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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 DAVID A. LARSON,

9 Plaintiff,

10 v.

11 JAY INSLEE, et al.,

12 Defendants.

No. 2:21-cv-1596-BJR

ORDER ON PLAINTIFF’S MOTION
FOR TEMPORARY RESTRAINING
ORDER

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14 In this case, Plaintiff David Larson challenges orders issued by Defendants Jay Inslee,
15 Governor of the State of Washington, and Dr. Jeff Duchin, the King County Health Officer, that
16 require attendees at large indoor events to show proof of being fully vaccinated against COVID-
17 19 or proof of a recent negative result from a COVID-19 test if they are 12 years old or older.
18 Plaintiff seeks a temporary restraining order (TRO) to restrain enforcement of these orders. Dkt.
19 No. 3. Specifically, Plaintiff seeks a TRO so that he may attend a college basketball game in
20 Seattle on December 4, 2021, between Gonzaga University and the University of Alabama
21 (which Plaintiff refers to as “the Battle in Seattle”) without showing proof of COVID-19
22 vaccination or a recent negative COVID-19 test.
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24 Having reviewed the materials submitted by the parties, the Court DENIES Plaintiff’s
25 motion for a TRO for the reasons set forth below.
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I. Background

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2 Plaintiff filed this action on November 29, 2021. Plaintiff’s complaint challenges two
3 orders issued by Defendants (“the Orders”).

4 First, Plaintiff challenges Proclamation 21-16, which Defendant Inslee issued on October
5 18, 2021, and which went into effect on November 15, 2021. Dkt. No. 4-1. This proclamation is
6 entitled “Large Event COVID-19 Vaccine Verification” and prohibits any person 12 years old or
7 older from attending a “Large Event”¹ in person unless the person has: (1) been fully vaccinated
8 against COVID-19 and provides proof thereof to the event organizer; or (2) received a negative
9 COVID-19 test within 72 hours preceding attendance at the event and provides proof thereof to
10 the event organizer.
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12 Second, Plaintiff challenges an order issued by Defendant Duchin on September 16,
13 2021, which took effect on October 25, 2021. Dkt. No. 4-2. The order is entitled “Revised
14 Local Health Officer Verification of Vaccination Order” and requires patrons or customers 12
15 years old or older at the following public events and establishments in King County to provide
16 verification that they are fully vaccinated against COVID-19: (1) outdoor recreational and
17 entertainment events with 500 or more people; (2) indoor restaurants, bars, and taverns with
18 seating capacity of 12 and more, and indoor entertainment and recreational establishments.² The
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23 ¹ The term “Large Event” is defined in the Proclamation as “(1) any ticketed or preregistered assembly of 10,000 or
24 more individuals at an outdoor venue that has defined entrances and exits, or (2) any ticketed or preregistered
assembly of 1,000 or more individuals at an indoor venue that has defined entrances and exits.” *Id.*

25 ² The Order lists the following examples of indoor entertainment and recreational establishments: Gyms, fitness
26 facilities, public pools, entertainment and performing arts venues, night clubs, music and concert venues, movie
theatres, museums, collegiate and professional sports stadiums and arenas, exhibition halls, and convention centers.
The Order also applies to indoor restaurants, bars, and taverns with seating capacity of less than 12 effective
December 6, 2021. *Id.*

1 order provides that as an alternative to providing vaccine verification, a patron or customer may
2 provide proof of a negative COVID-19 test administered within the previous 72 hours.

3 Plaintiff alleges that as a result of these Orders, he is “unlawfully prohibited from
4 attending meetings and other functions at restaurants, work[ing] out at a government owned
5 community center/gym, watch[ing] a movie at his local movie theater, attend[ing] sporting
6 events and attend[ing] other large events without being forced to disclose his private medical
7 status as a condition of entry and without fear of criminal prosecution.” Dkt. No. 1 at 4.

8 Plaintiff maintains that Defendants “have no statutory or constitutional authority to create or
9 enforce the requirements and prohibitions complained of in this action.” *Id.*

10 Plaintiff’s complaint lists six causes of action, which are labelled as: (1) Violation of
11 Article IV § 4 of the U.S. Constitution and Washington Constitution, Article I, § 1; (2) Violation
12 of Fourth Amendment of the U.S. Constitution and Article I § 7 of the Washington State
13 Constitution and Violation of Right to Privacy and Bodily Integrity; (3) Violation of the First
14 Amendment to the U.S. Constitution and Article I § 4 of the Washington Constitution; (4)
15 Violation of Freedom of Conscience and Religious Liberty, 42 U.S.C. 2000a and Article I, §§ 7
16 and 11 of the Washington Constitution; (5) Violation of the Fourteenth Amendment of the U.S.
17 Constitution and Article I § 12 of the Washington Constitution; (6) Injunctive Relief and
18 Declaratory Relief.

19 Plaintiff’s complaint seeks a declaration that both of the Orders are invalid and
20 unenforceable. Plaintiff also seeks injunctive relief to restrain Defendants from enforcing the
21 Orders.

22 Concurrently with his complaint, Plaintiff filed a Motion in Support of Temporary
23 Restraining Order and Declaratory and Injunctive Relief. Dkt. No. 3. Plaintiff’s motion requests

1 that the Court issue: (1) “a temporary restraining order as to the Battle in Seattle on December 4,
2 2021,” and (2) “a preliminary injunction on the merits of the remainder of Plaintiff’s claims in
3 this matter.” *Id.* at 2. Plaintiff’s motion also states that “there are only legal questions at issue”
4 and requests “that this Court consolidate the preliminary injunction hearing with the trial on the
5 merits and rule on the merits in accordance with [Fed R.] Civ. P. 65(a)(2).” *Id.* at 1.

6
7 The Court provided Defendants until 4:00 pm on Wednesday, December 1, 2021, to
8 respond to Plaintiff’s motion to the extent that Plaintiff seeks a TRO. Defendants filed their
9 response in a timely manner and oppose Plaintiff’s request for a TRO. The Court finds that this
10 matter may be decided on the papers submitted by the parties and that oral argument is not
11 necessary.

12 II. Discussion

13 A. Standing

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15 Defendants argue that the Court lacks subject matter jurisdiction because Plaintiff’s
16 complaint fails to establish that he has Article III standing. Defendants argue that Plaintiff’s
17 complaint fails to allege facts demonstrating that he has suffered or will imminently suffer an
18 “injury in fact” that is both “concrete and particularized.” Defendants maintain that the injuries
19 alleged by Plaintiff are not “particularized” but are instead “generalized grievances” that do not
20 satisfy the injury in fact requirement. Defendants argue that “the Court should not only deny the
21 TRO Motion but dismiss the complaint.” Dkt. No. 20 at 12.

22
23 In light of the necessarily short time frame for briefing Plaintiff’s request for a TRO,
24 Plaintiff has not had an opportunity to respond to Defendants’ arguments on standing.
25 Therefore, the Court will defer consideration of Defendants’ arguments on standing at this time.
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1 As discussed below, even assuming for the purposes of the pending motion that Plaintiff has
2 standing to maintain his claims, the Court finds that Plaintiff is not entitled to a TRO.

3 **B. Plaintiff’s Request for a TRO**

4 “The standard for issuing a TRO is the same as the standard for issuing a preliminary
5 injunction.” *Dawson v. Asher*, 447 F. Supp. 3d 1047, 1049 (W.D. Wash. 2020). Like a
6 preliminary injunction, a TRO is an “extraordinary remedy that may only be awarded upon a
7 clear showing that the plaintiff is entitled to relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555
8 U.S. 7, 24 (2008).

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10 To obtain a TRO or a preliminary injunction, a plaintiff “must establish [1] that he is
11 likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of
12 preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in
13 the public interest.” *Id.* at 20. When the government is a defendant, the last two factors merge.
14 *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

15
16 Under Ninth Circuit law, courts may apply a “sliding scale” test in evaluating these
17 requirements. *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). Under this
18 test, relief may be granted if a plaintiff demonstrates “serious questions going to the merits” and
19 that the “balance of hardships . . . tips sharply towards the plaintiff,” so long as the plaintiff also
20 shows that there is a likelihood of irreparable injury and that the injunction is in the public
21 interest. *Id.* at 1135.

22
23 **1. Plaintiff Has Not Shown A Likelihood of Success on the Merits**

24 As Defendants note, Plaintiff’s motion for a TRO does not include arguments on all of
25 the claims asserted in his complaint, but is based on three theories: (1) that the Orders violate
26 Article IV, § 4 of the U.S. Constitution, which is known as the Guarantee Clause; (2) that the

1 Orders exceed Defendants’ powers under Washington statutes; and (3) the Orders are invalid
2 under the non-delegation doctrine under the Washington Constitution.

3 **a. The Guarantee Clause**

4 The Guarantee Clause provides that the United States “shall guarantee to every state in
5 this Union a Republican Form of Government” However, as Defendants note, the U.S.
6 Supreme Court “has several times concluded . . . that the Guarantee Clause does not provide the
7 basis for a justiciable claim.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (citing
8 *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912)). Here, Plaintiff has not cited case
9 law in which the Guarantee Clause was the basis for a justiciable claim, although he points to a
10 1992 decision by the U.S. Supreme Court which stated “recently, the Court has suggested that
11 perhaps not all claims under the Guarantee Clause present nonjusticiable political questions.”
12 *New York v. United States*, 505 U.S. 144, 185 (1992). Given the lack of case law supporting
13 Plaintiff’s arguments, the Court finds that Plaintiff has not demonstrated a likelihood of success
14 on his claims under the Guarantee Clause.
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17 **b. Defendants’ Powers Under Washington State Law**

18 Defendants also argue that to the extent Plaintiff seeks a TRO based on allegations that
19 Defendants violated Washington state law by exceeding their powers, such relief is barred by the
20 Eleventh Amendment to the U.S. Constitution. Defendants point in particular to the U.S.
21 Supreme Court’s decision in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89
22 (1984). In *Pennhurst*, the Court noted that “it is difficult to think of a greater intrusion on state
23 sovereignty than when a federal court instructs state officials on how to conform their conduct to
24 state law” and concluded that “[s]uch a result conflicts directly with the principles of federalism
25 that underlie the Eleventh Amendment.” *Id.* at 106. Defendants also argue that several other
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1 federal courts have declined to enjoin COVID-19 executive orders based on state-law claims.
2 Dkt. No. 20 at 16 (collecting cases). By contrast, Plaintiff has not pointed to cases in which a
3 federal court has issued injunctive relief based on alleged violations of state law by state
4 officials. Therefore, to the extent that Plaintiff request for a TRO is based on allegations that
5 Defendants exceeded their powers under state law, the Court finds that Plaintiff has not shown a
6 likelihood of success.

8 **c. Non-Delegation Clause**

9 Similarly, Defendants argue that the Eleventh Amendment bars Plaintiff's claims that the
10 Orders are invalid under the non-delegation doctrine, which Defendants describe as "a state-law
11 separation of powers principle (and a theory found nowhere in the Complaint)." Dkt. No. 20 at
12 13. For the reasons discussed above, the Court finds that Plaintiff has not demonstrated a
13 likelihood of success on his claims to the extent they are based on the non-delegation doctrine
14 under the Washington Constitution, given the barriers under the Eleventh Amendment to seeking
15 such relief in federal court.

17 **2. Plaintiff Has Not Shown He is Likely to Suffer Irreparable Harm**

18 Plaintiff alleges that he will suffer irreparable injury if a TRO does not issue because the
19 "Battle in Seattle" is "a once in a lifetime event and money damages would not replace the in-
20 person experience." Dkt. No. 3 at 3. Plaintiff also "suggests a good faith extension of the law to
21 shift the burden to the defendants to show the absence of irreparable injury; government officials
22 should not be allowed to act beyond their authority and then shift the burden to others to prove
23 harm as a way to dodge immediate responsibility for their actions." *Id.* at n.6.

25 The Court finds Plaintiff's arguments totally unpersuasive. As Plaintiff should be aware,
26 clear and repeated precedent established by the U.S. Supreme Court and the Ninth Circuit Court

1 of Appeals squarely places the burden on Plaintiff to show that he is likely to suffer irreparable
2 harm if injunctive relief is not granted. *See, e.g., Winter*, 555 U.S. at 22 (noting “[o]ur frequently
3 reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable
4 injury is likely in the absence of an injunction.”) (emphasis omitted).

5 Here, the Court finds that Plaintiff has not demonstrated that he is likely to suffer
6 irreparable injury if a TRO does not issue. The Court does not regard the possibility that
7 Plaintiff may be unable to attend the “Battle in Seattle” in person to be an irreparable injury. As
8 Defendants note, Plaintiff may view the game on television if he chooses not to comply with the
9 requirements for attendance. Plaintiff points to *Roman Catholic Diocese of Brooklyn v. Cuomo*,
10 141 S. Ct. 63, 68 (2000) (per curiam) for the proposition that “remote viewing is not the same as
11 personal attendance.” However, as Defendants note, the Supreme Court made that statement “in
12 the context of excluding worshippers from religious services (with no testing or vaccination
13 option), not attendance at a sporting event.” Dkt. No. 20 at 24. The potential injury from being
14 unable to attend a basketball game in person is not comparable nor of the same constitutional
15 dimension as being unable to attend religious services.

16 Plaintiff also suggests that he would suffer irreparable harm because the loss of
17 constitutional freedoms “for even minimal periods of time . . . unquestionably constitutes
18 irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). However, Plaintiff has not shown
19 a likelihood of success on his claims that his constitutional freedoms are violated by the Orders.

20 Therefore, the Court finds that Plaintiff has not shown that he is likely to suffer
21 irreparable harm if a TRO is not issued.
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3. The Balance of Equities and the Public Interest Do Not Weigh in Favor of Plaintiff

As noted above, the questions of whether the balance of equities tips in favor of the party seeking a TRO and whether such relief is in the public interest are merged when the government is the defendant. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

Here, Plaintiff makes little attempt to show that the balance of equities weighs in his favor; instead, Plaintiff argues that “[t]his element of injunctive relief unfairly shifts the burden away from government officials acting outside of their authority” and that “Defendants should be forced to prove an overarching hardship if relief is granted.” Dkt. No. 3 at 5-6. However, as noted above, this Court is ruled by precedent. Recognizing the precedent that places the burden on Plaintiff to demonstrate he is entitled to a TRO, the Court finds that Plaintiff has offered little if any basis to show that the balance of equities tips in his favor.

As for the public interest, Plaintiff argues that this factor is satisfied because “[r]estoring representative government and stopping public officials from acting outside their authority is certainly in the public interest.” *Id.* at 6. However, as discussed above, Plaintiff has not shown a likelihood of success on his claims in this Court that Defendants are exceeding their authority. In contrast, Defendants persuasively argue that the Order serves the public interest by preventing the further spread of COVID-19 and addressing the continuing health emergency caused by the virus.

III. Conclusion

For the foregoing reasons, Plaintiff’s motion for a TRO is denied.

The Court notes that Plaintiff’s motion also requests a preliminary injunction on his remaining claims. The parties are directed to meet and confer to determine if they can agree on a

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briefing schedule to the extent that Plaintiff seeks a preliminary injunction in this matter.

Dated: December 2, 2021



Barbara Jacobs Rothstein
U.S. District Court Judge