COVER SHEET FOR FILING CIVIL ACTIONS

COMMONWEALTH OF VIRGINIA

Case No. ..... (CLERK'S OFFICE USE ONLY)

Richmond City ..... Circuit Court

Virginia Manufacturers' Association et al. ..... PLAINTIFF(S) v./*In re:* Ralph S. Northam et al. ..... DEFENDANT(S)

I, the undersigned [ ] plaintiff [ ] defendant [x] attorney for [x] plaintiff [ ] defendant hereby notify the Clerk of Court that I am filing the following civil action. (Please indicate by checking box that most closely identifies the claim being asserted or relief sought.)

GENERAL CIVIL

Subsequent Actions

- [ ] Claim Impleading Third Party Defendant
  - [ ] Monetary Damages
  - [ ] No Monetary Damages
- [ ] Counterclaim
  - [ ] Monetary Damages
  - [ ] No Monetary Damages
- [ ] Cross Claim
- [ ] Interpleader
- [ ] Reinstatement (other than divorce or driving privileges)
- [ ] Removal of Case to Federal Court

Business & Contract

- [ ] Attachment
- [ ] Confessed Judgment
- [ ] Contract Action
- [ ] Contract Specific Performance
- [ ] Detinue
- [ ] Garnishment

Property

- [ ] Annexation
- [ ] Condemnation
- [ ] Ejectment
- [ ] Encumber/Sell Real Estate
- [ ] Enforce Vendor's Lien
- [ ] Escheatment
- [ ] Establish Boundaries
- [ ] Landlord/Tenant
  - [ ] Unlawful Detainer
- [ ] Mechanics Lien
- [ ] Partition
- [ ] Quiet Title
- [ ] Termination of Mineral Rights

Tort

- [ ] Asbestos Litigation
- [ ] Compromise Settlement
- [ ] Intentional Tort
- [ ] Medical Malpractice
- [ ] Motor Vehicle Tort
- [ ] Product Liability
- [ ] Wrongful Death
- [ ] Other General Tort Liability

ADMINISTRATIVE LAW

- [ ] Appeal/Judicial Review of Decision of (select one)
  - [ ] ABC Board
  - [ ] Board of Zoning
  - [ ] Compensation Board
  - [ ] DMV License Suspension
  - [ ] Employee Grievance Decision
  - [ ] Employment Commission
  - [ ] Local Government
  - [ ] Marine Resources Commission
  - [ ] School Board
  - [ ] Voter Registration
  - [ ] Other Administrative Appeal

DOMESTIC/FAMILY

- [ ] Adoption
  - [ ] Adoption – Foreign
- [ ] Adult Protection
- [ ] Annulment
  - [ ] Annulment – Counterclaim/Responsive Pleading
- [ ] Child Abuse and Neglect – Unfounded Complaint
- [ ] Civil Contempt
- [ ] Divorce (select one)
  - [ ] Complaint – Contested*
  - [ ] Complaint – Uncontested*
  - [ ] Counterclaim/Responsive Pleading
  - [ ] Reinstatement – Custody/Visitation/Support/Equitable Distribution
- [ ] Separate Maintenance
  - [ ] Separate Maintenance Counterclaim

WRITS

- [ ] Certiorari
- [ ] Habeas Corpus
- [ ] Mandamus
- [ ] Prohibition
- [ ] Quo Warranto

PROBATE/WILLS AND TRUSTS

- [ ] Accounting
- [ ] Aid and Guidance
- [ ] Appointment (select one)
  - [ ] Guardian/Conservator
  - [ ] Standby Guardian/Conservator
  - [ ] Custodian/Successor Custodian (UTMA)
- [ ] Trust (select one)
  - [ ] Impress/Declare/Create
  - [ ] Reformation
- [ ] Will (select one)
  - [ ] Construe
  - [ ] Contested

MISCELLANEOUS

- [ ] Amend Death Certificate
- [ ] Appointment (select one)
  - [ ] Church Trustee
  - [ ] Conservator of Peace
  - [ ] Marriage Celebrant
- [ ] Approval of Transfer of Structured Settlement
- [ ] Bond Forfeiture Appeal
- [x] Declaratory Judgment
- [ ] Declare Death
- [ ] Driving Privileges (select one)
  - [ ] Reinstatement pursuant to § 46.2-427
  - [ ] Restoration – Habitual Offender or 3rd Offense
- [ ] Expungement
- [ ] Firearms Rights – Restoration
- [ ] Forfeiture of Property or Money
- [ ] Freedom of Information
- [x] Injunction
- [ ] Interdiction
- [ ] Interrogatory
- [ ] Judgment Lien-Bill to Enforce
- [ ] Law Enforcement/Public Official Petition
- [ ] Name Change
- [ ] Referendum Elections
- [ ] Sever Order
- [ ] Taxes (select one)
  - [ ] Correct Erroneous State/Local
  - [ ] Delinquent
- [ ] Vehicle Confiscation
- [ ] Voting Rights – Restoration
- [x] Other (please specify)

Virginia Admin. Process Act

[ ] Damages in the amount of $ ..... are claimed.

09/15/2020
DATE

[ ] PLAINTIFF [ ] DEFENDANT [x] ATTORNEY FOR [x] PLAINTIFF [ ] DEFENDANT

Matthew D. Hardin
PRINT NAME

1725 I Street NW, Suite 300
ADDRESS/TELEPHONE NUMBER OF SIGNATOR

Washington, DC 20006

434-202-4224 ; MatthewDHardin@gmail.com
EMAIL ADDRESS OF SIGNATOR (OPTIONAL)

*"Contested" divorce means any of the following matters are in dispute: grounds of divorce, spousal support and maintenance, child custody and/or visitation, child support, property distribution or debt allocation. An "Uncontested" divorce is filed on no fault grounds and none of the above issues are in dispute.

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

VIRGINIA MANUFACTURERS ASSOCIATION,	)	
and	)	
JOHN TIGGES, individually and on behalf of his businesses,	)	
and	)	
BISHOP LEON BENJAMIN, Sr.	)	
and	)	
NEW LIFE HARVEST CHURCH,	)	Case No. _____
and	)	
JOSH TIGGES,	)	
and	)	
DAVE LAROCK,	)	
and	)	
ANNE WAYNETTE ANDERSON, individually and on behalf of her businesses,	)	
and	)	
LINDA PARK,	)	
and	)	
HEIDI BUNDY,	)	
Appellants/Plaintiffs,	)	
v.	)	
RALPH S. NORTHAM, Governor of Virginia	)	

and)
)
M. NORMAN OLIVER,)
State Health Commissioner)
)
and)
)
C. RAY DAVENPORT,)
State Commissioner of Labor &)
Industry,)
)
and)
.)
VIRGINIA SAFETY AND)
HEALTH CODES BOARD)

Serve: Mark Herring, Esq.
Attorney General of Virginia
202 N. 9th Street
Richmond, VA 23219

Virginia Department of Health
% Secretary of Health & Human Resources Daniel Carey
109 Governor Street
Richmond, Virginia 23219

M. Norman Oliver, Commissioner
Virginia Department of Health
109 Governor Street
Richmond, Virginia 23219

C. Ray Davenport, Commissioner of Labor and Industry
Main Street Center
600 East Main Street, Suite 207
Richmond, VA 23219

Brian Ball, Secretary of Commerce and Trade
Main Street Center
600 East Main Street, Suite 207
Richmond, VA 23219

Governor Ralph Northam
% Rita Davis, Counsel to the Governor
1111 E. Broad Street
Richmond, VA 23219

Charles L. Stiff, Chairman
Virginia Safety & Health Codes Board
5316 Summer Plains Dr
Mechanicsville, Virginia 23116-6663

APPEAL PURSUANT TO
THE VIRGINIA ADMINISTRATIVE PROCESS ACT,
AND
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NOW COME the Appellants/Plaintiffs in this matter (hereinafter "Claimants"), by and through their undersigned counsel, and state the following:

INTRODUCTION

For months on end, Defendants have taken numerous actions, with constantly shifting standards, to subject millions of Virginians and tens of thousands of Virginia businesses to harmful and burdensome regulations, most carrying the threat of criminal sanction, and nearly all without legal precedence, justification, or authority. The defendants want to wield, unilaterally and indefinitely, unbridled power over every citizen, household, business and church under color of a declared "emergency," yet apparently do not think that the Constitution and laws of Virginia still apply to constrain that power – as long as such self-declared "emergency" remains in effect.

The mandates of the Governor and Commissioner infringe on multiple fundamental rights of the Plaintiffs including their freedom of assembly, freedom of association, free exercise of religion, free speech, privacy, and due process of law. The infringements on these rights are further compounded by numerous instances of unequal treatment. The mandates in

the various Orders of the Governor and Health Commissioner are illegal in at least three fundamental ways and in order for Defendants to prevail, they must win on each of these fundamental threshold issues – and do so for each mandate. A government actor may only permissibly infringe on fundamental rights under the Virginia Constitution if: (A) they have followed procedures required by law, *and* (B) they are operating pursuant to a permissible delegation of legislative authority, *and* (C) they meet the high standards for infringing on multiple rights under the Virginia Constitution.

For virtually every one of Defendants' ongoing "emergency" mandates, they have not met any of these basic thresholds, let alone all three. However, the situation is even worse than that for the Defendants because they have not only violated these elemental principles here-and-there in separate areas of the law, but they have violated all of them simultaneously and cumulatively in each area of law raised by the Plaintiffs.

As an example, consider a religious wedding service. Defendants purport to define a "family," which determines who can sit or stand together at a wedding, thus infringing on freedom of association. Defendants set limits on the size of the gatherings, including social gatherings related to the wedding, which are infringements on freedom assembly. Defendants specifically impose burdensome regulations on religious services that they do not impose on non-religious weddings, infringing on the free exercise of religion. Defendants compel speech by requiring government messages about the coronavirus for a religious wedding but not other services, infringing on free speech, free exercise, and assembly, and association. To enforce the seating chart issues, Defendants would ask event organizers and enforcement officials to enquire about private living arrangements, infringing on privacy rights. There has been no debate in the General Assembly and no law has been

passed to impose these burdensome requirements, nor have administrative procedures requiring a public docket, a notice and comment period, a regulatory impact analysis, and a regulatory flexibility analysis been followed.

Moreover, Defendant Department of Labor and Industry ("DOLI") and Safety and Health Codes Board has jumped on the Governors' Executive Power bandwagon. The Governor specifically directed the DOLI to issue regulations with the parameters set by the Governor instead of those set out in law. He demanded that such rules be done in an emergency fashion outside ordinary procedures under Virginia Administrative Process Act ("VAPA"). In demanding these "Emergency Temporary Standard" (ETS) regulations that govern every employer in Virginia, they must necessarily claim that every employment context in Virginia poses a "grave danger" and that all such mandates are supported by "substantial evidence" and are "necessary" to adequately address the public health threat. The Board not only acquiesced to the Governor's illegitimate demand, but it went even further by incorporating the Governor's current (and constantly changing) illegal Orders (and any subsequent Executive Orders) into their rules to which all Virginia employers are now subject.

For Defendants to prevail in maintaining the ETS regulations, including incorporating the Executive Orders into the ETS regulations, the Executive Branch must demonstrate that: (A) they have followed procedures required by law, *and* (B) they are operating pursuant to a permissible delegation of legislative authority, *and* (C) they meet the high standards for infringing on multiple rights under the Virginia Constitution, *and* (D) such infringements are *all* "necessary" to meet a "grave danger," *and* (E) the rules are "feasible", *and* (F) all of that is supported by "substantial evidence," *and* (F) all of those standards are

met for application of the rules in every employment setting in this Commonwealth. Defendants cannot prevail on any of these factors, let alone all of them. As a result of the above illegal actions, if an employee sneezes, coughs, or has a headache that employee is suspected of being exposed to COVID-19 and must leave a work site not to return for days. None of this works. None of this is based on the law.

Fortunately, Defendants' bloated view of their authority is not the law of this Commonwealth. Unfortunately, Virginia has suffered under unitary rule for at least seven months. It is long past time to end this approach that is deeply antithetical to the rule of law and the rights of all Virginians, including the Plaintiffs in this case.

Allegations

1. This suit arises pursuant to various Constitutional and statutory provisions. First, all Claimants seek review of and challenge rules provided under certain orders issued by Ralph S. Northam, Governor of the Commonwealth of Virginia, and M. Norman Oliver, Commissioner of Health for the Commonwealth of Virginia
2. Second, all Claimants seek review and challenge an Emergency Temporary Standard ("ETS") issued by the Virginia Safety and Health Codes Board (a part of the Virginia Department of Labor and Industry) on July 15, 2020.
3. The currently operative orders containing the rules that Claimants challenge are Executive Order 63 and Order of Public Health Emergency 5 (together "EO 63") (Face Coverings), and Executive Order 67 and Third Amended and Order of Public Health Emergency Seven (together "EO 67")(Phase 3)(September 10, 2020). Claimants further challenge the limitations under prior related Executive Orders, including the shut downs of businesses by categories, restrictions on civil liberties.

These are also clear examples of limits the Governor and Health Commissioner may, and some cases, have already reverted.

4. All Claimants seek review of the provisions in E067 and E063 that meet the definition of a rule under the Virginia Administrative Process Act ("VAPA"), Va. Code § 2.2-4000 *et seq.* ("VAPA"). Claimants seek declaratory judgment invalidating the ETS under Va. Code § 40.1-22 (7). Because the ETS incorporates as a mandatory requirement that covered employers "shall ensure compliance with mandatory requirements of any applicable Virginia executive order or order of public health emergency,"[1] Claimants also challenge the rules in EO63 and EO67 in the context of the ETS. Claimants seek seek declaratory judgment pursuant to Va. Code § 8.01-184, and an injunction pursuant to Va. Code § 8.01-620.
5. Claimants Benjamin, New Life Harvest Church, Josh Tigges, and John Tigges seek declaratory and injunctive relief under the Virginia Religious Freedom Restoration Act ("RFRA"), Va. Code § 57-2.02 (D).
6. Although the claims at issue in this case arise under different legal theories, the factual background giving rise to the claims is similar or even identical.
7. First, the Governor and State Health Commissioner have promulgated numerous rules in EO63 and EO67 without following the statutorily-required procedures of VAPA.
8. Second, the Governor and Health Commissioner have issued rules in their orders without using a permissible delegation of rulemaking authority from the legislature, which must contain policies and standards provided by the General Assembly through enactment of law.

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[1] See 16VAC25-220-40(F) and 16VAC25-220-70(C)(9).

9. Third, the rules in the Orders of the Governor and Health Commissioner impermissibly infringe on fundamental rights and provisions under the Virginia Constitution including freedom of assembly, freedom of association, privacy rights related to freedom of association, free exercise of religion, freedom of speech, and due process.

10. The Virginia Safety and Health Codes Board at the Department of Labor and Industry, continues this problem in the ETS by cross-referencing the Orders of the Governor and Health Commissioner.

11. All Claimants challenge and seek relief with respect to the entire ETS because it was not adopted in accordance with procedures required by law, and because there was a failure to meet statutory standards. Further, the Board undertook actions in excess of its authority, and the regulations are impermissibly vague.

12. Claimants ask this Court to (a) declare the applicable regulations unlawful pursuant to Va. Code 8.01-184; (b) enjoin the defendants from enforcing the unlawful regulations pursuant to Va. Code 8.01-620; and (c) "set aside" the relevant regulations and order the defendants to comply with the statutorily-required procedural requirements pursuant to Va. Code § 2.2-4029 if defendants seek to implement them in the future.

13. Claimants also invoke this Court's inherent power pursuant to the self-executing provisions of the Virginia Constitution to remedy violations of the constitutionally guaranteed separation of powers and non delegation doctrines, as well as violations of the constitutionally guaranteed rights of assembly, free association, free exercise of

religion, privacy, and rights to not participate in compelled speech. See *Gray v. Virginia Secretary of Trans.*, 662 S.E.2d 66, 276 Va. 93 (2008).

14. Lastly, Claimants Bishop Leon Benjamin (in each of his capacities, set forth below), Jon Tigges, and Josh Tigges specifically seek declaratory and injunctive relief pursuant to the state RFRA (Va. Code § 57-2.02 (D)). Claimant Jon Tigges is pursuing claims related to religious wedding services as his business, Zion Springs, is a venue for religious and non-religious weddings. Josh Tigges is planning to be married, possibly in a religious wedding ceremony. Bishop Leon Benjamin is subject to the edicts at issue in this suit both because he is a pastor and in his individual capacity as a practicing Christian.

15. Claimants further seek all other appropriate relief including attorneys cost and fees as provided by law and deemed just and appropriate in the eyes of this Court.

PARTIES

16. The Virginia Manufacturers Association ("VMA") was founded in 1922 and develops constructive policies and activities on behalf of industry by serving as an advocate for legislative, regulatory, taxation, environmental, workplace, business law, insurance, and technology issues, and as an aggregator of business services for its members. It sues in its own right and as a representative of its members. VMA is a small business as that term is defined in VAPA, and many of its members are also small businesses as that term is defined in the relevant statute. Both VMA and its members have employees and maintain workplaces that are subject to the ETS. The employees of both VMA and its members are also subject to the Executive Orders and Orders of Public Health Emergency referenced herein. Absent the regulations and

orders referenced herein, both VMA and its members would regulate their course of conduct and businesses in a safe and responsible manner, but would not follow each and every regulatory requirement referenced herein due to various practical and legal concerns.

17. Jon Tigges is a resident and domiciliary of the Commonwealth of Virginia. He lives and works in Loudoun County, where he and his wife Chris Tigges own three (3) contiguous lots totaling twenty-four (24) acres ("the Property"). He sues in his individual capacity and in his capacity as the owner and manager of Zion Springs LLC ("Zion Springs")—a limited liability company duly organized under the laws of Virginia with its principal place of business in Hamilton, Virginia. Zion Springs is a venue located in Loudoun County hosting weddings and corporate retreats as primary services. Mr. Tigges is adversely affected by the ETS as an employer. Plaintiff Jon Tigges is also directly affected by the rules and orders at issue herein because he is a zealous advocate for those who use facilities he operate for weddings and/or religious events. Absent the regulations and orders referenced herein, both Mr. Tigges and the businesses he operates would regulate their course of conduct in a safe and responsible manner, but would not follow each and every regulatory requirement referenced herein due to various practical and legal concerns.

18. Leon Benjamin, Sr. is a resident of the Commonwealth of Virginia. He is the founder and Senior Pastor and Bishop of the New Life Harvest Church, Inc. located at 3509 Midlothian Turnpike, Richmond, VA 23224. He sues in his individual capacity and in his pastoral capacity, and as a representative of of New Life Harvest Church ("Church"). In addition to other claims for relief set forth elsewhere herein, he seeks

injunctive and other appropriate relief pursuant to Virginia's Religious Freedom Restoration Act because of various harms brought to him and the church by EO63 and E067 and prior Orders. Absent the regulations and orders referenced herein, both Mr. Benjamin and the Church would regulate their course of conduct in a safe and responsible manner, but would not follow each and every regulatory requirement referenced herein due to various practical and legal concerns.

19. The New Life Harvest Church, Inc ("Church") is located at 3509 Midlothian Turnpike, Richmond, VA 23224. The Church has employees and is affected by the ETS and other regulations herein in its role as an employer. The Church is a small business as that term is defined in VAPA. The Church provides religious services of various types, marriage guidance, pre-marital assistance, and promotes its faith in the community. The regulations and orders referenced herein affect the conduct of the Church and its ability to practice its faith as it believes it is required to by the tenets of its own doctrines.

20. Josh Tigges is a resident and domiciliary of the Commonwealth of Virginia. He lives and works in Loudoun County, where he is employed as a server. He is currently planning his wedding, and plans to invite guests. He sues in his capacity as an individual and in his capacity as a regulated employee. Absent the regulations and orders referenced herein, he would conduct himself in a responsible manner but would not follow each and every one of the requirements set forth in the relevant orders and regulations.

21. Dave LaRock is a resident of the Commonwealth of Virginia, and has been elected to serve in the House of Delegates as a representative of District 33. He is subject to the

challenged regulations as an individual. As a member of the House of Delegates, he is uniquely harmed by the usurpation of the legislative power of this Commonwealth by actions of the Executive Branch defendants which do not comport with legislative grants of authority. As an individual, he has been subject to and adversely affected by the rules in the Orders and faced curtailment of his civil liberties. He is also an independent contractor adversely affected by the ETS, and supervises the work of employees in his context as a member of the General Assembly. Absent the regulations and orders referenced herein, he would conduct himself in a responsible manner but would not follow each and every one of the requirements set forth in the relevant orders and regulations.

22. Anne Waynette Anderson is a resident of the Commonwealth of Virginia and owner of Sponsor Hounds, LLC which owns an event and concert venue in Roanoke. The venue has included music festivals, music acts and other entertainment. She is also President of River Rock Entertainment, Inc located in Roanoke, Va and also connected to the concert and event venue. As an individual, she has been subject to and adversely affected by the rules in the Orders and faced curtailment of her civil liberties. As a business owners, the curtailments and limits on assembly and other rules have adversely affected her business. She is also and employer adversely affected by the ETS. She sues both in her individual capacity and in her capacity as the owner of Sponsor Hounds, LLC and River Rock Entertainment, Inc., both of which are small businesses as that term is defined in VAPA. Absent the regulations and orders referenced herein, she would conduct herself in a responsible manner but would not follow each and every one of the requirements set forth in the relevant

follow each and every one of the requirements set forth in the relevant orders and regulations challenged herein.

25. Defendant Ralph S. Northam is the Governor of the Commonwealth of Virginia and is sued in his official capacity. The Governor has been delegated certain authority from the Virginia General Assembly in his capacity as Governor, and also wields some power as the Director of Emergency Management during a time of declared emergency.[2]

26. Defendant Dr. M. Norman Oliver is the State Health Commissioner for the Commonwealth of Virginia and issued in his official capacity.

27. Defendant C. Ray Davenport is the Commissioner of Labor and Industry, and is sued in his official capacity as such.

28. Defendant, Virginia Safety and Health Codes Board promulgated the ETS.

JURISDICTION AND VENUE

29. This Court has jurisdiction for all claims herein brought pursuant to Va. Code § 17.1-513, Va. Code § 2.2-4026, Va. Code § 40.1-22.7, Va. Code § 57-2.02, and pursuant to all self-executing claims under the Virginia Constitution.

30. Venue for all of claims is proper in the Circuit Court for the City of Richmond pursuant to Va. Code § 8.01-262 because the City of Richmond is where (i) the defendants have their principal place of employment, where substantial portions of their business activity is conducted; (iii) the the plurality of the evidence relevant to this proceeding is likely located; and (iv) some or all of the actions which give rise to the claims took place.

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[2] Va. Code § 44-146.18

STATEMENT OF FACTS

31. On February 7, 2020, the Health Commissioner declared COVID-19 a communicable disease of public health threat.

32. On March 12, 2020, the Governor issued Executive Order 51 ("EO 51")[3] declaring a state of emergency in Virginia "to continue to prepare and coordinate our response to the potential spread of COVID-19, a communicable disease of public health threat." That declaration took no steps to impose new law on citizens or businesses in Virginia but rather asserted means of assistance; authorized rules of expedition for the government to enter contracts; and activated existing statutory provisions regarding price gouging.

33. Subsequently, the Governor and Health Commissioner issued a number of executive orders and orders of public health emergencies (along with amendments) severely limiting the Claimants' rights of assembly, association, religious services, commercial activity, and other private actions under a complicated and broad regulatory structure that subjects businesses and citizens to criminal penalties for failure to comply. For many businesses or houses of worship, if there is a failure to follow a specific rule, the Orders requires that the business operations or religious services cease operation entirely.

34. On March 23, 2020, the Governor issued Executive Order 53 ("EO 53"). EO53 unilaterally closed certain recreational and entertainment business, severely limited the operations of many retail businesses, restaurants and dining establishments, which

[3] This Court may take judicial notice of all orders referenced herein, which are available at: https://www.governor.virginia.gov/executive-actions/. *See* Rule 2:202.

the Governor -in his sole discretion- deemed- to be "non-essential," and banned certain (though not all) gatherings of more than ten (10) people, including weddings, church services, funerals and backyard barbeques (though exempting larger establishments like Wal-Mart and Home Depot from this limit). His order also required closure of K-12 schools, both public and private, for the remainder of the academic school year.

35. On March 30, 2020, the Governor issued Executive Order 55 ("EO 55"), which required: "All individuals in Virginia shall remain at their place of residence, except as provided below by this Order and Executive Order 53."

36. On May 26, 2020, effective May 29th—78 days after initially declaring a public emergency—the Governor and Health Commissioner issued Executive Order 63 and Order of Public Health Emergency Five (together, "EO 63") requiring the wearing of face coverings while inside public and most commercial buildings. Like the previous orders, these orders subjected individual citizens and businesses to criminal sanctions for failure to comply.

37. Violations of these orders may be enforced as Class 1 misdemeanors pursuant to Virginia Code §§ 32.1-27 or 44-146.17. On information and belief, some enforcement actions may have been initiated for violations across the Commonwealth.

38. As part of his "reopening" Virginia, the Governor has announced "Forward Virginia Guidelines" which set forth various "phases" for the relaxation of his unilateral strictures. To date, there have been four official phases: Phase Zero (i.e. the initial draconian prohibitions under EO 53), Phase One, Phase Two, and Phase Three.[4]

[4] These Phases are outlined in EO 61, which itself has been amended three times.

39. Notably, each phase contains a long list of restrictions that fundamentally regulate businesses and religious services as well as limiting the right of citizens to make their own decisions over: (i) how, when, and where to gather with friends and family; (ii) where to eat; (iii) what to wear; and (iv) and how to spend their recreational time.

40. Pursuant to Executive Order 67 and Order of Public Health Emergency Seven (together, "EO 67"), Virginia entered Phase Three on July 1, 2020.

41. The Governor publicly announced that "if we see surges [of COVID cases] in the commonwealth," Virginia could return to earlier phases.[5]

42. After the purported effective date of the Orders as written in the Orders themselves, the Northam Administration took steps to file the orders in the Virginia Register of Regulations under the category "Governor."

43. The Governor amended EO 51 extending the State of Emergency with a stated effective date of March 12, 2020, but with an extension with a signature date of May 26, 2020. This extension was first published in the Virginia Register of Regulations on June 8, 2020.

44. EO 61 easing the Phase One restrictions had an effective date as written on May 15th but was first published in the Virginia Register of Regulations on June 8, 2020.

45. EO 62, temporarily delaying Northern Virginia from entering phase one was stated as effective on May 15, 2020 (signed on May 8th) but published by in the Virginia Register of Regulations on June 8, 2020.

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[5] Rick Massimo, *Northam: Virginia will enter Phase Three July 1*, WTOP News (June 24, 2020), https://wtop.com/coronavirus/2020/06/virginia-coronavirus-phase-three-update/.

46. EO 63 regarding the requirement to wear face coverings while inside buildings was stated as effective on May 29, 2020 but was published in the Virginia Register of Regulations on June 8, 2020.

47. EO 65 (Phase Two excluding Richmond City and Northern Virginia) has an effective date stated as June 5, 2020 but was published in the Virginia Register of Regulations on June 22, 2020.

48. Amended EO 65 was signed on June 9, 2020 and allowed Richmond City and Northern Virginia to enter Phase Two on June 12, 2020. The Order was published in the Virginia Register of Regulations under the title Governor on July 6, 2020.

49. EO 67 (Phase Three) was stated as effective on July 1, 2020 but was published in the Virginia Registrar of Regulations on July 20, 2020.

50. On July 28, 2020, the Governor and Health Commissioner signed Executive Order 68 and Order of Public Health Emergency Eight (together, " EO 68"). The order restricts the operation of restaurants and food services businesses in the Eastern Region of Virginia. EO 68 also reduced the numerical limits on gathering back to 50 people from 250. The order explained reasons for the tighter regulations based on metrics the Governor and Health Commissioner claimed distinguished that region. EO 68 was in effect from July 31, 2020 until rescinded. EO 68 was published in the Virginia Register of Regulations under the category "Governor" on August 17, 2020.

51. The third Amended EO 67 was signed on September 10, 2020. The Third Amended EO 67 stated that EO 68 expired on September 10, 2020 and made other changes such as a change to the definition of "Family Member."

52. Under Phase Three, most businesses are "permitted" to operate under "guidelines" that have some sections described as "mandatory" and others stated as "best practices." In some areas, there is a discrepancy between the mandatory sections and the text of the Orders themselves.

53. On April 23, 2020, the Commissioner of Labor and Industry received a petition from the Virginia Legal Aid Justice Center (LAJC), Community Organizing, and Community Solidarity with the Poultry Workers organizations to enact an emergency regulation to address COVID-19 related workplace hazards in the poultry processing and meatpacking industries.

54. On May 26, 2020, Governor Ralph Northam issued a revised Executive Order 63 that provides in part:

> "E. Department of Labor and Industry
> Except for paragraph B above, this Order does not apply to employees, employers, subcontractors, or other independent contractors in the workplace. **TheCommissioner of the Virginia Department of Labor and Industry shall promulgate emergency regulations and standards to control, prevent, and mitigate the spread of COVID-19 in the workplace**. The regulations and standards adopted in accordance with §§ 40.1-22(6a) or 2.2-4011 of the Code of Virginia **shall apply to every employer, employee, and place of employment within the jurisdiction of the Virginia Occupational Safety and Health program as described in 16 Va. Admin. Code § 25-60-20 and Va. Admin. Code § 25-60-30.** These regulations and standards **must address personal protective equipment, respiratory protective equipment, and sanitation, access to employee exposure and medical records and hazard communication.** Further, these regulations and standards **may not conflict with requirements and guidelines applicable to businesses set out and incorporated into Amended Executive Order 61 and Amended Order of Public Health Emergency Three."**(Emphasis added).

Although EO 63 does not mention the Safety and Health Codes Board, the Governor issued a news release which says in part:

> "The Governor is also directing the Commissioner of the Department of Labor and Industry to develop emergency temporary standards for occupational safety that will protect employees from the spread of COVID-19 in their workplaces. **These occupational safety standards will require the approval by vote of the Virginia Safety and Health Codes Board** and must address personal protective equipment, sanitation, record-keeping of incidents, and hazard communication. Upon approval, the Department of Labor and Industry will be able to enforce the standards through civil penalties and business closures."

55. Around two weeks later, on June 12, 2020 DOLI posted a Notice of Meeting for a June 24, 2020 emergency meeting of the Safety and Health Codes Board to consider for adoption the proposed Emergency Temporary Standard ("ETS"), applicable to every employer, employee, and place of employment in the Commonwealth of Virginia within the jurisdiction of the Virginia Occupational Safety and Health Program ("VOSH") program as described in §§16VAC 25-60-20 and 16VAC 25-60-30.

56. On June 12, 2020, DOLI also opened a 10-day Comment Forum to provide the public the opportunity to submit written comments on the Department's request to consider for adoption an ETS. The Safety and Board held a further meeting on June 24, 2020.

57. On July 15, 2020, the Virginia Department of Labor and Industry's Safety and Health Codes Board approved the ETS for COVID-19 to be enforced by the Virginia Occupational Safety and Health Program (VOSH). The ETS includes an extensive list of requirements that all employers within VOSH's jurisdiction must follow, regardless of the level of risk of exposure to COVID-19, and additional requirements for employers based on the risk of exposure. The ETS went into effect on July 27, 2020.

The standard will expire after six months or "upon expiration of the Governor's State of Emergency."

58. On July 24, DOLI posted the ETS as a proposed permanent standard on its website providing a comment period from July 27, 2020 to September 25, 2020. The ETS specifically states in 16VAC § 25-60-10 (B) that "this standard shall not be extended or amended without public participation in accordance with the Virginia Administrative Process Act (§ 2.2-4000 et sec. of the Code of Virginia) and 16VAC25-60-170." Public participation under VAPA ordinarily includes comments on a regulatory impact analysis and regulatory flexibility analysis, but none have been provided for this comment period.

COUNT I - THE VIRGINIA ADMINISTRATIVE PROCESS ACT

59. Paragraphs 1-58 are hereby incorporated by reference, including with respect to all Errors of Law set forth below.

60. Claimants challenge the purported creation of law through rules of general applicability by the defendants under color of State authority (including, with out limitation, under EO63 and EO67). Claimants further challenge any progeny of these orders ("the Orders") which contain similar rules to those of concern in this complaint.

61. VAPA applies to the rules in the Orders because of the specific definitions in VAPA. VAPA provides that a "rule" or "regulation" means any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws. This definition covers the orders and regulations at issue in this case.

62. VAPA defines a covered agency as "any authority, instrumentality, officer, board or other unit of the state government empowered by the law to make regulations or decide cases." Absent the status of operating as an administrative agency neither the Governor, the Health Commissioner, or any other defendant would have an authority create regulations, even to fill in ostensible legislative gaps. Both the Governor and Health Commissioner in this context can only described as one of the listed entities empowered by to make regulations as defined by the VAPA definition of a "rule" or "regulation."

63. The orders, regulations, and rules at issue in this case were published and are not internal guidance or mere clarifications of other law. Through the Orders, the Governor, Health Commissioner, and other defendants purported to create law and to hold citizens and businesses in Virginia subject to them.

64. VAPA is intended to be a default or catch-all source of administrative due process, applicable whenever the basic law fails to provide process. In summary, VAPA governs an agency's actions except where that agency's basic law provides its own due process or where VAPA expressly exempts a particular agency or its actions. *School Bd. v. Nicely*, 12 Va. App. 1051, 1060, 408 S.E.2d 545, 550 (1991). *See also* Va. Code §§ 2.2-4002. Accordingly, VAPA applies to both Va. Code §§ 44-167.17 and 32.1-13.

65. While Va. Code § 32.1-13 does grant the Board and Commissioner of Health authority to make separate "orders and regulations to meet any emergency," Va. Code § 32.1-24 ("Applicability of Administrative Process Act") is clear that "The provisions of the Administrative Process Act (§ 2.2-4000 et seq.) shall govern the procedures for *issuing all orders and regulations under the provisions of this Code administered by*

the Board, the Commissioner or the Department unless exempt from the Administrative Process Act." (emphasis added).

66. There is no exemption provided by the VAPA or the basic laws for the rules in the various Executive Orders and Orders of Public Health Emergency. *See* Va. Code § 2.2-4000, *et seq*. Va. Code §§ 2.2-4002 and 2.2-4006. Therefore, the VAPA controls.

67. In a similar case, the Governor and Health Commissioner argued that Va. Code § 32.1-26 is an exemption from VAPA.[6] This is incorrect. Va. Code § 32.1-26 has a particular requirement for a hearing under that specific section in the context of certain orders of enforcement. The language of Va. Code § 32.1-26 applies only to procedures under Va. Code § 32.1-26, and is not a VAPA exemption of general applicability. Va. Code § 32.1-26 states the provisions of this section (meaning Va. Code § 32.1-26) shall not affect the authority of the Board to issue separate orders and regulations and to meet any emergency as provided in Va. Code § 32.1-13. This is not an exception from Va. Code § 32.1-24 the section that states VAPA applies to orders and regulations. This is not an exemption from VAPA. By its terms, this language related to 32.1-13 is only an exception to Va. Code § 32.1-26 orders of enforcement. Indeed, this provision is evidence the General Assembly understood exactly what should and should not apply.

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[6] See Response to Verified Petition For Writ of Mandamus at 33, *Park et. al.* v. *Northam, et al.*, Record No. 200767 (Supreme Court of Virginia).

68. The Governor and Health Commissioner have not invoked nor followed the conditions of Va. Code § 2.2-4011,[7] which specifically address "emergency regulations," i.e. "those necessitated by an emergency situation."[8]

69. Upon information and belief, the Governor and the Health Commissioner have not submitted a written report under Va. Code 2.2-4005(C) discussing a relevant exemption nor submitted the rules under the Orders as an emergency rule under VAPA.

70. Pursuant to Va. Code § 2.2-4026 (A), "Any person affected by and claiming the unlawfulness of any regulation or party aggrieved by and claiming unlawfulness of a case decision and whether exempted from the procedural requirements… shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents in the manner provided by the Rules of Supreme Court of Virginia."

71. Pursuant to Va. Code § 2.2-4026 (B), "in any court action under this section by a person affected by and claiming the unlawfulness of any regulation on the basis that any procedure for the promulgation or adoption of a regulation specified in this chapter or in such agency's basic law, the burden shall be upon the party complaining

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[7] Not to mention the fact, as discussed *infra*, that the "emergency" has now existed for over six months. Clearly there is enough time for public notice and comment—even if the structure needs to change to adopt to the post-COVID world.

[8] VAPA is much more than just a requirement for a notice and comment period, which can be waived by going through the procedures in the emergency rule provision of Va. Code § 2.2-4011. VAPA provides a waiver of sovereign immunity, specific statutory language for standing, and numerous other requirements for the processing of rules. Va. Code § 2.2-4011 is not an exemption from VAPA; but only Va. Code § 2.2-4002 and 2.2-4006 provide exemptions from VAPA.

of the agency action to designate and demonstrate the unlawfulness of the regulation by a preponderance of the evidence. If the court finds in favor of the party complaining of the agency action, the court shall declare the regulation null and void and remand the case to the agency for further proceedings."

72. In *Virginia Board of Medicine v. Virginia Physical Therapy Association*, 13 Va. App. 458, 413 S.E.2d 59 (1991), aff'd, 245 Va. 125, 427 S.E.2d 183 (1993), the Court of Appeals ruled as follows:

> Under the [Administrative Process Act], "rule" and "regulation" are defined as "any statement of general application, having the force of law, affecting the rights or conduct of any person, promulgated by an agency in accordance with the authority conferred on it by applicable basic laws." Code § 9-6.14:4(F) (emphasis added). "Promulgate" means to publish or to announce officially, and is commonly used in the context of the "formal act of announcing a statute." Black's Law Dictionary 634 (5th ed. 1983). The [Administrative Process Act] and the Virginia Register Act provide the procedure for the promulgation and adoption of a rule or regulation. An agency's rule or regulation is invalid if the agency failed to comply with these statutes in the promulgation process. 13 Va. App. at 466, 413 S.E.2d at 64

73. According to Va. Code § 2.2-4027, the burden is upon the party complaining of agency action to designate and demonstrate an error of law subject to review by the court.

74. Such issues of law include: (i) accordance with constitutional right, power, privilege, or immunity, (ii) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlement in connection with case decisions, (iii) observance of required procedure where any failure therein is not mere harmless error, and (iv) the substantiality of the evidentiary support for findings of fact.

75. In addition to any other judicial review provided by law, a small business, as defined in subsection A of Va. Code § 2.2-4007.1, that is adversely affected or aggrieved by final agency action shall be entitled to judicial review of compliance with the requirements of subdivision A 2 of § 2.2-4007.04 and § 2.2-4007.1 within one year following the date of final agency action.

76. Paragraphs 1-75 are hereby incorporated by reference with regard to all Errors of Law set forth below.

77. The Governor, Health Commissioner, and other defendants violated all pertinent provisions of VAPA in enacting the rules in the Orders. Specifically, those statutory provisions include (i) the requirement at Va. Code § 2.2-4007.01 to provide notice of intended regulatory action; (ii) the requirement at Va. Code § 2.2-4007.02 relating to public participation guidelines; (iii) the requirement at Va. Code § 2.2-4007.03 to provide meaningful opportunities for comment, and other meaningful provisions which restrict the ability fo an agency to act unilaterally without a meaningful process involving participation from the public and a consideration of the impact its actions will have.[9]

78. The emergency rules section of VAPA, Va. Code § 2.2-4111, cannot support actions taken months after the initial declaration of a State of Emergency. Neither the

[9] Additionally, as stated in the final provision, the failure to comply with the requirements of this statutory section cannot be deemed "mere harmless error." See also Va. Code § 2.2-4007.04 (requiring an agency to provide an economic impact analysis, Va. Code § 2.2-4007.04:01 concerning notice of certain departments, Va. Code § 2.2-4007.05 with respect to providing notice to the Registrar (including the content and manner of submission), Va. Code § 2.2-4007 requiring an agency to provide a regulatory flexibility analysis for small businesses, and Va. Code § 2.2-4112 to file the regulation with the Registrar of Regulations as a regulation and in a timely manner.

Governor nor the Health Commissioner have set forth a public process, regulatory impact analyses, regulatory flexibility analyses, a public docket, or any other element of VAPA, even though they have had countless opportunities to do so in recent months.

79. All of these VAPA steps are important building blocks to quality and public acceptance of regulations, and none of them have been followed. All that has been provided is what is stated in declarative form in the Orders. There has been no analysis of impacts and no consideration of "less restrictive" alternatives. There is no administrative record containing evidence on which the Governor and Health Commissioner have been relying.

80. Paragraphs 1-79 are hereby incorporated by reference in regard to all Errors of Law set forth below.

81. The Governor and Health Commissioner have create rules of general applicability that threaten criminal sanctions on individuals, businesses, and churches in Virginia. Generally, and in the first instance, the creation of law must go through the General Assembly. Accordingly, the Executive Branch can only create such rules where there is a permissible grant of rulemaking authority from an enactment of law from the General Assembly through the established Constitutional process.

82. The Orders reference the Governor's powers under Article V of the Constitution of Virginia, Virginia Code § 44-146.17, and "any other applicable law." Likewise, the Health Commissioner relies on the powers provided in Va. Code §§ 32.1-13, 20, and 35.1-10.

83. The Virginia Constitution permits the delegation of rulemaking authority to an administrative agency and the legislature does grant rule making authority on a regular basis.

84. However, the Virginia Constitution does not provide the power to create law to the Executive Branch in the first instance, and nothing in Article V provides such authority.

85. Separation of Powers regarding the creation of law is fundamental precept of our Constitutional Republic and is protected in several ways in the Constitution of Virginia.

86. Va. Const. Art. I, §5 states "The legislative, executive, and judicial departments shall be separate and distinct, so that none exercises the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time; provided , however, administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe.".

87. Va. Const. Art. I, § 6. states that:

> That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of **their representatives duly elected, or bound by any law to which they have not, in like manner, assented** for the public good. (emphasis added)

88. Virginia's Constitution has consistently maintained, in one form or another since 1776, "[t]hat **all power of suspending laws, or the execution of laws**, by any authority, **without consent of the representatives of the people**, is injurious to their

rights, and ought not to be exercised." VA. CONST. arT. I, § 7 (emphasis added). *See generally Howell*, 292 Va. at 344-48, 788 S.E.2d at 720-22.

89. Va. Const. Art. III, § 1 states:

> The legislative, executive, and judicial departments shall be separate and distinct, so that none exercises the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time; provided , however, administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe.

90. Va. Const. Art. IV , § 1 states that "**The legislative power of the Commonwealth shall be vested in a General Assembly**, which shall consist of a Senate and House of Delegates. **No law shall be enacted except by bill.** (emphasis added).

91. Quite simply, the Legislative Power resides with the General Assembly with participation by the Governor through a Constitutional process. Separation of Powers belongs to and is for the benefit of the citizens of Virginia. The legislature may not give the Legislative Power to the Executive Branch.

92. "Deeply embedded in the Virginia legal tradition is 'a cautious and incremental approach to any expansions of the executive power.'" *Howell v. McAuliffe*, 292 Va. 320, 327, 788 S.E.2d 706, 710 (2016) (quoting *Gallagher v. Commonwealth*, 284 Va. 444, 451, 732 S.E.2d 22, 25 (2012)). This tradition reflects our belief that the "concerns motivating the original framers in 1776 still survive in Virginia," including their skeptical view of the "the unfettered exercise of executive power."

93. To claimants' knowledge, no previous Governor or Virginia legislature has ever placed a statewide numerical limitation on assembly or provided a government definition of who may or may not sit or stand together in certain settings, among other

100. Va. Code § 44-146.17 contains specific grants of authority. However, the rules in the Orders do not operate under or relate to the language of greater specificity under Va. Code § 44-146.17. For example, under Va. Code § 44-146.17 there are core — and obviously narrow — provisions concerning an operation plan, directing evacuations, addressing exceptional circumstances related to orders of quarantine, or rules to control, restrict, allocate or regulate the use, sale, productions and distribution of food, clothing and other commodities, materials, goods services and resources under state or local emergency services programs. The parts of the Orders that complainants contest are not covered under any of this language.

101. Va. Code § 44-146.17 states: "The Governor shall be Director of Emergency Management. He shall take such action from time to time as is necessary for the adequate promotion and coordination of state and local emergency services activities relating to the safety and welfare of the Commonwealth in time of disasters."

102. Defendants have relied on a few lines in § 44-146.17(1), namely, the power "To proclaim and publish such rules and regulations and to issue such orders as may, in [the Governor's] judgment, be necessary to accomplish the purposes of this chapter including, but not limited to, such measures as are in his judgment required to control, restrict, allocate or regulate the use, sale, production and distribution of food, fuel, clothing and other commodities, materials, goods, services and resources under any state or federal emergency services programs."

103. Even here, the "including" clause is of no assistance to Defendants. Effectively, the Governor claims the source of authority is the part of the sentence "to proclaim and publish such rules and regulations and to issue such orders as may, in his judgment be

necessary to accomplish the purposes of this chapter…" This is precisely the type of language that was determined to be insufficient as a basis of a permissible delegation of rulemaking authority in cases such as *Bell.*

104. Defendants, meanwhile, ignore language that limits what constitutes an emergency for purposes of a rule under that chapter. An "Emergency" is defined as:

> any occurrence, or threat thereof, whether natural or man-made, which results or may result in substantial injury or harm to the population … and may involve governmental action beyond that authorized or contemplated by existing law **because governmental inaction for the period required to amend the law to meet the exigency would work immediate and irrevocable harm** upon the citizens or the environment of the Commonwealth or some clearly defined portion or portions thereof Va. Code § 44-146.16 (emphasis added).

105. Thus, for purposes of the emergency authority, "emergency" is a period of time during which the Chief Executive must act because there is not time to "amend the law" through legislative means. *See id.* This is a legislative restriction consistent, in part, with concerns over Separation of Powers. *See also Wisconsin Legislature v. Palm,* 2020 Wisc. LEXIS 121 ("Constitutional law has generally permitted the Governor to respond to emergencies without the need for legislative approval … But the Governor's emergency powers are premised on the inability to gain legislative approval given the nature of the emergency.").

106. In regard to COVID-19, the state of emergency was declared on March 12, 2020—over six (6) months ago. Ironically, March 12th was the same day that the Virginia State Legislature adjourned its regular session, so (nearly) all members of the legislature were physically present in Richmond at that time.

107. The Governor could have issued a contemporaneous request for the legislature to remain in session to address this emergency. *See* Va. Const., Art. IV, § 6 ("The Governor may convene a special session of the General Assembly when, in his opinion, the interest of the Commonwealth may require . . .").

108. There has been no statement of the Governor regarding the inability to "amend the law to meet the exigency" that is COVID-19. The Governor did not make a requests for the legislature to convene for an emergency session—as he did following the shooting in Virginia Beach in 2019, when the legislature was called into special session just four weeks afterwards to consider gun control legislation.[11]

109. Va. Code § 44-146.15 (4) provides another limitation on unilateral actions by the Executive. Under this provision, nothing in the statutory chapter is to be construed to: "...Affect the jurisdiction or responsibilities of police forces, firefighting forces, units of the armed forces of the United States or any personnel thereof, when on active duty; but state, local and interjurisdictional agencies for emergency services shall place reliance upon such forces in the event of declared disasters..." The Governor and Health Commissioner have used this purported authority to create a criminal sanction for millions of Virginians and tens of thousands of businesses with respect to limits on assembly, distancing requirements, status of relationships, across every segment of economic life. These actions affect the responsibility of police forces.

110. The Defendants' strained reliance on Va. Code § Section 32.1-13 does not satisfy the standards in *Bell*. The provision states:

[11] *See* Campbell Robinson, *A Gun-Focused Special Session in Virginia Ends Abruptly*, New York Times (July 9, 2019).

> The Board may make separate orders and regulations to meet any emergency, not provided for by general regulations, for the purpose of suppressing nuisances dangerous to the public health and communicable, contagious and infectious diseases and other dangers to the public life and health. (emphasis added).

111. The relevant statute, facially or as interpreted by the defendants, fails to provide meaningful legislative policies or standards.

112. While the Governor and Health Commissioner purport to rely on general powers, the General Assembly has granted the executive specific powers related to communicable diseases. The Defendants have not used such specific grants of authority and the claimants do not challenge specific, narrow grants of authority in this case.

113. Va. Code Chapter 44 and Chapter 32.1 have specific and detailed statements from the legislature concerning "evacuations," "quarantines," "isolations," and the provision of goods and services. Despite referencing these statutes in the Executive Orders, neither the Governor the Health Commissioner have actually followed the requirements laid out in their provisions.

114. Title 44, as the original source of emergency authority, speaks to the Governor's powers related to communicable diseases (such as COVID-19). Specifically, Va. Code § 44-146.17(1) permits the Governor to "address exceptional circumstances that exist relating to an order of quarantine or an order of isolation . . . for an affected area of the Commonwealth pursuant to …Va. Code § 32.1-48.05, *et seq*."

115. To date, no such orders of quarantine or isolation under Title 32.1 have been issued.

116. Further, the Commissioner is required to petition the circuit court for the county in which the quarantined individual(s) live for *ex parte* review and confirmation of the quarantine order as soon as possible. Va. Code § 32.1-48.09(D). This review requires the circuit court to find that that the quarantine "is being implemented in the **least restrictive environment** to address the public health threat effectively." Va. Code § 32.1-48.09(G) (emphasis added).

117. Finally, such a petition must be predicated on a factual "determination" by the Commissioner that the persons subject to the quarantine order "are known to have been exposed to or infected with or reasonably suspected to have been exposed to or infected with" the disease. Va. Code § 32.1-48.05(A).

118. Isolation orders have even more stringent prerequisites. First, they only relate to specific individuals—and, thus, provide no authority for the executive orders at issue. Va. Code§ 32.1-48.02(A). Additionally, they afford due process rights to the affected individual which have not been provided here, such as the right to petition for a hearing. Va. Code§ 32.1-48.03. None of those rights have been provided here.

119. In short, the Governor appears—both implicitly and through briefs on related cases —to rely on general emergency authority outside of this specific provision related to quarantine and isolation. *See* Va. Code § 44-146.17(1) ("The Governor shall have . . . the following powers and duties . . . [t]o proclaim and publish such rules and regulations and to issue such orders as may, in his judgment, be necessary to accomplish the purposes of this chapter **including, but not limited to** . . . .").[12] The

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[12] Response to Verified Petition For Writ of Mandamus at p. 27, *Marrs* v. *Northam, et al.*, Record No. 200573 ("the Governor is authorized to issue orders that go beyond" those which are specifically delineated)

Defendants' actions have turned a statutory scheme which was specifically tailored to provide due process protections and meaningful judicial review on its head, regulating millions of Virginians with no process for participation in crafting the regulation or for judicial review afterwards.

120. Where there is an (alleged) conflict between a statute of general application and a specific statute addressing the precise issue, "[t]he more specific statutory provisions must prevail." *Frederick Cnty. Sch. Bd. v. Hannah*, 267 Va. 231, 237, 590 S.E.2d 567, 570 (2004).

121. Here, the legislature has given specific authority to the Governor in matters "concerning a communicable disease of public health threat" (such as COVID-19). See Va. Code § 44-146.17(1). Specifically, the Governor "may address exceptional circumstances that exist **relating to an order of quarantine or an order of isolation**" concerning such diseases. *Id.*

122. When there are no orders of quarantine or isolation, the Governor cannot create his own regulatory structure – un-tethered to the Code and ungoverned by VAPA – to restrict the rights of citizens. This is especially so when the Governor has no evidence any particular individual has been infected or even exposed to COVID-19.

123. The Governor and the Health Commissioner have made the Separation of Powers problem worse by choosing rules that infringe on fundamental Constitutional rights. Such infringement would be highly problematic for the legislature, but is especially troubling when promulgated by the executive alone.

124. In the instant case, the Executive Branch is creating every element of this new regulatory scheme without reference to any statutory text other than a general purpose

clause. The Executive Branch's major constructs include limits on assembly, distancing, separating classes by definitions of households and families, categorizing essential versus not essential, providing for the differentiation of business categories, and other intrusive regulations. There are no standards or policies in the legislative text to guide these Executive Branch decisions.

125. Paragraphs 1-124 are hereby incorporated by reference in regard to all Errors of Law set forth below.

126. EO67 provides numerous requirements for a variety of businesses regarding distancing, seating, cleaning, and face masks. In the last paragraph for many of these provisions the Order states "If any such business cannot adhere to these requirements, it must close." The same language applies to religious services pursuant to B. 1 (F) of the EO67.

127. Pursuant to EO67 A (13), regarding enforcement the Governor and Health Commissioner state in part:

> The Virginia Department of Health shall have authority to enforce section A of this Order. Any willful violation or refusal, failure, or neglect to comply with this Order, issued pursuant to § 32.1-13 of the Code of Virginia, is punishable as a Class 1 misdemeanor pursuant to § 32.1-27 of the Code of Virginia. The State Health Commissioner may also seek injunctive relief in circuit court for violation of this Order, pursuant to § 32.1-27 of the Code of Virginia. In addition, any agency with regulatory authority over a business listed in section A may enforce this Order as to that business to the extent permitted by law.

128. The Order's provision requiring closure of a business effectively operates as a sanctions for the other requirements in the order. Such a sanction, however, is provided for under Va. Code § 32.1-27 only as part of a carefully-crafted legislative

scheme which protects due process rights and provides for judicial review. The creation of a sanction unilaterally by the Governor or Health Commissioner absent such judicial review is in excess of their delegated authority.

129. Paragraphs 1-128 are hereby incorporated by reference in regard to all Errors of Law set forth below.

130. VA. Const., Art. I, § 12 states: "the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble …."

131. By definition, a numerical limitation by the state on the size of assemblies is an infringement on Claimants' right to peaceably assemble. A statewide limitation on the size of assemblies in Virginia is unprecedented. Moreover, the infringement on the right of assembly has uneven application under the rules of the orders. For months, there was a 10-person, and then a 50-person, restriction on assembly, including for weddings, celebrations, sporting events, family reunions, and Easter church services. Now the restriction has a higher limit (but includes a restriction on occupancy in certain settings that are lower limts). However, these same restrictions did not and do not now apply to a large meeting of lawyers at a law firm. Countless individuals performing functions together through their employment is not a "gathering" under the Order. Crowds are allowed at a Walmart, Lowes, or other large "essential" stores without those restrictions.

132. After numerical limits of 10 persons in Phase One and 50 in Phase Two, the numerical limits on assembly are 250 under EO 67. These limitations on assembly included arbitrary government definitions of "family" as part of defining the 10-

person limit. EO 68 generally has gone back to a 50-person limit on assembly. The limits on assembly apply in certain circumstances, but not in others, without apparent reasons being given to attempt to justify the distinctions.

133. EO 67 Third Amended and various standards referred to in that Order incorporate a separate document styled "Safer at Home: Phase Three Guidelines For All Business Sectors" (hereinafter "Guidelines"). Despite its use of the term "guidelines," the document has sections called "best practices" and sections described as "Mandatory Requirements." It states that establishments must either implement these mandatory requirements or close.

134. The requirements vary by setting, but the settings are generally parallel to EO 67. The mandatory requirements in the Guidelines, however, use materially different terms than those used in EO 67. Where EO 67 has a "family" exception for distancing, the "mandatory requirements" provisions employ the term "members of the same household" and the term "at all times" in various sections.

135. Curiously, the definition of "Family members" in EO 67 would not even include a married couple who are not currently "residing in the same household." (A later "Amended EO 67" updated that definition to add "…or visiting such household pursuant to a child custody arrangement or order." This still excludes married couples residing in separate places who don't have a child custody arrangement.

136. For Farmers markets, "non-essential" brick and mortar retail establishments, indoor and outdoor swimming pools, and horse and other livestock shows, the Guidelines use the narrower terms "household," whereas EO 67 uses the term "family." For purposes of the right of assembly in innumerable situations, and especially given that such rules

apply to all Virginians, distinctions like this have major implications, particularly when violating them carries a criminal penalty. This regulatory inconsistency also deprives every Virginian of due process because it makes it impossible for anyone to know with whom they may gather and when without risking committing a criminal offense.

137. Notably, the Guidelines language for performing arts venues, concert venues, movie theaters, drive in entertainment, sports venues, botanical gardens, zoos, fairs, carnivals, amusement parks, museums, aquariums, historic horse racing facilities, bowling alleys, skating rinks, arcades, amusement parks, trampoline parks, fairs, carnivals, arts and craft facilities, escape rooms, trampoline parks, public and private social clubs, and all other entertainment centers and places of public amusement all use the term "members of the same household" as an exception. However, that term is not used in EO 67 itself.

138. For Horse Racing Racetracks, the Mandatory Guidelines say all must observe distancing, but exceptions-- whether household or family-- are not included.

139. A government scheme that prohibits every instance of physical proximity among individuals within six feet of one another, based on nothing more than the government's arbitrary and unilateral classification of their relationship statuses, is an infringement of fundamental rights under the Virginia Constitution.

140. The right of association is both an integral part of the right of assembly and also a separate fundamental right. Ordinary conversations at a distance much closer than 6 or 10 feet is also important to the right of free speech. It is the kind of speech that can, and in many instances, must occur among two people or a few people to maintain

their right to privacy without others intruding or overhearing. At issue is nothing less than the right of a free people to determine, apart from government rules or coercion, with whom they can sit or whom they can stand next to, perhaps to have a private conversation or maybe simply to hold hands – or frankly any other manner of close personal activity.

141. Virginians have a fundamental right in who they choose to dance with, who to hold close, who to have a normal conversation with, and, generally, who to be next to as long as the other person wants the same.

142. All Virginians "have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Va. Const., Art. I, § 1.

143. The Constitution of Virginia notes the desire to have a government that is most effectually secured against the dangers of maladministration. Va. Const., Art. I, § 3.

144. Virginians have a fundamental freedom of speech and assembly. Va. Const., Art. I, § 12.

145. We know that "No free government, nor the blessings of liberty, can be preserved to any people, but ...by frequent recurrence to fundamental principles." Va. Const., Art. Art. I, § 15.

146. A government definition of who can be close to other people and who cannot, imposed broadly, indefinitely, arbitrarily, and unilaterally upon all Virginians is a profound and impermissible assault on their fundamental rights.

147. EO 67 provides several definitions of who may associate without distancing, which apply in certain settings but not in others. Several elements of EO 67 require maintaining a 6-foot or 10-foot distance in certain settings for certain groups but not others based on a definition in the order of either family or household.

148. The Virginia Supreme Court has stated that provisions of the Constitution of Virginia that are substantively similar to those in the United States Constitution will be afforded the same meaning. See, e.g., *Shivaee,* 270 Va. at 119, 613 S.E.2d at 574 ("due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution."); *Habel v. Industrial Development Authority,*241 Va. 96, 100, 400 S.E.2d 516, 518 (1991) (federal construction of the Establishment Clause in the First Amendment "helpful and persuasive" in construing the analogous state constitutional provision).

149. While the First Amendment does not, by its terms, protect a "right of association," the United States Supreme Court has recognized such a right in certain circumstances. *Dallas v. Stanglin*, 490 U.S. 19, 23-24 (1989). In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court defined the right at issue to include choices to enter into and maintain certain intimate human relationships and the separate but related right to "expressive association."

150. A recent opinion in the U.S. District Court for the Western District of Pennsylvania by the Honorable William S. Stickman IV held that Pennsylvania's regulations similar to those at issue in this case were unconstitutional. *Butler v. Wolf*, CA No. 2:20-cv-677 (United States District Court, Western District of Pennsylvania, September 14, 2020).

151. Paragraphs 1-150 are hereby incorporated by reference in regard to all Errors of Law set forth below.

152. EO 67 specifically regulates religious services in ways that other gatherings and business settings are not regulated. The regulation is directed specifically at religious services and is not a general regulation that applies to both non-religious and religious services. As an example, a non-religious wedding service, funeral service or gathering is not subject to the numerous burdensome and restrictive requirements of Section (B)(1)(a-h) of the EO 67 regulations, but a religious wedding service, religious funeral service, or other religious service is. See *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 US 520 (1993) (unanimously holding that because the government's directives were designed to limit religion or its practices, they violated the Free Exercise Clause).

153. A wedding itself is a strong expression of speech, often religiously inspired. In many people's lives it is the most important communication a couple and community will make. The Defendants cannot satisfy the high standard to infringe on such assembly, communication, association, and, very often, religious service.

154. Policies singling out only religious groups are on their face content-based and therefore "'presumptively inconsistent with the First Amendment.'" *Fairfax Covenant Church v. Fairfax Cnty. Sch. Bd.*, 811 F. Supp. 1137, 1140 (E.D. Va. 1993) (quoting *Simon & Schuster v. New York Crime Victims Bd.*, 116 L. Ed. 2d 476, 112 S. Ct. 501 (1991)). "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. . . . The government may not . . .

impose special disabilities on the basis of religious views or religious status[.]" *Emp't Div. v. Smith*, 494 U.S. 872, 877, 110 S. Ct. 1595, 1599 (1990) (citations omitted).

155. The Court must review the rules as written. The face coverings order is still in effect. There is a specific list of exceptions. Not included in the exceptions and, as examples, are: (1) appearing in ceremonies including bride, groom, or wedding party; (2) photo sessions; (3) sitting in areas where distances alleviate risks.

156. Under EO67--Individuals may attend religious services subject to the following requirements:

- a) Individuals attending religious services must be at least six feet apart when seated and must practice proper physical distancing at all times. Family members, as defined below, may be seated together.
- b) Mark seating and common areas where attendees may congregate in six-foot increments to maintain physical distancing between persons who are not Family members.
- c) Any items used to distribute food or beverages must be disposable, used only once and discarded.
- d) Practice routine cleaning and disinfection of frequently-contacted surfaces must be conducted prior to and following any religious service.
- e) Post signage at the entrance that states that no one with a fever or symptoms of COVID-19 is permitted to participate in the religious service.
- f) Post signage to provide public health reminders regarding physical distancing, gatherings, options for high risk individuals, and staying home if sick.

- g) Individuals attending religious services must wear cloth face coverings in accordance with Executive Order 63, Order of Public Health Emergency Five.
- h) If religious services cannot be conducted in compliance with the above requirements, they must not be held in-person. Further, any social gathering held *in connection with a religious service* is subject to the public and private in-person gatherings restriction in section B, paragraph 1

152. In addition, all public and private in-person gatherings of more than 250 individuals are prohibited. However, the presence of more than 250 individuals performing functions of their employment is not a "gathering." For purposes of controlling a virus, such a distinction is arbitrary.

153. A "gathering" includes, but is not limited to, parties, celebrations, or other social events, whether they occur indoors or outdoors.

154. According to EO 67, violations of section B paragraphs 1, 2, and 3 of this Order shall be a Class 1 misdemeanor pursuant to Va. Code § 44-146.17 and, thus, punishable by a fine $2,500 and up to one year in jail.

155. The standard for reviewing infringements of religious rights under the Virginia and U.S. Constitution is amplified by the state Religious Freedom Restoration Act (RFRA) in Title 57 of the Virginia Code.

156. Under Va. Code § 57-2.02 (B) "No government entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability unless it demonstrations that application of the burden to the person is

(i) *essential* to further a compelling governmental interest and (ii) the *least restrictive* means of furthering that compelling governmental interest." (emphasis added).

157. Religious viewpoint or expression is speech which deserves this same protection as any other constitutionally protected speech. *Rosenberger v. Univ. of Virginia*, 515 U.S. 819, 831, 115 S. Ct. 2510, 2517 (1995); *Widmar v. Vincent*, 454 U.S. 263, 269, n.6 (1981) (religious worship and discussion are constitutionally protected speech under the First Amendment); *Lancu v. Brunetti*, 588 U.S. , (2019) (slip. Op., at 4-5) (Laws that restrict the viewpoint it expresses are unconstitutional). When a government official protects one kind of speech over another, he or she has violated the constitution. *Masterpiece Cakeshop V. Colorado Civil Rights Common*, 584 U.S. at (2018) (slip. Op., at 14-16); *Calvary Chapel*, 591 U.S. , (J. Alito, dissenting op. p. 8) (Governor cannot favor one type of speech over another.)

158. In Virginia, where laws affect "a fundamental constitutional right," any "presumption of constitutionality fades" and a strict scrutiny test is applied. *Mahan v. Nat'l Conservative Political Action Comm.*, 227 Va. 330, 336, 315 S.E.2d 829, 832 (1984) (citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

159. The requirements to post signage apply in some settings but not others regarding information and messages from the Centers for Disease Control ("CDC") promulgated the Virginia Department of Health, which is a form of compelled speech. For example, the requirements apply to religious services but not other gatherings.

160. The CDC posters are very general and do not refine or suggest flexibility on risk practices. For example, the CDC posters say people should wear masks in public regardless of whether they are indoors or outdoors or near other people. The CDC posters say people should maintain 6ft distances regardless of knowledge of relationship to other individuals.

161. Many churches regularly serve communion, held to be a sacred religious right, in or on non-disposable instruments, and in some churches these sacraments are shared in common among the religious faithful. But the requirement that "any item used only once and discarded" severely disrupts a 2,000 year-old practice.

162. Weddings and wedding celebrations, in particular, often feature ornate place settings and cutlery that is non-disposable.

163. Requiring religious groups to post signs on their doors that discourage or possibly forbid certain persons from entering is anathema to the tenants of those religious groups. Churches, including New Life Harvest Church and its pastor, desire to welcome congregants and strangers alike into their doors.

164. Most churches exist, in large part, to care for the sick, the burdened, the weary, and the outcasts. This includes New Life Harvest Church, which desires to welcome congregants and views caring for the sick as a key tenet of the Christian religion. Forbidding churches to allow certain persons into their premises is bad enough, but compelling them to post speech on their very doors that is contrary to their mission is unconstitutional. See *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018).

COUNT II - ACTION FOR DECLARATORY JUDGEMENT UNDER VA CODE §40 .1-22(7)

165.Paragraphs 1-164 are hereby incorporated by reference in regard to all Errors of Law set forth below.

166.The Safety and Health Codes Board is authorized by Va. Code 40.1-22(5) to: "adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the federal OSH Act of 1970...as may be **necessary** to carry out its functions established under this title." (emphasis added).

167. Under the same section, "[t]he Commissioner shall enforce such rules and regulations. All such rules and regulations shall be designed to protect and promote the safety and health of such employees."

168. However, "In making such rules and regulations to protect the occupational safety and health of employees, the Board shall adopt the **standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity."** *Id.* (emphasis added).

169. The Governor's directives in EO 63 as mandates to the Department of Labor and Industry are illegal, in excess of authority and inconsistent with law.

170. The directive fails all of the tests related to Separation of Powers are set out above, and also violates the independence of the Board itself, which is a separate statutory creation of the General Assembly with separate duties and powers from those of the Governor.

171. The Governor's mandate that "The Commissioner of the Virginia Department of Labor and Industry shall promulgate emergency regulations and standards to control, prevent, and mitigate the spread of COVID-19 in the workplace" was issued in excess of the Governor's authority and is, therefore, void. Workplace standards and whether they are emergency standards are set forth in the basic laws and policies of this Commonwealth or implemented by the Board following regular abd reasonable procedures. Workplace standards in this Commonwealth have never been based on unilateral directives from the Governor.

172. The Governor's mandate that "The regulations and standards adopted in accordance with §§ 40.1-22(6a) or 2.2-4011 of the Code of Virginia shall apply to every employer, employee, and place of employment within the jurisdiction of the Virginia Occupational Safety and Health program" is both in excess of the Governor's authority and unlawfully constrains the lawful discretion of the Virginia Safety and Health Codes Board.

173. The mandate goes beyond policies and standards under the basic laws, and presupposes the regulations at issue meet the statutory standards for an application to every employer, employee, and place of employment.

174. Moreover, the scope of any regulations under the basic laws must be decided by the Board through a process based on statutory policies and standards, rather than by directive from the Governor.

175. The directive in EO63 that "[t]hese regulations and standards must address personal protective equipment, respiratory protective equipment, and sanitation, access to employee exposure and medical records and hazard communication" is unlawful

because the scope of any regulations under the basic laws must be decided by the Board through a process based on statutory policies and standards, rather than by directive from the Governor.

176. The directive in EO63 that "[t]hese regulations and standards may not conflict with the requirements and guidelines applicable to businesses set out and incorporated into Amended Executive Order 61 and Amended Order of Public Health Emergency Three" is unlawful because the scope of any regulations under the basic laws must be decided by the Board through a process based on statutory policies and standards, rather than by directive from the Governor.

177. The illegal directives from the governor poisoned the process the Board used to adopt the ETS as well as its scope and substance contrary to the requirements of law and in violation of Separation of Powers.

178. The Governor's directive that the Board not issue any regulation which conflicts with Executive Orders or Orders of Public Health Emergency is codified as 16VAC25-220-10(F).

179. Such a provision is unlawful. The Governor has no authority to cabin the lawful exercise of authority or discretion by executive agencies with a separate legal existence or to subvert all otherwise-lawful regulation in the Commonwealth to his whims. Nor can the independent agencies abdicate the responsibility that the legislature has given them to regulate in a manner that meets certain legislative policies and procedures out of a desire not to adopt regulations which conflict with the governor's aims.

180. DOLI's website states "In accordance with Executive Order 63, the Department presented to the Safety and Health Codes Board an emergency temporary standard/ emergency regulation to address COVID-19, applicable to all employers and employees covered by Virginia Occupational Safety and Health (VOSH) program jurisdiction."

181. In document styled Draft Safety and Health Codes Board Public Hearing and Meeting Minutes, June 24, 2020, the second sentence describes the Governor's directive in EO 63. The draft agenda for the July 24, 2020 describes the directives in EO 63 under Summary of Rulemaking Process.

182.The record shows a vote related to the adoption of an emergency standard. The minutes show that Mr. Withrow stated that the "staff of the Department of Labor and Industry recommends that the Board find that SARS-CoV-2 and COVID-19 related hazards and job task employee exposures constitute a grave danger to employees in Virginia that necessitate the adoption of an emergency temporary standard to protect Virginia employees from the spread of the SARS-CoV-2 virus which causes COVID-19 under Va. Code §40.1-22(6a). (emphasis added).

183. The aforementioned statement by Mr. Withrow was noted as following a discussion of the briefing package up to p. 136. (Note, the draft summary of the draft ETS starts on p. 153). The Board had a discussion related to the recommendation and whether there was a grave danger and if there is a need for an emergency temporary standard. The motion was made, properly seconded, and carried.

184. Since a regulation with a scope that applied to all employers and contained all of the instructions of the EO 63 was the only thing provided to the Board, there is no

indication that the Board considered alternatives and the components of the overall ETS to see if all components and their full scope were "necessary" to address a "grave danger" and "feasible" and supported by "substantial evidence in the record as a whole."

185. Proceeding through this unusual approach that did not provide a comment period that satisfied VAPA, that had no regulatory impact analysis, and provided for no regulatory flexibility analysis, and the Board's decision to follow the express directions of the Governor to the exclusion of considering any other option, left the Board's administrative record unlawfully cabined and renders its decision unsupported by substantial evidence and unlawful.

186. There is also no indication that the Board provided a response to significant comments from the 10-day comment period, nor any indication that the Board was presented a significant discussion of comments.

187. The text of the final ETS does not itself contain findings that the all the major components of the final ETS are necessary to meet a "grave danger." The issue is not whether *any* ETS is necessary to meet the "grave danger" standard but whether all of the substantial elements of this ETS as applied across the scope of every employer in Virginia is necessary under the procedures of Va. Code § 40.1-22(6a).

188. Even assuming the *instant* ETS was necessary to meet a "grave danger," any action must meet the "to the extent feasible" standard in Va. Code § 40.1-22(5). Pursuant to that section, the considerations include "the feasibility of the standards."

189. Perhaps because the substance and scope of the standard was directed by EO 63, Board findings on the more refined points it was required to consider are not available.

190. The Federal Occupational Safety and Health Administration ("OSHA") took the position that it will not be promulgating an emergency standard pursuant to its authority under the OSH Act of 1970, instead opting to rely upon many voluntary guidelines for various business sectors. There is no evidence the Board meaningfully considered OSHA's regulatory framework, even though the Virginia Code provides that OSHA standards are presumptively lawful when adopted by the Board under its powers.

191. Pursuant to Va. Code §40.1-22(6), Chapter 40 (§ 2.2-4000 et seq.) of Title 2.2 shall apply to the adoption of rules and regulations under this section and to proceedings before the Board.

192.Pursuant to Va. Code §40.1-22 (7) "Any person who may be adversely affected by a standard issued under this title may challenge the validity of such standard in the Circuit Court of the City of Richmond by declaratory judgment. The determination of the Safety and Health Codes Board shall be conclusive if supported by **substantial evidence** in the record considered as a whole." (emphasis added).

193. The Safety and Health Codes Board has failed to meet the standard of finding that the full scope of the ETS are "necessary" to address a "grave danger" to use the extraordinary process of Va. Code §40.1-22(6)(a) and do not have "substantial evidence" in the record for this finding.

194. There are many reasons Defendants fail on this front. First, it is important to consider the scope of the rule. The rule covers virtually every private and public employer in Virginia.

195. Second, the rule is unworkable. Under the ETS, a single cough means an employee cannot work for 10 days. The ETS requires unrealistic reporting and planning burdens for every employer regardless of whether that employment situation is substantially above the background risk facing Virginians in multiple settings. That is not a burden that is proportional or reasonable for the risk and does not warrant the exceptional use of 40.22 (6a). By their own statements and structure of the rule, the Board has stated 4 levels of risk from low to very high. Yet the rule poses substantial requirements on all levels.

196. Additionally, the Board cannot justify how it can simultaneously designate parties to be a "low" risk while still regulating those same parties on the basis that they face "grave danger."

197. The Board has provided no comparative assessment or statement to support its finding of "grave danger."

198. More importantly the Board has not shown that the burdens in the ETS are necessary to address a grave danger.

199. The US Department of Labor and US Court of Appeals for the District of Columbia Circuit have already provided direction on this issue. On April 28, 2020, AFL-CIO President, Richard Trumka, petitioned US Secretary of Labor Eugene Scalia to adopt a Department of Occupational Safety and Health Administration (OSHA) emergency

temporary standard for COVID-19. On April 30, 2020, US Secretary of Labor Eugene Scalia rejected the AFL-CIO petition from April 28, 2020, and stated:

> "Coronavirus is a hazard in the workplace. But it is not unique to the workplace or (except for certain industries, like health care) caused by work tasks themselves. This by no means lessens the need for employers to address the virus. But it means that the virus cannot be viewed in the same way as other workplace hazards."

The letter also states

> "your letter disparages OSHA's guidelines as 'only voluntary', suggesting that there are no compliance obligations on employers. That is false... Indeed, the contents of the rule detailed in your letter add nothing to what is already known and recognized (and in many instances required by the general duty clause itself). Compared to that proposed rule, OSHA's industry specific guidance is far more informative for workers and companies about the steps to be taken in *their* particular workplaces" That is one of the reasons OSHA has considered tailored guidance to be more valuable than the rule you describe."

On June 11, 2020, the US Court of Appeals for the District of Columbia Circuit denied the AFL-CIO's May 18 petition.

200. The Board has not shown evidence that the myriad requirements it imposed are "necessary" with substantial evidence to address a "grave danger" and "feasible." First, for the requirements to be "necessary" and "feasible" they would need to be operationally workable and "necessary" in the sense that the timing concerns warranted the extraordinary step of not following the ordinary requirements of VAPA. VAPA would require economic impact analyses, regulatory flexibility analyses and a more meaningful comment period than provided by the Board.

201. The general duty requirements of Va. Code § 40.1-51.1 (a) of the Code of Virginia apply to all employers covered by the Virginia State Plan for Occupational Safety and Health. Under this provision "....it shall be the duty of every employer to furnish to

each of his employees safe employment and a place of employment that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.." Accordingly, the baseline for understanding what is "necessary" to address a "grave danger" should be viewed against the baseline that employers already have legal obligations relating to COVID-19.

202. The rules are not "feasible" because the Board has not provided adequate time or taken sufficient steps to roll-out and educate the employers within the scope of the rule about the rule and compliance with the rule. The rule is massively complicated. There is no evidence that the Board has taken steps to make all Virginia employers aware of the rule and set-up appropriate steps for such a massive program.

203. The immediate effective date of the ETS upon publication in the City of Richmond is irrational and not feasible. The training requirements effective dates are equally irrational as there was no time provided for businesses to evaluate their obligations and options to control the virus before beginning training.

204. The Board is unreasonably exposing businesses to threats of compliance enforcement action for steps they cannot take in the time frame set out in the rule. Such actions are not consistent with the Constitution of Virginia because the Board is depriving businesses and citizens of liberty without the fundamental due process rights of sufficient notice and time for compliance. The scheme *per se* sets up a regime of arbitrary enforcement since few if any employers were likely in compliance as of its effective date and could not have realistically been in compliance.

205. Moreover, the operation of the ETS's "suspected" COVID provisions are unworkable. The term "suspected to be infected with SARS-CoV-2 virus""means a

person that has signs or symptoms of COVID-19 but has not tested positive for SARS-CoV-2 and no alternative diagnosis has been made." See §16VAC25-220-30. However, the ETS does not define "symptoms."

206. The ETS does have a definition of "symptomatic." "Symptomatic" means the employee is experiencing symptoms similar to those attributed to COVID-19 including fever or chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, or diarrhea. Symptoms may appear in 2 to 14 days after exposure to the virus. §16VAC25-220-30.

207. Assuming the term "symptomatic" contains the relevant "symptoms" — a point which is not clear — then the universe of employees with suspected COVID-19 that pose the stated risk includes, among a broader universe, anyone who has a cough *or* headache *or* sore throat *or* congestion *or* runny nose, or fatigue, as just some examples.

208. Pursuant to the ETS, employers are required to develop and implement policies and procedures for employees to report when they are experiencing symptoms consistent with COVID-19, at least when no alternative diagnosis has been made (e.g., tested positive for influenza). Such employees shall be designated by the employer as "suspected to be infected with SARS-CoV-2 virus." See § 16VAC25-220-40 A(4)

209. It is unrealistic to expect employers and contractors, including small and medium sized employers to evaluate alternative diagnosis or expect timely assessments by medical personnel in the time frames for the kinds of low level symptoms described. There is no evidence that this is feasible or that this approach is necessary or even

useful to addressing a "grave danger." If anything, the ETS creates a situation in which employees will be skittish to cooperate at all.

210. Pursuant to the ETS, employers are required to prohibit employees or other persons known or suspected to be infected with the SARS-CoV-2 virus to report to or remain at the work site or engage in work at a customer or client location until cleared for return to work. See §16VAC25-220-40.B and §16VAC25-220-40 A(5).

211. Similar language covers subcontractors. See §16VAC25-220-40 A(7)

212. No employee or subcontractor can return to the worksite until at least 72 hours since the signs of any symptom have passed and ten days have elapsed, whichever period is longer. See §16VAC25-220-40.B

213. §16VAC25-220-40 (B)(6) states that "employers shall ensure that sick leave policies are flexible and consistent with public health guidance..."

214. Although the ETS contains language that is vague and threatens potential penalties, the Safety and Health Codes Board does not have authority over sick leave policies. Therefore its statement with regard to such policies is illegal and in excess of authority.

215. The statement regarding sick leave nonetheless illustrates the problem with the ETS. An employee who coughs or sneezes has to lose work for a significant period of time. That may deny that employee important employment opportunities, the ability to contribute to specific projects, and cause great disruption.

216. The ETS has a test reporting scheme that penalizes employers who cannot gain agreements with third parties and operate within unrealistic time frames and at risk for mishandling the privacy of medical information. See §16VAC25-220-40 A(8). The

system for reporting positive tests includes employees, subcontractors, contract employees, temporary employees, building owners, tenants, residents in a building, and 24 time frames is overly broad, not shown to be necessary, and not feasible for the full scope of employers.

217. The rule definition of economic feasibility at §16VAC25-220-30 is impermissible. The rule defines "economic feasibility" to mean the employer is financially able. The standard does not ask whether the employer could stay in business or avoid releasing employees in order to find the funds to pay for the costs of the rule.

218. The ETS states under the definition of physical distancing pursuant to §16VAC25-220-30 that "physical separation of an employee from other employees or persons by a permanent, solid floor to ceiling wall constitutes physical distancing from an employee or other person stationed on the other side of the wall." Yet, as pointed out in comments to the Board, physical separation does not have to be achieved by permanent or floor to ceiling walls. Temporary plexiglass and other hard surface barriers are regularly used to retrofit workstations, counters and cubicles as physical separation "shields" or barriers for employees. On information and belief, the Board did not consider that alternative.

219. Pursuant §16VAC25-220-40(A)(3), employers are prohibited from even considering serologic test results in deciding when an employee can return to work. A prohibition on using relevant medical information for decisions is an unprecedented political restriction of medical assessments. Not only has the Board seen fit to prohibit serologic testing from being conclusive or determinative of any issue, but the Board has outright prohibited employers from considering scientific evidence in their

decisionmaking. Such an across-the-board prohibition is per se unreasonable and unnecessary.

220. Pursuant to §16VAC25-220-40 (F) of the ETS, the Board has illegally included in the ETS the variable and illegal rules in Orders provided by the Governor and Health Commissioner.

221. Indeed, the structure of the ETS includes any Order they may provide such that the Board has impermissibly delegated its authority under §16VAC25-220-40 (F) to the Governor and Health Commissioner.

222. Under the ETS, there has been no comment process to review the underlying Orders by the Governor or Commissioner. There is no public docket for the Orders, no regulatory impact statements, no regulatory flexibility analysis, and no opportunity for public comment. There was no discussion by the Board of the interaction of the Orders and the emergency rule.

223. Including compliance with such Executive Orders as an enforceable mandate of the ETS constitutes an unlawful expansion of the Board's authority and that of the Governor and essentially creates an extra statutory enforcement mechanism for the Governor's orders which was never contemplated by the legislature.

224. The ETS frequently refers to the standards applicable to the industry which is language that may be appropriate for guidance but is too vague to be meaningful.

225. The physical distancing requirement in the ETS is unworkable and ambiguous. Distancing is not available for restaurant wait staff, personal services, physical instructors. The application of this rule is overly broad, unclear and not justified.

226. While the Board provided a brief opportunity to comment under VAPA, such an opportunity is statutorily required to include the opportunities to comment on a regulatory impact statement and a regulatory flexibility analysis. To date there has been no regulatory impact analyses or regulatory flexibility analysis.

COUNT III- RELIGIOUS FREEDOM RESTORATION ACT

227. Paragraphs 1-226 are hereby incorporated by reference.

228. Each argument set forth elsewhere herein concerning failure to follow procedures required by law, failure to follow a permissible delegation of legislative authority, and impermissible infringement on rights under the Virginia Constitution, in part, provide the basis of Count III and for separate relief under RFRA.

229. Claimants Bishop Leon Benjamin, New Life Harvest Church, and Josh Tigges each claim and assert the protections of the Virginia Religious Freedom Restoration Act (RFRA), found in Va. Code § 57-2.02, in contesting numerous substantially burdensome infringements of their fundamental right to the free exercise of religion as protected by the Virginia Constitution. See Va. Const., Art. I, § 12, 16.

230. Such substantial burdens include numerous express and otherwise effective limitations in the Executive Orders on the place, the frequency, and the manner of their carrying out various religious services, activities, rites, and ceremonies. Many of these have been described in previous paragraphs.

231. According to Va. Code § 57-2.02 (B): "No government entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability unless it demonstrations that application of the burden to the person is (i) *essential* to further a *compelling* governmental interest and (ii) *the least*

restrictive means of furthering that compelling governmental interest." (emphasis added). The Code defines "Substantially burden" as "to inhibit or curtail religiously motivated practice," a very low threshold that is clearly met in these Claimants' case.

232. Claimants Bishop Leon Benjamin, New Life Harvest Church, and Josh Tigges therefore seek all relief available under RFRA, to include declaratory and injunctive relief vindicating their statutory and Constitutional rights as protected therein, attorney's fees, and other relief this Court deems just and proper.

COUNT IV- SELF EXECUTING PROVISIONS OF THE VIRGINIA CONSTITUTION

233. Paragraphs 1-232 are hereby incorporated by reference.

234. Each argument concerning failure to follow procedures required by law, failure to follow a permissible delegation of legislative authority, and impermissible infringement on rights under the Virginia Constitution form the basis of a separate entitlement to relief under self-executing provisions of the Virginia Constitution.

235. Constitutional provisions in bills of rights and those merely declaratory of common law are usually considered self-executing. The same is true of provisions which specifically prohibit particular conduct. Provisions of a Constitution of a negative character are generally, if not universally, construed to be self-executing.

236. Article I, Section 5; Article III, Section 1; and Article IV, Section 1 of the Virginia Constitution are among the self-executing constitutional provisions that thereby waive the Commonwealth's sovereign immunity. See *Gray v. Virginia Sec'y of Transp.*, 276 Va. 93 (2008).

237. All Claimants in this matter are entitled to, and seek, an award of injunctive and declaratory relief pursuant to the self-executing provisions of the Constitution of Virginia because all claimants are citizens (natural or corporate) of Virginia and are the beneficiaries of such Constitutional provisions.

PRAYER FOR RELIEF

WHEREFORE, the claimants respectfully pray, through counsel, that this Court,

a) Declare the applicable regulations unlawful pursuant to Va. Code 8.01-184 and other relevant law referenced or discussed herein;

b) Enjoin the defendants from enforcing the unlawful regulations pursuant to Va. Code 8.01-620 and other relevant law referenced or discussed herein;

c) Set aside the relevant regulations and portion of Orders, regulations, and rules, and order the defendants to comply with the statutorily-required procedural requirements pursuant to Va. Code § 2.2-4029, and order that the ETS is void pursuant to Va. Code § 40.1-22 (7) and other relevant law referenced or discussed herein; and

d) Declare all applicable regulations unconstitutional to the extent that they violate the Constitution's Separation of Powers provisions as well as Claimants' constitutionally-guaranteed rights of assembly, free speech, free association, free exercise of religion, privacy, and due process of law;

e) Declare the rights of the Claimants and grant injunctive relief pursuant to Virginia's Religious Freedom Restoration Act;

f) Award Claimants' reasonable attorneys' fees and costs where applicable; and

g) Grant any other appropriate relief that is just and proper in the eyes of the Court.

Respectfully submitted this 16th day of September, 2020,

VIRGINIA ASSOCIATION OF MANUFACTURERS
JOHN TIGGES
ZION SPIRINGS, LLC
SPONSOR HOUNDS, INC.
JOSH TIGGES
LINDA PARK
NEW LIFE HARVEST CHURCH
FUJIYA HOUSE
HEIDI BUNDY
A LITTLE BIT HIPPY
LEON BENJAMIN, SR.
ANNE WAYNETTE ANDERSON
DAVE LAROCK
RIVER ROCK ENTERTAINMENT, INC.
By their Counsel:

Matthew D. Hardin, VSB #87482
1725 I Street NW, Suite 300
Washington DC 20006
(434) 202-4224
MatthewDHardin@protonmail.com

Nandan Kenkeremath, Esq.*
2707 Fairview Court
Alexandria, Virginia 22311
Phone: (703)407-9407
nandank@comcast.net

*Active member of DC Bar (#384732)
Motion to Appear *pro hac vice* forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of Sept., 2020, I served a true and correct copy of the foregoing upon:

Mark Herring, Esq.
Attorney General of Virginia
202 N. 9th Street
Richmond, VA 23219

Virginia Department of Health
% Secretary of Health & Human Resources Daniel Carey
109 Governor Street
Richmond, Virginia 23219

M. Norman Oliver, Commissioner
Virginia Department of Health
109 Governor Street
Richmond, Virginia 23219

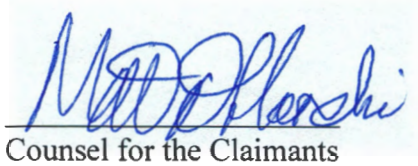
C. Ray Davenport, Commissioner of Labor and Industry
Main Street Center
600 East Main Street, Suite 207
Richmond, VA 23219

Brian Ball, Secretary of Commerce and Trade
Main Street Center
600 East Main Street, Suite 207
Richmond, VA 23219

Governor Ralph Northam
% Rita Davis, Counsel to the Governor
1111 E. Broad Street
Richmond, VA 23219

Charles L. Stiff, Chairman
Virginia Safety & Health Codes Board
5316 Summer Plains Dr
Mechanicsville, Virginia 23116-6663

Via First Class U.S. Mail, postage prepaid.



Counsel for the Claimants