knowledge, that can supply the Secretary with confidence—subject to further verification by sampling and other methods—that a given set of signatures are valid and reflect "registered electors." Colo. Const. art. V, § (1)(6) ("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.").

The Executive Order would eviscerate these constitutional baselines. It instructs that the Secretary "must" issue emergency regulations that dispense with the requirement of an in-person signature in the presence of a petition circulator. Ex. 1, at 3, ¶ II(G)(a). In stark contrast to

the century-plus tradition of one-on-one interactions that allow petition circulators to personally witness and positively attest to the validity of registered electors' signatures and status "in their own proper persons," permitting the collection of effectively unverifiable electronic signatures *en masse* provides none of the critical safeguards enumerated in article V. If, as a policy matter, Colorado's ballot-initiative process warrants a revisiting in the digital age, that is for the people to decide. The Governor's attempt to do so by fiat is textbook ultra vires conduct.

3.3 All the *Rathke* factors support an injunction.

Because the Executive Order conflicts both with the Colorado Disaster Emergency Act and with the Colorado Constitution, there is a reasonable probability that Plaintiffs will succeed on the merits. *See Rathke v. MacFarlane*, 648 P.2d 648, 653–54 (Colo. 1982); Pls.' Mot. at 7–18, May 18, 2020. The remaining *Rathke* factors likewise favor granting temporary injunctive relief now.

Immediate and Irreparable Harm. Besides the enormous real-world costs to Colorado's business community and public in terms of confusion, disruption, and loss of confidence in the citizen-initiative process, immediate and irreparable harm exist when, as here, "fundamental constitutional rights are being destroyed or threatened with destruction." *Rathke*, 648 P.2d at 652; *see Kikimura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (observing that "[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary").

No Plain, Speedy, and Adequate Remedy at Law. These harms cannot be adequately remedied at law after trial, because these core constitutional and statutory protections safeguarding the ballot-initiative process will be lost if permitted to lapse even temporarily. *See, e.g.*, *Pinson*

v. Pacheco, 397 F. App'x 488, 492 (10th Cir. 2010) (holding that "a constitutional injury is irreparable in the sense that it cannot be adequately redressed by post-trial relief").

An Injunction Would Serve the Public Interest. Granting temporary injunctive relief affirmatively advances the public interest here because "it is always in the public interest to prevent the violation of a party's constitutional rights." *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012); *see Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993) (explaining that "there is a strong public interest in meticulous compliance with the law by public officials").

Balance of the Equities. On the other side of the balance, the Governor and Secretary face no hardship from an injunction that "prevents the state from enforcing restrictions likely to be found unconstitutional." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). "If anything, the system is improved by such an injunction." *Id.* Given the enormous harms now looming over Plaintiffs, amici, and the public, the equities tilt decisively in favor of temporary injunctive relief.

The Status Quo Will Be Preserved Pending Trial. The status quo in the context of preliminary-injunctive relief is "the last existing state of peaceable, noncontested conditions which preceded the pending controversy." *Mantle Ranches, Inc. v. U.S. Park Serv.*, 945 F. Supp. 1449, 1452 (D. Colo. 1996). Here, that last existing state of peaceable, noncontested conditions is the state of the law before Friday, May 15, when the Executive Order issued. The status quo is thus preserved by enjoining the Executive Order pending final resolution on the merits. Preserving the status quo would also reduce confusion about whether it is permissible to gather electronic and mail-in signatures on ballot initiatives.

CONCLUSION

The Executive Order exceeds the limits on the Governor's authority by seeking to unilaterally suspend and rewrite core elements of Colorado's elections law. It thus falls to this Court, as an independent judicial arbiter, to check that unlawful power grab. The Court can and should do so now.

The Court should therefore enter an order declaring that the Governor lacks authority under the Colorado Disaster Emergency Act to temporarily suspend the ballot-initiative statutes referenced in paragraph II(A)–(E) of the Executive Order. The order should also declare that the provisions of the Executive Order directing the Secretary to promulgate temporary emergency rules that would allow registered electors to sign ballot petitions electronically or by mail violate article V, section 1 of the Colorado Constitution. If the Court awards injunctive relief, the Court should order the Secretary to continue enforcing the ballot-initiative statutes listed in paragraphs II(A)–(E) of the Executive Order, and it should bar the Secretary from promulgating or enforcing rules allowing registered electors to sign ballot petitions electronically or by mail.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 21, 2020, I used the E-System to serve this document on all counsel of record.

/s/ Andrew C. Lillie
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