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11 **UNITED STATES DISTRICT COURT**
12 **WESTERN DISTRICT OF WASHINGTON**

13) **CASE NO.**
14)
15) **PLAINTIFF'S MOTION IN**
16) **SUPPORT OF TEMPORARY**
17) **RESTRAINING ORDER AND**
18) **DECLARATORY AND**
19) **INJUNCTIVE RELIEF**
20)
21) **11/29/2021**
22) *Oral argument requested*
23) **JURY DEMANDED**
24)
25)

11 DAVID A. LARSON,
12)
13 Plaintiff,
14)
15 v.)
16 JAY INSLEE, individually and as the)
17 governor of the State of Washington,)
18 DR. JEFF DUCHIN, individually and)
19 as the King County Health Officer.)
20 Defendants.)

21 **INTRODUCTION**

22 Plaintiff David A. Larson, pro se and by and through his attorney, respectfully move this Court
23 for a temporary restraining order and preliminary injunction as set forth below and for the reasons set
24 forth in the accompanying Memorandum in Support of Plaintiff's Motion. Fed. R. Civ. P. 65(a).
25 Because there are only legal questions at issue, Plaintiffs respectfully request that this Court
consolidate the preliminary injunction hearing with the trial on the merits and rule on the merits in
accordance with Civ. P. 65(a)(2).

1 Plaintiff respectfully requests the Court grant his Motion and issue a temporary restraining
2 order as to the Battle in Seattle on December 4, 2021 and a preliminary injunction on the merits of the
3 remainder of Plaintiff’s claims in this matter.

4 **I. FACTUAL BACKGROUND**

5 On October 18, 2021, Defendant Governor Jay Inslee signed Proclamation 21-16.
6 Proclamation 21-16 becomes effective on November 15, 2021 and it prohibits individuals from
7 attending “ticketed or preregistered assembly of 10,000 or more individuals at an outdoor venue” or
8 “1,000 or more individuals at an indoor venue” absent proof of having “(1) been fully vaccinated
9 against COVID-19 and provided proof thereof to the Large Event Organizer, or (2) received a negative
10 result from an FDA-approved molecular (e.g., PCR) or antigen COVID-19 test performed on a
11 specimen collected from the individual within the 72 hours preceding the individual’s attendance at
12 the Large Event and provided proof thereof to the Large Event Organizer...” It is noted in the
13 Proclamation that, “Violators of this order may be subject to criminal penalties pursuant to RCW
14 43.06.220(5).” See Declaration of David A. Larson, Exhibit 1.

15
16 On September 16, 2021, the King County Health Officer, Dr. Jeff Duchin issued Local Health
17 Officer Order, *Verification of Vaccination*, requiring, as of October 25, 2021 that “all patrons and
18 customers 12-years of age and older” must provide “verification that they are fully vaccinated¹” at any
19 outdoor event with 500 or more people, at “indoor restaurants, bars, and taverns with seating capacity
20 of 12 and more,” at “indoor entertainment and recreational establishments, such as gyms, fitness
21 facilities, public pools, entertainment and performing arts venues, night clubs, music and concert
22
23

24
25 ¹ “For purposes of this ORDER, “fully vaccinated” means that a person has received all the required doses of an FDA-
authorized COVID-19 vaccine (two doses of the Moderna or Pfizer-BioNTech vaccines, or one dose of the Johnson &
Johnson vaccine) or a WHO-authorized COVID-19 vaccine series, and 14 days have passed since the final dose.”

1 venues, movie theaters, museums, collegiate and professional sports stadiums and arenas, exhibition
2 halls, and convention centers.” In addition, as of December 6, 2021, all “Indoor restaurants, bars, and
3 taverns with seating capacity of less than 12” must also screen customers for proper verification of
4 their medical status before being able to serve them. See Larson Dec., Exhibit 2. Violation of a health
5 department order is a misdemeanor under RCW 70.05.120(4).
6

7 David A. Larson is a resident of King County and, like many other people, wishes to attend
8 meetings and other functions at restaurants, work out at a government owned community center/gym,
9 watch a movie at his local movie theater, and attend the Battle in Seattle, Gonzaga vs. Alabama, the
10 inaugural men’s collegiate basketball game in the Climate Pledge Arena (returning after a six year
11 hiatus) on December 4, 2021, without being forced to disclose his private medical status as a condition
12 of entry and without fear of criminal prosecution.

13 The Climate Change Arena is owned by the City of Seattle and is leased and operated by Seattle
14 Arena Company, LLC. Attendance at events in the Climate Pledge Arena requires proof of COVID-
15 19 vaccination, as required by local and State Mandates enacted by defendants.²
16

17 Defendants may claim that this is not a vaccine mandate because the plaintiff and others are
18 not required to get a vaccine and that they have an alternative means to show the absence of COVID.
19 However, the fact remains that defendants are mandating COVID vaccination and the waiver of
20 medical privacy to participate in certain activities. This “do it or else” approach is akin to mandatory
21 child immunization for school attendance, where the legislature does not “mandate” vaccines, but does
22 mandate proof of vaccination for participation in school.³ No such mandate exists for adults.
23

24
25 ² Plaintiff is not even allowed to purchase a ticket unless he consents to follow what he believes to be an illegal order. See Larson Dec., Paragraph 5.

³ See RCW 28A.210.060 through RCW 28A.210.170

1 Perplexing though is that the defendants are mandating vaccines, medical testing, and disclosure of
2 private medical status as a condition of entry to events and locations based upon their own desires and
3 not based on any law duly enacted by the legislature giving them the authority to act.

4 The plaintiff in this case is representative of many people in our state adversely affected by
5 these orders. In addition to not being able to dine out for pleasure, the plaintiff cannot attend his
6 Kiwanis meeting, cannot work out at his government owned community center, cannot attend movies,
7 will be prevented from attending the upcoming Battle in Seattle, was prevented from attending a local
8 play associated with his longtime community service, and cannot attend other public events unless he
9 discloses his otherwise private medical status.
10

11 II. ISSUES PRESENTED

12 Whether Article IV, Section 4 of the United States Constitution and the non-delegation
13 doctrine requires this court to enjoin the defendants from exceeding their statutory and constitutional
14 authority in the creation and enforcement of their respective orders.
15

16 III. LEGAL AUTHORITY

17 1. Plaintiff is Entitled to a Temporary Restraining Order so that He Can Attend the 18 Battle in Seattle and is Entitled to a Preliminary Injunction to Engage in Other Activities Prohibited by Defendants' Respective Orders

19 Pursuant to Federal Rule of Civil Procedure 65, the Court may grant preliminary injunctive
20 relief in order to prevent "immediate and irreparable injury." Fed. R. Civ. P. 65 (b)(1)(A). *Slidewaters*
21 *LLC v. Wash. Dep't of Labor & Indus.*, No. 2:20-CV-0210-TOR, at *6 (E.D. Wash. July 14, 2020).
22 To obtain a permanent or final injunction, a plaintiff must demonstrate: "(1) actual success on the
23 merits; (2) a likelihood of irreparable injury in the absence of preliminary relief; (3) that a balancing
24 of the hardships weighs in plaintiff's favor; and (4) that a preliminary injunction will advance the
25 public interest. *Id.*, citing: *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)

1 and *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012).

2 Importantly, the Ninth Circuit has “articulated an alternate formulation ... under which serious
3 questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can
4 support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a
5 likelihood of irreparable injury and that the injunction is in the public interest.” *Farris v. Seabrook*,
6 677 F.3d 858, 864 (9th Cir. 2012) (internal quotation marks and citation omitted). *All. For the Wild*
7 *Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (“a stronger showing of one element may
8 offset a weaker showing of another.”).

9 Plaintiff meets the above-listed factors for a TRO for the Battle in Seattle, as follows:

10 (1) Plaintiff will succeed on the merits because it is patently obvious from a review of the law
11 that defendants acted beyond their respective authority in enacting the vaccine passport
12 orders;

13 (2) Plaintiff will suffer irreparable injury as this is a once in a lifetime event and money
14 damages would not replace the in-person experience. The Supreme Court has noted that
15 “remote viewing is not the same as personal attendance.”⁴ In *BST Holdings v OSHA* ____
16 F.2d ____⁵ (5th Cir. 2021) the Court noted that...” the loss of constitutional freedoms ‘for
17 even minimal periods of time . . . unquestionably constitutes irreparable injury.’ *Elrod v.*
18 *Burns*, 427 U.S. 347, 373 (1976).”⁶

19 (3) This element of injunctive relief unfairly shifts the burden away from government officials
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23 _____
24 ⁴ *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020).

⁵ Case #21-60845

25 ⁶ Plaintiff suggests a good faith extension of the law to shift the burden to the defendants to show the absence of irreparable injury; government officials should not be allowed to act beyond their authority and then shift the burden to others to prove harm as a way to dodge immediate responsibility for their actions.

1 acting outside of their authority. Defendants should be forced to prove an overarching
2 hardship if relief is granted. The need to prove vaccine status or proof of a negative test
3 obviously did not pose an imminent threat or the respective orders would have been
4 effective immediately upon issuance. Any hardship to the defendants is eliminated due to
5 alternative means to protect the public that do not violate medical privacy such as requiring
6 facemasks, temperature checks, and self-attestation as to suspect symptoms as a condition
7 of entry.⁷ Defendants should not be able to rely on the mere possibility of infection as the
8 basis for quashing plaintiff, or anyone else's, privacy rights and rights of association; and
9
10 (4) Restoring representative government and stopping public officials from acting outside of
11 their authority is certainly in the public interest.⁸

12 These factors show this Court's need to grant Plaintiff's preliminary injunction. Having shown
13 the likelihood of success on his request for a Temporary Restraining Order, Plaintiff now moves to
14 the substance of the arguments: Violations of the United States Constitution arising under the
15 Governor's Proclamation and Defendant Duchin's Order.

16
17 **2. This Court Must Restore Representative Government to Washington State by
Granting Plaintiff's Request for Injunctive Relief**

18 Article IV, Section 4 of the United States Constitution, the "Guarantee Clause," **guarantees**
19 that every State shall have a Republican Form of Government: "The United States shall guarantee to
20

21 ⁷ In addition, the State of Washington has achieved vaccination rates of 80.5% for the 12+ population receiving one dose
22 and 74.3% full vaccination for the same age group. Washington State Department of Health COVID-19 Data Dashboard,
23 updated 11/23/2021: <https://www.doh.wa.gov/emergencies/covid19/datadashboard>, Last accessed: 11/24/2021—
24 extrapolated over the entire population of the State of Washington, one-dose individuals are 75.38% and full vaccinations
25 are 67.61% of the population: <https://data.news-leader.com/covid-19-vaccine-tracker/washington/53/>. Last accessed:
11/24/2021.

⁸ In addition, Proclamation 21-16, while content neutral is discriminatory based on activity as other large facilities
(government buildings, office buildings, airports, etc.) are not subject to this mandate, nor are events with the same
attendance numbers that do not qualify as "large events," (*i.e.*, events having the same capacity that are not ticketed or
preregistered).

1 every State in this Union a Republican Form of Government...” As discussed below, Governor
2 Inslee’s Proclamation 21-16 and Dr. Duchin’s Order are precisely the type of violations that are to be
3 prevented by Article IV, Section 4 and the non-delegation doctrine.

4 In the past, the Guarantee Clause in Article IV, Section 4 of the United States Constitution
5 has been asserted in cases that were considered as nonjusticiable political questions. However, the
6 Supreme Court in *New York v United States*, addressed the Guarantee Clause, noting that “recently,
7 the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable
8 political questions.” *New York v United States*, 505 U.S. 144, 112, 185 S.Ct. 2408 120 L.Ed.2d 120
9 (1992), citing *Reynolds v. Sims*, 377 U.S. 533, 582, 84 S.Ct. 1362, 1392, 12 L.Ed.2d 506 (1964)
10 (“some questions raised under the Guarantee Clause are nonjusticiable”).⁹

11
12 Legal scholars have opined that the Guarantee Clause *ought* to protect the States when a rogue
13 actor acts outside their authority in derogation of the principles underlying representative government
14 and the Rule of Law:

15 By interpreting the guarantee clause to require that states act consistently with their
16 constitutions and laws, the federal courts do their part to guarantee that the protections
17 of minorities in state constitutions which have been approved by Congress will be
18 observed in practice. Without a federal guarantee, state governments, dominated by
19 majority coalitions, could violate with impunity the provisions intended to protect
20 minorities against state action. Under the rule of law interpretation of the guarantee
21 clause, by contrast, the minority rights articulated in state constitutions and laws are
22 guaranteed by a federal republic which is independent of the influence a state majority
23 faction exerts against liberties inside the state. Moreover, the federal political
24 marketplace is especially sensitive to the influence of minorities which, in turn, are
25 better organized than the majority at the national level and which have an interest in
26 monitoring the states' treatment of minorities. The guarantee of constitutional
27 government in the small state republics by the overarching national republic ensures
28 that minority liberties will be twice protected.¹⁰

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⁹ In *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 576 U.S. 787, 135 S. Ct. 2652, 192 L. Ed. 2d 704 (2015), the court noted in footnote 3, “But see *New York v. United States*, 505 U. S. 144, 185 (1992) (“[P]erhaps not all claims under the Guarantee Clause present nonjusticiable political questions.”).”

¹⁰ *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, *Yale Law Review*, Vol. 93: 561, (1984)

1 Likewise, James Madison, in *Federalist Paper No. 21*, warned against this type of state actor.¹¹

2 Unfortunately, this present challenge to Governor Inslee’s Proclamation 21-16 and the King
3 County Order are the experience of the Washingtonians living in times foreshadowed and warned
4 against by Madison. This claim must be brought under the Guarantee Clause of Article IV, Section
5 4 as there is no other legal remedy is available. The governor could have employed the proper legal
6 avenue afforded to him by calling a special session under Article III, Sec. 7; however, Governor
7 Inslee has refused to call such a session throughout the duration of the pandemic, even though several
8 Legislators have called on him to do so.¹² Instead, the Governor has shown manifest disregard for
9 the political process and the laws and constitution of the United States of America and the State of
10 Washington as he has overthrown and disregarded the Rule of Law and the legislative process.
11 Making matters worse, the State Supreme Court has clearly taken sides on this issue by following
12 suit by creating its own vaccine mandate thereby compromising the state’s highest court in its ability
13 to adjudicate this issue fairly.
14

15 Similarly, Dr. Duchin as the County Health Officer has also overthrown our republican form
16 of government by *creating* law beyond the scope of his authority instead of lobbying for changes and
17 additions within the bounds of this state’s duly established democratic process to accomplish the
18 desired ends.
19

20
21 ¹¹ “The want of a mutual guaranty of the State governments is another capital imperfection in the federal plan. There is
22 nothing of this kind declared in the articles that compose it; and to imply a tacit guaranty from considerations of utility,
23 would be a still more flagrant departure from the clause which has been mentioned, than to imply a tacit power of coercion
24 from the like considerations. The want of a guaranty, though it might in its consequences endanger the Union, does not so
25 immediately attack its existence as the want of a constitutional sanction to its laws.

Without a guaranty the assistance to be derived from the Union in repelling those domestic dangers which may sometimes threaten the existence of the State constitutions, must be renounced. Usurpation may rear its crest in each State, and trample upon the liberties of the people, while the national government could legally do nothing more than behold its encroachments with indignation and regret. A successful faction may erect a tyranny on the ruins of order and law, while no succor could constitutionally be afforded by the Union to the friends and supporters of the government.”

¹²House Republicans called on Inslee to call a special session in the Spring and Fall of 2020: <https://houserepublicans.wa.gov/2021/09/02/emergency-powers-reform/>

1 These dictatorial and overreaching actions by defendants are exactly the type of ill intended
2 to be prevented in Article IV, Section 4 and the effects on the citizenry and on our form or government
3 are the same as if our state was taken over by physical force. Defendants’ usurpation of state law and
4 the democratic process is the direct cause of the harm experienced by the plaintiff and others. Article
5 IV, Section 4 is a sword and shield for the individual rights that are being infringed by defendants’
6 overreach. Returning to Madison in *Federalist Paper No. 43*, “Among the advantages of a
7 confederate republic enumerated by Montesquieu, an important one is, ‘that should a popular
8 insurrection happen in one of the States, the others are able to quell it. Should abuses creep into one
9 part, they are reformed by those that remain sound.” Plaintiff’s call to this court: remain sound and
10 right the wrongs caused by defendants’ actions in excess of their authority.
11

12 **3. In a Republican Form of Government, the Legislative Branch Creates Laws that the**
13 **Executive Branch Implements and that the Courts Interpret and Enforce with the**
14 **Constitution as its Guide.**

15 The wisdom of the ages has taught us that the best way to assure a free and stable society is to
16 separate power into three branches with distinct powers and responsibilities. This wisdom has been
17 adopted into the Washington and United States Constitutions.¹³ A republican form of government
18 recognizes that there will be a perpetual conflict of ideas, a thirst for power, a tendency to form
19 factions, and the existence of people driven by malevolent motives. A properly functioning republic
20 guards against those inevitabilities.

21 In Federalist Paper No. 70, Alexander Hamilton wrote that, “...a vigorous Executive is
22 inconsistent with the genius of republican government” as power in the hands of one person without
23 a proper check and balance by a legislative branch and independent courts is rife with folly. In
24

25 ¹³ Washington Constitution, Articles II, III, and IV separate the Legislative Department, the Executive, and the Judiciary. The United States Constitution similarly separates the three branches in Articles I, II, and III, respectively.

1 Federalist Paper No 78, Alexander Hamilton discussed the importance of an independent judiciary to
2 serve as a check and balance on the abuses that might surface from the other two branches, and even
3 abuses from the people themselves, wrote:

4 “This independence of the judges is equally requisite to guard the Constitution and the
5 rights of individuals from the effects of those ill humors, which the arts of designing
6 men, or the influence of particular conjunctures, sometimes disseminate among the
7 people themselves, and which, though they speedily give place to better information,
8 and more deliberate reflection, have a tendency, in the meantime, to occasion
9 dangerous innovations in the government, and serious oppressions of the minor party
10 in the community.”

8 **4. Only the Legislature Can Compel Vaccinations under Washington Law**

9 States, by statute, can mandate vaccines, but such vaccine regulation cannot be imposed by
10 unilateral orders of executive branch officials. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). In
11 *Jacobson*, the court held:

12
13 According to settled principles, the police power of a State must be held to embrace, at
14 least, such reasonable regulations **established directly by legislative enactment** as
15 will protect the public health and the public safety...**no rule prescribed by a State,**
16 **nor any regulation adopted by a local governmental agency acting under the**
17 **sanction of state legislation, shall contravene the Constitution of the United States**
18 **or infringe any right granted or secured by that instrument.** A local enactment or
19 regulation, even if based on the acknowledged police powers of a State, must always
20 yield in case of conflict with the exercise by the General Government of any power it
21 possesses under the Constitution, or with any right which that instrument gives or
22 secures.

18 *Id.* at pp. 24-25 (citations omitted and emphasis added).¹⁴

19 In this matter, there is no regulation “established directly by legislative enactment” permitting
20 the governor and/or local health officers the authority to directly or indirectly adopt vaccine mandates
21 via vaccine passports. The *Jacobson* Court addressed a Massachusetts *statute* that allowed local

23 ¹⁴Parenthetically, the United States Supreme Court has called the type of analysis required under *Jacobson* into question
24 further bolstering the plaintiff’s case. See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020) and *Tandon*
25 *v. Newsom*, 141 S.Ct. 1294 (2021). Specifically, this new line of thinking has concluded that *Jacobson* incorrectly applied
a rational basis standard, whereas the present standard of review would be strict scrutiny, requiring the State to demonstrate
that that the regulation is “‘narrowly tailored’ to serve a ‘compelling’ state interest.” *Roman Catholic Diocese of Brooklyn*
v. Cuomo, 141 S.Ct. 63, 67 (2020). However, that analysis would only be necessary if this court finds that the defendants
had authority to act.

1 jurisdictions to mandate vaccines. In the present matter, the only vaccination mandate currently in
2 effect in Washington relates to children and has no legal effect on adults.¹⁵ See RCW 28A.210.060
3 through RCW 28A.210.170. Conversely, the State has codified informed consent by statute and the
4 right to bodily integrity by common law. See: RCW 7.70.060 and *Miller v. Kennedy*, 11 Wn. App.
5 272, 286 n.8 (Wash. Ct. App. 1974). Affirmed, *Miller v. Kennedy*, 85 Wn. 2d 151 (Wash. 1975). State
6 law also codifies medical privacy. See RCW 70.02 and other statutes.
7

8 The legislative process is imperative to ensure that the state’s police power does not unduly
9 curtail or limit individual rights while achieving intended goals.¹⁶ By invoking the democratic process,
10 needs are met and individual rights are maintained, as provided in the constitutionally protected
11 republican form of government. Now we turn to how the defendants violated Article IV, Section 1 and
12 the non-delegation doctrine.

13 **5. Existing Statutory and Regulatory Mechanism in Washington State does not Include**
14 **Gubernatorial Power and Control Over Health Emergencies**

15 The Governor’s emergency powers do not give him the authority to create laws and
16 regulations, but only allows him to waive or suspend them for a limited time. See RCW
17 43.06.220(2). RCW 38.52.050(3)(a) addresses the governor’s authority in emergency management
18 situations, and it authorizes the governor to, “make, amend, and rescind the necessary orders, rules,
19 and regulations to carry out the provisions of this chapter,” but such actions must occur “within the
20 limits of the authority conferred upon” the governor. The governor has no general authority over
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22
23 ¹⁵ There is no statute that mandates adult vaccinations or delegates the decision to require vaccinations to any other
government official or government regulatory body.

24 ¹⁶ An additional reason that the legislative process is essential is that the democratic process has the tendency to reduce
25 political strife and resistance from those holding a view different from that pushed by the people more interested in getting
“their” way instead of working together to try to find “our” way. Do we really want decisions that can suppress individual
rights to be made by one person or a small group of people with no limitations on that power? That is why this litigation
is about restoring the Rule of Law.

1 health emergencies “conferred upon” him anywhere in state law. RCW 43.06.220, the governor’s
2 claimed basis for Proclamation 21-16, provides for limited actions that can be taken by the governor
3 and those powers do not include directing vaccine policy or any other aspect of health emergencies.

4 Health departments have been part of our lives in Washington State for quite some time, but
5 the current statutory structure is most pertinent to this discussion. An understanding of the statutory
6 structure is important when analyzing the extent to which gubernatorial authority under RCW 38.08,
7 RCW 38.52, and RCW 43.06 can or cannot be asserted in health emergencies. The best summary of
8 the laws currently in effect¹⁷ regarding to role of the different public health stakeholders is found on
9 Washington State Department of Health (DOH) own webpage. See Larson Dec., Exhibit 3.

11 The Board of Health established in Article XX of the Washington Constitution creates
12 regulations that local health departments/districts must follow. RCW 43.20.050(5). This rule-making
13 authority extends to rules regarding “the prevention and control of infectious and noninfectious
14 diseases.” RCW 43.20.050(2)(e) and (2)(f). Board of Health regulations are found in WAC 246. The
15 response to communicable diseases is regulated in WAC 246-100. Local health officers in health
16 departments/districts are charged with several duties including enforcing local and state health
17 laws/regulations as well as controlling and preventing dangerous diseases. RCW 70.05.070.

19 The Secretary of the Department of Health has “...the same authority as local health officers,
20 except that the secretary shall not exercise such authority unless the local health officer fails or is
21 unable to do so, or when in an emergency the safety of the public health demands it, or by agreement
22 with the local health officer or local board of health” RCW 43.70.130(7).

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25 ¹⁷ See, RCW 43.70 (Department of Health); RCW 43.20 (State Board of Health); RCW 70.05 (Local Health Departments);
RCW 70.08 (Combined City-County Health Departments); and RCW 70.46 (Health Districts).

1 As an example of control by local health officials, not the governor or other state officials, is
2 found in WAC 246-100-036(1), which provides that the “local health officer shall establish, in
3 consultation with local health care providers, health facilities, emergency management personnel, law
4 enforcement agencies, and any other entity he or she deems necessary, plans, policies, and procedures
5 for instituting emergency measures necessary to prevent the spread of communicable disease or
6 contamination.” The key phrases are, “local health officer shall establish” and “in consultation with”
7 others, meaning that individuals act **at the direction** of the local health officer. However, this
8 authority is not unfettered, and Section 6 of this Memorandum addresses how defendant Duchin’s
9 actions have exceeded this authority.
10

11 The local health official can also close public or private facilities, but the official must comply
12 with the *Control of Communicable Diseases Manual*, 20th edition, published by the American Public
13 Health Association when doing so. See WAC 246-100-036(3). In addition, local health officials, not
14 state health officials, address school closures for communicable diseases. WAC 246-110-020.
15 Parenthetically, school districts have communicable disease policies and, in addition, school closure
16 policies are adopted pursuant to public notice and comment. See RCW 28A.335.020. Generally,
17 emergency closure decisions are also made by school districts, not the Office of the Superintendent
18 of Public Instruction. See RCW 28A.335.030.
19

20 How does this discussion relate to the governor’s authority to act during a pandemic? That
21 answer is best derived from legislative action taken in 2006, whereby the legislature acted to reinforce
22 a local command and control system for public health response in a pandemic by adopting RCW
23 70.26, currently titled: Pandemic Influenza –Preparedness. RCW 70.26 defines the powers and duties
24 of county health departments and the State Department of Health during a pandemic. The centerpiece
25

1 of the legislation was the requirement for **each local health department**, not the state, to create
2 “pandemic flu preparedness and response plans.”

3 In 2006, the legislature spoke on pandemics and found that, “An effective response to
4 pandemic influenza in Washington **must focus at the local level** and will depend on preestablished
5 partnerships and collaborative planning...” RCW 70.26.010(5). The legislature stated its intent, as
6 follows:
7

8 It is therefore **the intent of the legislature** that adequate pandemic flu preparedness
9 and response plans be developed and **implemented by local public health**
10 **jurisdictions statewide** in order to limit the number of illnesses and deaths, preserve
the continuity of essential government and other community services, and minimize
social disruption and economic loss in the event of an influenza pandemic.

11 RCW 70.26.010(6) (emphasis added).

12 The Department of Health formed Emergency Preparedness and Response Regions to plan for
13 and address, not ironically, emergencies in which a “...lead agency and coordinator help local health
14 jurisdictions to create local emergency preparedness plans and to collaborate on a regional plan that
15 will tie the local plans together.” This plan was ultimately adopted a Comprehensive Emergency
16 Management Plan required by RCW 38.52.030. Appendix 4 to the State Plan addresses pandemics
17 and provides that:

18 Local Health Jurisdictions (LHJs) and Tribal Governments are generally responsible
19 for developing and implementing activities in order to protect the health of the public
20 within their jurisdiction. During a communicable disease emergency this mission
remains the same but also includes other activities to promote information sharing
and operational coordination...¹⁸

21 The Plan further provides that the core responsibility of Local and Tribal Health Officers
22 during a communicable disease emergency is to order all necessary and effective measures to control
23 spread of the disease within their jurisdiction. *Id.* at p. ESF8-4-25. Importantly, the governor is only
24

25 ¹⁸ Comprehensive Emergency Management Plan, Appendix 4 –Communicable Disease and Pandemic Response Concept
of Operations, p. ESF8-4-24. See Larson Dec., Exhibit 4.

1 mentioned as the source of a possible emergency proclamation and **not** as the person in charge of
2 managing or controlling the response to pandemics.

3 The legislature never included health emergencies or allowed for gubernatorial intervention
4 in contagious diseases, epidemics, or pandemics in any statute. The legislature could have easily
5 provided for gubernatorial intervention when it adopted RCW 70.26, but it did not do so. Instead,
6 the legislature found that an “...effective response to pandemic influenza in Washington must focus
7 **at the local level**” and should be “...implemented by local public health jurisdictions...” RCW
8 70.26.010 (emphasis added).
9

10 The closest gubernatorial power that could remotely apply after using a strained construction
11 of the statute is RCW 43.06.010(12). It provides that the governor’s power can only extend to the
12 “area affected” by a “public disorder, disaster, energy emergency, or riot...which affects life, health,
13 property, or the public peace,” but that section was originally adopted to “control or suppress riots or
14 unlawful strikes...” and not to address health emergencies. See 1965 c 8 § 43.06.010. Prior: 1890 p
15 627 § 1; RRS § 10982.^{19, 20}
16

17 RCW 43.06.010 has been amended several times and each time the law was amended the
18 legislature provided a statement of intent that laid out the need for the governor to be involved in the
19 topic brought forward at the time. Energy emergencies were added in 1976. 1975-‘76 2nd ex.s. c
20

21 ¹⁹ (12) He may control or suppress riots or unlawful strikes, or any unlawful assembly of ten or more persons, when by
22 such riot, unlawful strike, or unlawful assembly any persons are attempting to commit a felony, or inciting others to commit
23 such crime, or any person or persons are in imminent danger of losing either life or property. Before taking any such action,
24 the governor shall first notify and request the local authorities to suppress such riot, unlawful strike, or unlawful assembly,
25 and if they fail, refuse, neglect, or are unable to do so, he shall issue his proclamation commanding such persons to disperse
and refrain from taking part in or encouraging or inciting such riot, unlawful strike, or unlawful assembly, and if thereafter
such imminent danger still continues, the governor shall proceed to suppress it by calling into action all the force necessary
to accomplish that purpose.

²⁰ The section was amended in 1969. 1969 ex.s. c 186 § 8 to read, “He may, after finding that a public disorder, disaster,
or riot exists within this state or any part thereof which affects life, health, property, or the public peace, proclaim a state
of emergency in the area affected, and the powers granted the governor during a state of emergency shall be effective only
within the area described in the proclamation;”

1 108 § 25. Plant infestations were added in 1982. 1982 c 153 § 1. Aquatic species were added in
2 2014. 2014 c 202 § 305. There are powers to address “infestation of plant pests”²¹ and invasive
3 aquatic species²², but not viruses or pandemics.

4 One would need to use common sense and rules of statutory construction to reconcile the clear
5 intent for local control of health emergencies with the specific absence of the governor’s power to
6 address health emergencies in RCW 43.06 to answer the question of the validity of gubernatorial
7 intervention here. A health emergency is not a public disorder, energy emergency, or a riot, so the
8 only remaining question is whether it is considered a “disaster” under RCW 43.06.010(12). RCW
9 43.06 does not define disaster, but RCW 38.52.010(9)(a) provides:
10

11 “Emergency or disaster” as used in all sections of this chapter except
12 RCW 38.52.430 means an event or set of circumstances which: (i) Demands
13 immediate action to preserve public health, protect life, protect public property, or to
14 provide relief to any stricken community overtaken by such occurrences; or (ii)
15 reaches such a dimension or degree of destructiveness as to warrant the governor
16 proclaiming a state of emergency pursuant to RCW 43.06.010.

17 One must construe RCW 38.52.010(9)(a) in the context of all other existing laws and
18 regulations. Arguably, the COVID-19 issue presented a “set of circumstances” that affected “public
19 health,” but the question remains whether “immediate action” was allowed by the governor when
20 there was an existing legally adopted methodology for responding to pandemics that did not include
21 gubernatorial control and intervention. See RCW 70.26, WAC 246-100, and WAC 246-110.

22 The next question is whether RCW 38.52 gives EMD, and therefore the governor, the right to
23 exert direct command and control authority over local health departments/districts. The definitions
24 found in RCW 38.52.010 do not seem to fit local health districts/departments because they are not a

25 ²¹ RCW 43.06.010(13)

²² RCW 43.06.010(14)

1 “county, city or town²³” and do not “provide firefighting, police, ambulance, medical, or other
2 emergency services.²⁴” This does not mean that EMD plays no role, it just means that EMD does not
3 play a supervisory role that can supplant the clearly established statutory and regulatory authority of
4 local health officers.²⁵ Therefore, the governor cannot exercise such control either.

5
6 Further evidence suggests that the governor’s powers do not extend to pandemics in general
7 and do not extend to the issuance of vaccine passports, in particular. RCW 43.06.220(2)(g) (iii)
8 provides that the governor cannot suspend laws if the “the waiver or suspension would conflict with
9 the rights, under the First Amendment, of freedom of speech or of the people to peaceably assemble.”
10 If the governor cannot waive laws to infringe on those rights, the governor certainly cannot impose
11 restrictions on those rights either, especially under the Washington State Constitution, which provides
12 that such rights “shall never be abridged.”²⁶

13 To construe a “disaster” under RCW 38.52.010(9)(a) in a manner that would give the governor
14 the power to mandate vaccinations as a condition to peaceably assemble or attend events would
15 essentially nullify all of the above-referenced health laws and regulations and the United States
16 Constitution and Constitution of the State of Washington. Any such interpretation flies in the face of
17 basic rules of statutory construction. Further, there is an absence of language in RCW 38.08, RCW
18 38.52, or RCW 43.06 that ties gubernatorial power to pandemics or health emergencies, and the
19 governor can neither show the existence of such language, nor can he create such language out of
20

21
22 _____
23 ²³ RCW38.52.010 (20) “Political subdivision” means any county, city or town.

24 ²⁴ RCW38.52.010(21) “Public agency” means the state, and a city, county, municipal corporation, district, town, or public
25 authority located, in whole or in part, within this state which provides or may provide firefighting, police, ambulance,
medical, or other emergency services.” (Emphasis added.)

²⁵The emergency plan does mention the role of the Director of the State Department of Health, but the Director did not
issue Proclamation 21-16. Even if one assumes that the Director has statewide authority in a pandemic, that authority has
limits pursuant to the non-delegation doctrine discussed below.

²⁶ WA Const., Art. I, Sec 4.

1 whole cloth. The Governors Proclamation, lacking enabling authority, is invalid. Equally important,
2 each defendant has violated the non-delegation doctrine.

3 **6. There is no Statutory Authority that Allows the Defendants to Create Rules or**
4 **Regulations that Require the Disclosure of an Individual’s Vaccine Status or Negative**
5 **COVID Status as a Prerequisite to Engage in the Right to Peaceably Assemble and/or**
6 **Engage in Other Public Activities.**

7 In Washington State, delegation of legislative authority to regulate only passes constitutional
8 muster:

9 ...when it can be shown (1) that the legislature has provided standards or guidelines
10 which define in general terms what is to be done and the instrumentality or
11 administrative body which is to accomplish it; and (2) that procedural safeguards exist
12 to control arbitrary administrative action and any administrative abuse of discretionary
13 power.

14 *Barry & Barry, Inc. v. Dept of Motor Vehicles*, 81 Wash.2d 155, 159, 500 P.2d 540 (1972). The Court
15 went on to hold:

16 The non-delegation doctrine can and should be altered to turn it into an effective and
17 useful judicial tool. Its purpose should no longer be either to prevent delegation of
18 legislative power or to require meaningful statutory standards; its purpose should be
19 the much deeper one of protecting against unnecessary and uncontrolled discretionary
20 power.... The focus of judicial inquiries thus should shift from statutory standards to
21 administrative safeguards and administrative standards. As soon as that shift is
22 accomplished, the protections should grow beyond the non-delegation doctrine to a
23 much broader requirement, judicially enforced, that as far as is practicable
24 administrators must structure their discretionary power through appropriate safeguards
25 and must confine and guide their discretionary power through standards, principles,
and rules.

26 *Id.* at p. 161 (emphasis added). The Supreme Court affirmed the non-delegation doctrine in *State v.*
27 *Crown Zellerbach Corp.*, 92 Wash. 2d 894, 602 P.2d 1172 (1979).

28 The Court of Appeals in *Associated Gen. Contractors of Washington v. State*, ___ Wash.App.
29 ___, 494 P.3d 443 (Div. II, 2021) held a statute unconstitutional that gave an administrative body the
30 ability to set the prevailing wage by reviewing collective bargaining agreements. The court held:

31 RCW 39.12.015 lacks appropriate ‘standards or guidelines,’ and it lacks
32 ‘adequate procedural safeguards.’ *Barry & Barry*, 81 Wash.2d at 163-64, 500 P.2d 540.

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Therefore, it does not meet the test set forth in *Barry* for the proper delegation of legislative power. See *Barry & Barry*, 81 Wash.2d at 163-64, 500 P.2d 540. For these reasons, we agree with AGC and hold that RCW 39.12.015(3) violates the non-delegation doctrine.

The non-delegation doctrine also applies to agencies and municipalities that are not part of state government. See *Anderson v. City of Issaquah*, 70 Wash. App. 64, 851 P.2d 744 (1993). However, more deference has been given to local public health agencies when regulating within the scope of powers delegated by statutes, but only if constitutional rights are not compromised in the enforcement of such requirements. However, those powers have the same limitations under the non-delegation doctrine, i.e. the need for enabling legislation that provides clear standards and procedural safeguards. *Spokane Cty. Health Dist. v. Brockett*, 120 Wash. 2d 140, 839 P.2d 324 (1992).

In *Spokane Cty.*, the Court upheld the trial court’s decision that Spokane County Health Department’s needle exchange program was valid by construing the AIDS Act broadly. The Court held that the program was created within the scope of a provision in the AIDS Act codified as RCW 70.24 and not simply because the health officer was given the broad general charge to control AIDS.

Although local health districts and health officers are given general statutory authority for the “control and prevention of any dangerous, contagious or infectious disease”²⁷ and to “control and prevent the spread of any dangerous, contagious or infectious diseases,”²⁸ respectively those powers are not without limitation. These regulatory bodies still need an enabling statute (like the AIDS Act) to justify the specific authority to act. Here, defendants lack specific statutory authority to act especially when constitutional rights are implicated, as they are in this case, and they cannot rely solely on broad statutory general powers or emergency powers.

²⁷ Local boards under RCW 70.05.060(4)
²⁸ Local health officers under RCW 70.05.070(3)

1 In *Spokane Cty.* the Court specifically held that the plaintiff’s constitutional rights were not
2 impaired. However, in the present case, the constitutional rights of the plaintiff and others similarly
3 situated are impaired by the overreach of the King County Health Department and the Governor.
4 Therefore, greater scrutiny of defendants’ respective acts through judicial intervention is necessary to
5 address the wrongs here.
6

7 The State Board of Health provided for in Article XX of the State Constitution, not the
8 governor, is given the power by the legislature to “Adopt rules for the prevention and control of
9 infectious and noninfectious diseases, including food and vector borne illness, and rules governing the
10 receipt and conveyance of remains of deceased persons, and such other sanitary matters as may best
11 be controlled by universal rule.” RCW 43.20.050(f).

12 By way of illustration, the specific legislative grant of power to regulate “food and vector borne
13 illnesses” is found in RCW Chapter 69 and in other chapters. The specific legislative grant of power
14 to regulate the “receipt and conveyance of remains of deceased persons” is found in RCW Chapter 68.
15 The required statutory authority for the “prevention and control of infectious and noninfectious
16 diseases” can be found in various RCW chapters, but the only statutory authority mandating
17 immunizations as a condition of participating in an activity is for children. RCW 28A.210.060 through
18 RCW 28A.210.170. Regulatory power for immunizations of children is found in WAC 246-105 and
19 in other WACs.²⁹ RCW 28A.210.140 provides for the very type of legislative delegation of rule-
20 making power required by *Barry & Barry, supra*:
21

22 The state board of health shall adopt and is hereby empowered to adopt rules pursuant
23 to chapter 34.05 RCW which establish the procedural and substantive requirements for
24 full immunization and the form and substance of the proof thereof, to be required
pursuant to RCW 28A.210.060 through 28A.210.170.

25 ²⁹ Other regulations for childhood vaccinations can be found in WAC 170-300 (Early Learning), WAC 110-305 (Child Care), and WAC 180-38 (K-12).

1 RCW 28A.210.140. There are also the necessary procedural protections found in RCW
2 28A.210.130.

3 The childhood immunization regulations authorized by RCW 28A.210.140 can be found in
4 WAC 246.105. There are no such state or local regulations for immunizations or testing for adults
5 simply because there is no statutory authority for such immunizations or testing.³⁰

6 As to children, WAC 246-105-030 requires vaccinations for specifically named diseases and
7 there is no provision for adding diseases on an open-ended basis in the case of an emergency.³¹ WAC
8 246-105-080 provides guidelines for when to exclude children from schools and childcare centers and
9 that “schools must use procedures consistent with chapters 180-38 and 392-380 WAC.” Excluded
10 students are required to be given written notice of the exclusion and are then afforded a hearing under
11 WAC 392-380-080. However, those affected by the governor’s and health officer’s orders in this case
12 have no such redress and other than lawsuits like this, they have no way to even challenge the orders
13 themselves.

14
15 The King County health officer cites RCW 70.05.070 as the basis for his actions, but it should
16 be noted that such action must be made “under the direction of the local board of health or under
17 direction of the administrative officer...” RCW 70.05.070. Here, no such approval has occurred. The
18 health officer’s reliance on the “deems necessary” language of WAC 236-100-036 as a grant of power
19 for his order is misplaced. Such a broad grant of power to do anything even if the law and/or the
20 constitution do not support the action flies in the face of case law. It is hard to cite to a regulation
21

22
23 ³⁰ Assuming arguendo that such power did exist, it should be noted that state law provides a method to adopt emergency
24 regulations. See RCW 34.05.350. King County Health Department also adopted rules for the creation of emergency
25 regulations. See KCBHC 2.04.140.B.1. Yet, no such regulations supporting defendants’ actions have been adopted.

³¹ (1) Chickenpox (Varicella); (2) Diphtheria; (3) German measles (Rubella); (4) Haemophilus influenzae type B disease;
(5) Hepatitis B; (6) Measles (Rubeola); (7) Mumps; (8) Pneumococcal disease; (9) Polio (Poliomyelitis); (10) Tetanus;
and (11) Whooping cough (Pertussis).”

1 adopted by the State or the King County boards of health that would authorize such an order because
2 no such regulation exists. In fact, adult immunization is not addressed anywhere in the state or local
3 health codes. The overreach by defendants is exactly the type of overreach sought to be prevented by
4 the non-delegation doctrine enunciated in *Barry & Barry, Supra.*, and by the Guarantee Clause.³²

5
6 As noted, the State has no adult vaccination mandate on the books. The closest we get to
7 legislative enactment on adult vaccinations is RCW 70.54.370, which only requires that a university
8 advise students of the need to be vaccinated against meningococcal disease with no requirement that
9 the student actually receive such a vaccination. The legislature could have easily mandated such a
10 vaccination, but did not do so. RCW 70.54.370. In addition, RCW 74.42.285 requires long-term care
11 facilities to make vaccinations for influenza available to residents, but, again, no mandate. RCW
12 74.42.285. The legislature did provide for a vaccine prohibition; RCW 70A.230.120 prohibits
13 vaccines with mercury from being administered to pregnant women and children under three years
14 old. RCW 70A.230.120.

15
16 The legislature with full notice of COVID-19 could have mandated vaccines or vaccine
17 verification (vaccine passports) in the 2021 session in which it adopted RCW 43.70.715 (COVID-19
18 Public Health Response Account), but chose not to do so. They could have also delegated the decision
19 on whether the vaccine could be mandated to the Governor, the Board of Health, or to local health
20
21

22 ³² At the federal level, the executive branch is permitted to enact and enforce regulations, but they are not allowed to enact
23 or enforce regulations that are unsupported by specific enabling legislation duly adopted by the legislative branch. *Whitman*
24 *v. American Trucking Assns., Inc.*, 531 U.S. 457 (2001). The U.S. Supreme Court is trending to place more limits on the
25 regulatory power of the executive branch at the federal level. See *Gundy v. United States*, 560 U.S. 438, 139 S. Ct. 2116,
204 L. Ed. 2d 522 (2019). The current state of the law is that “a statutory delegation is constitutional as long as Congress
“lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated
authority] is directed to conform” *Id.*

1 boards, but instead the enacted law only provided for equitable distribution for those who wanted the
2 vaccine voluntarily. See RCW 43.70.715(2).

3 Further distinguishing *Jacobson*, the case addressed a Massachusetts legislatively adopted
4 statute that allowed local jurisdictions to mandate vaccines, whereas the present matter is a unilateral
5 enactment of such a requirement by the defendants. Rather, RCW 28A.210.140 only authorizes the
6 State Board of Health to enact such vaccine mandates for schoolchildren. However, neither the State
7 Board of Health nor the defendants can adopt direct or indirect vaccine mandates for adults as no such
8 statutory authority has been provided by the legislature. See *Jacobson, Supra* at p.24.

9
10 In *State Ex Rel. McBride v. Superior Court*, 104 Wash. 409, 174 Pac. 973 (1918), our state's
11 highest court confirmed that those intending to use the police power of the state to enforce health laws
12 must do so within the authority granted by the state legislature.

13 In testing the reasonableness of an ordinance or legislative conduct sounding in the
14 police power, the courts have not been inclined to go beyond the query, whether the
15 subject-matter of the act is within the range of its authority, and having so determined
they will not revise, correct or nullify the methods and means employed to accomplish
the purpose of the law.

16 *Id.* at p. 419 (emphasis added). In the present case, there is no enabling statute for adult vaccinations,
17 and even if the broad general powers of the governor and the local health board extended to such
18 vaccinations, there are no regulations regarding adult vaccinations that provide any limits to discretion
19 or that provide any procedural safeguards as required by Washington case law. Therefore, the
20 respective orders are invalid under the non-delegation doctrine and should be enjoined.

21
22 **7. Whether the Plaintiff Actually Has a Cognizable Constitutional Claim Only Needs to be
Litigated if the Court Determines that the Defendants Acted Within Their Authority**

23 The defendants may argue the merits of their respective responses to the pandemic and/or that
24 the plaintiff's rights can be suppressed in a pandemic. Whether the defendants' actions and directives
25 actually violate some legal right such as the right to assemble under the First Amendment and Article

1 I Section 4, the right to privacy under Article I, Section 7, and other rights may be the proper subject
2 of discussion if defendants were actually acting within the scope of lawful authority. Perhaps those
3 issues may need to be litigated in the future if the legislature passes enabling statutes that allow the
4 defendants to enter the type of orders proffered in this case or if this court finds that the defendants
5 acted within their authority. However, any such claims are rendered moot by the grant of injunctive
6 relief in this case.
7

8 IV. CONCLUSION

9 We must focus on principles over power, principles over panic, and principles over politics and
10 this Court must grant a Temporary Restraining Order, injunctive relief, or declaratory relief as
11 requested in Plaintiff's Complaint to prevent the unlawful enforcement of defendants' respective
12 orders.

13 Dated this 29th day of November 2021.

14 **SILENT MAJORITY FOUNDATION**

15 **PRO SE PLAINTIFF WITH**
16 **THE ASSISTANCE OF COUNSEL**

17 

18 

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