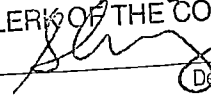


FEB 25 2021

CLERK OF THE COURT

BY:  Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

NATIONAL RETAIL FEDERATION;
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS; RELLES
FLORIST; MAYFIELD EQUIPMENT
COMPANY; and ABATE-A-WEED, INC.,

Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF
INDUSTRIAL RELATIONS, DIVISION OF
OCCUPATIONAL SAFETY AND HEALTH;
OCCUPATIONAL SAFETY & HEALTH
STANDARDS BOARD; DOUGLAS
PARKER, in his official capacity as Chief of
the California Department of Industrial
Relations; and DOES 1-50, inclusive,

Defendants.

Case No. CGC-20-588367

**ORDER DENYING PLAINTIFFS'
APPLICATIONS FOR PRELIMINARY
INJUNCTION**

WESTERN GROWERS ASSOCIATION,
CALIFORNIA FARM BUREAU
FEDERATION, CALIFORNIA BUSINESS
ROUNDTABLE, GROWER-SHIPPER
ASSOCIATION OF CENTRAL
CALIFORNIA, CALIFORNIA
ASSOCIATION OF WINEGRAPE
GROWERS, and VENTURA COUNTY
AGRICULTURAL ASSOCIATION,

Plaintiffs/Petitioners,

Case No. CPF-21-517344

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vs.

CALIFORNIA OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD;
DAVID THOMAS, CHRIS LASZCZ-DAVIS,
LAURA STOCK, BARBARA BURGEL, and
NOLA J. KENNEDY, in their official
capacities as Members of the California
Occupational Safety and Health Standards
Board; CHRISTINA SHUPE, in her official
capacity as Executive Officer of the California
Occupational Safety and Health Standards
Board; CALIFORNIA DIVISION OF
OCCUPATIONAL SAFETY AND HEALTH;
and DOUGLAS PARKER, in his official
capacity as Chief, California Division of
Occupational Safety and Health,

Respondents/Defendants.

INTRODUCTION

On November 30, 2020, as the COVID-19 pandemic surged out of control in California and across the country, the California Occupational Safety and Health Standards Board (the Board) promulgated an Emergency Temporary Standard intended to prevent the spread of COVID-19 in California workplaces (ETS Regulations). (8 Cal. Code Regs., §§ 3205-3205.3). Now, as the United States passes the grim milestone of half a million deaths from the pandemic, Plaintiffs in these related cases—representing the retail and agricultural industries—seek a preliminary injunction restraining the Board from enforcing the ETS Regulations. Plaintiffs contend that the Board should not have adopted the ETS Regulations on an emergency basis, but instead should have circulated them for public comment over a period of months; that the Board lacked authority to adopt the Regulations; and that the Board’s action violated their rights to due process. They complain that the Regulations are unnecessary, and that complying with them would be financially burdensome.

For the following reasons, the Court denies Plaintiffs’ applications in their entirety. Plaintiffs have not shown a likelihood of prevailing on the merits of their claims. Even if they could do so, the balance of interim harms and the public interest in curbing the spread of COVID-19 and protecting worker and community health weigh heavily in favor of the continued implementation and enforcement of the ETS Regulations. With the single exception of restrictions on attendance at religious services, which present unique constitutional considerations, no federal or state court in the country has blocked emergency public health orders intended to curb the spread of COVID-19, and the illnesses, hospitalizations, and deaths that follow in its wake. (See pg. 38 & fn. 32, *infra*.) This Court will not be the first. Lives are at stake.

FACTUAL BACKGROUND

The ETS Regulations were promulgated in response to the COVID-19 pandemic, which needs no introduction. “In the United States, hundreds of thousands are confirmed dead, including tens of thousands of Californians. Hundreds more Californians die each day. Our hospitals and intensive care units are overwhelmed, threatening even routine medical care. It is the worst

1 American public health crisis in a century.” (*Midway Venture LLC v. County of San Diego* (Jan.
2 22, 2021), 2021 WL 222006, at *2), *modified* (Feb. 8, 2021); see also *Calvary Chapel San Jose v.*
3 *Cody* (N.D.Cal. Dec. 18, 2020) 2020 WL 7428322, at *1 [“Every person in the United States is
4 aware of the COVID-19 pandemic, the highly contagious nature of the disease, and the steps public
5 health officers, state, and municipalities across the count[r]y have recommended to slow its deadly
6 and destructive path.”].) California’s regulatory response to the pandemic dates to early March
7 2020, when the Governor proclaimed a State of Emergency and, two weeks later, issued a stay-at-
8 home order.¹

9 Before the adoption of the ETS Regulations, Cal/OSHA did not have a specific enforcement
10 standard that protected the majority of workers from the hazard of COVID-19 in the workplace.
11 There is an Aerosol Transmissible Diseases (ATD) standard that provided workers with important
12 protections from exposure to pathogens, including COVID-19, but it is limited to specified health
13 care, correctional and other specialized settings including homeless shelters. (See 8 Cal. Code
14 Regs., § 5199(a)(1).) The majority of California workers do not fall within ATD protections.
15 (Administrative Record (AR) Tab IE at 4 ¶ 12; Tab 1K6 at 22 [“Many Non-5199 Workers are
16 affected by major outbreaks of COVID-19 including workers in the following industries: meat and
17 poultry processing, food processing, agriculture, garment manufacturing, warehousing, public
18 transportation, and retail stores.”].)

19 At its September 17, 2020 meeting, the Board considered a petition that had been filed by
20 the Labor and Employment Committee of the National Lawyers Guild and Worksafe on May 20,
21 2020, requesting it to initiate emergency rulemaking to address the potential harm posed to workers
22 by COVID-19. The petition sought adoption of an emergency standard that would apply to
23 employees in any facility, service category, or operation not covered by ATD, as well as a separate
24 permanent regulation to protect workers from infectious diseases. It expressed the view that the
25 Board’s Injury and Illness Prevention Program (IIPP) regulation (8 Cal. Code Regs. § 3203) had
26 not been adequate to protect worker safety, and that a new standard was necessary to provide

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28 ¹ The Ninth Circuit’s recent decision in *South Bay United Pentecostal Church v. Newsom* (9th Cir.
2021) 985 F.3d 1128, *app. for inj. relief granted in part*, 141 S.Ct. 716 (U.S. Feb. 5, 2021) contains
a useful summary of California’s response to the COVID-19 pandemic. (See *id.* at 1132-1136.)

1 “consistent rules as a starting point for our state’s workplaces that allow employers some flexibility
2 with respect to individual needs in their places of employment.” It took the view that “time is of
3 the essence” to provide “clarity” and safeguard worker safety.

4 The Division of Occupational Safety and Health, the Department of Industrial Relations’
5 enforcement agency (Cal/OSHA), reviewed the petition and recommended to the Board that it be
6 granted. (See AR Tab 1K6 at 22 (July 30, 2020).) After surveying existing state and federal
7 regulations, Cal/OSHA pointed out that there was “no existing Title 8 regulation that
8 comprehensively addresses an employer’s responsibility to protect Non-5199 Workers from
9 infectious diseases.” (*Id.*) It reasoned that “Cal/OSHA’s enforcement efforts could be streamlined
10 and strengthened through regulatory mandates specific to preventing the spread of infectious
11 diseases.” (*Id.*) “Given the unprecedented nature of the COVID-19 pandemic,” it concluded, “a
12 new standard that will enhance Cal/OSHA’s ability to protect workers is essential to keep
13 workplaces safe. A specific COVID-19 emergency regulation in Title 8 would provide clear
14 instructions to employers and employees on what needs to be done to protect workers from COVID-
15 19, eliminating any confusion and enhancing compliance.” (*Id.* at 22-23.) Cal/OSHA
16 recommended that the Board adopt the proposed standard as an emergency regulation, observing
17 that COVID-19 is “an occupational health emergency causing more deaths in less time than any
18 other workplace crisis in the nearly fifty-year existence of Cal/OSHA. The COVID-19 public
19 health crisis is exactly the type of catastrophe that the legislature intended an emergency regulation
20 to address.” (*Id.* at 21-22.)

21 In contrast, a Board staff evaluation recommended denial of the petition.² It acknowledged
22 that federal OSHA regulations did not specifically address employee protections against COVID-
23 19, and that the scope of the ATD standard was limited to medical offices and certain other
24 specialized facilities. It also acknowledged at least two states, Virginia and Oregon, had adopted
25 or had started the process of adopting emergency regulations mandating compliance with such
26 recommended practices. However, Board staff stated that they were “unable to find evidence that
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28 ² Occupational Safety and Health Standards Board, Petition File No. 583, Board Staff Evaluation
(Aug. 10, 2020).

1 the vast majority of California workplaces are not already in compliance with COVID-19
2 requirements and guidelines,” and expressed concern that a new regulation would “place additional
3 regulatory burden” on such businesses. While Board staff acknowledged that “[s]ome employers
4 exhibit a lack of regard for Cal/OSHA regulations and continue to do so despite robust efforts on
5 the part of regulatory agencies and employer and labor groups,” Board staff expressed the opinion
6 that “Cal/OSHA’s limited resources should continue to be focused on enforcement and consultation
7 outreach specifically targeted at employers and sectors of the economy with deficient COVID-19
8 protections, as this is more likely to be effective at ensuring employee protections.” It also
9 suggested that prescribing specific requirements, “without substantial evidence of need,” could
10 dilute the effectiveness of the IIPP regulation and cause confusion. In short, Board staff concluded,
11 “[d]eveloping an ETS and a follow-up permanent regulation for the entire state may not be the most
12 effective use of California’s limited Cal/OSHA and Board resources.”³

13 The Board unanimously voted to grant the petition in part, agreeing with Cal/OSHA that
14 “COVID-19 is a hazard to working people” and that “an emergency regulation would enhance
15 worker safety.” (AR Tab 1K5 at 3.) Between February 1, 2020 and September 27, 2020, the
16 Division received nearly 7,000 complaints alleging inadequate protections for and potential
17 exposure to COVID-19 in workplaces. (AR Tab 1E at 5 ¶ 15.) The Board accepted Cal/OSHA’s
18 assertion that “an emergency regulation would strengthen, rather than complicate, the Division’s
19 enforcement efforts.” (AR Tab 1K5 at 4.) Accordingly, the Board directed Cal/OSHA to work
20 with Board staff to expeditiously submit a proposal for an emergency regulation to protect all
21 workers not covered by section 5199 from COVID-19 exposure in the workplace. (*Id.*)

22 On November 12, 2020, the Board published a Notice of Proposed Emergency Action,
23 which extended to the public the opportunity to comment on the proposal prior to or at the upcoming
24 Board meeting. (AR Tabs 1C, 1H, 1J.) The administrative record reflects that prior to the meeting,
25 the Board received extensive written comment letters on the proposed ETS Regulations from a
26 variety of sources, including public agencies and municipalities, trade and industry associations,
27

28 ³ The Court granted Plaintiffs’ motion to supplement the record to include both the rulemaking
petition and the Board staff evaluation.

1 private employers, employee organizations, individual legislators, and the Attorney General. (AR
2 Tabs 2A-W.) On November 19, 2020, the Board held a lengthy (day-long) public hearing to discuss
3 the proposed ETS regulations, during which it heard extensive public comments. (AR Tab 5
4 (transcript).) Following the hearing, the Board adopted the ETS Regulations. (AR Tabs 3A (Board
5 resolution), 3B (Submission of Regulations), 3D (Proposed Text), 3F (Board vote sheet), 3G
6 (agenda), 3I (Economic and Fiscal Impact Statement).) The Board's unanimous resolution
7 adopting the regulations was accompanied by a 57-page Finding of Emergency (AR Tab 3E) that
8 listed dozens of scientific studies, CDC and other agencies' guidance documents, executive orders,
9 government statistical reports, and other documents relied upon by the Board. (AR Tabs 1K1-
10 1K71.) The Board subsequently issued a brief, three-page Addendum to that Finding. (AR Tab
11 3E1.) The Office of Administrative Law approved the Board's emergency regulatory action, which
12 became effective on November 30, 2020. (AR Tab 4.)

13 The Board adopted five new emergency regulations. (8 Cal. Code Regs., §§ 3205-3205.4.)
14 They apply to all employees and places of employment, other than places of employment with one
15 employee who does not have contact with other persons; employees working from home; and
16 employees who are covered by section 5199 (i.e., the ATD Standard discussed above). (§ 3205(a).)
17 Among other measures, they provide:

- 18 • **COVID-19 Prevention Program.** Employers must establish, implement, and
19 maintain an effective, written COVID-19 Prevention Program, which among other
20 things must address communicating information to employees about COVID-19,
21 identification and evaluation of COVID-19 hazards in the workplace, investigating
22 and responding to COVID-19 cases in the workplace, correcting COVID-19
23 hazards, providing effective training and instruction to employees on workplace
24 COVID-19 prevention and policies, physical distancing and face coverings,
25 provision of personal protective equipment, recordkeeping requirements for
26 recording or tracking positive COVID-19 cases in the workplace, etc. (§ 3205(c));⁴

27
28 ⁴ The regulation provides that the COVID-19 Prevention Program may be integrated into the
employer's existing Injury and Illness Program (§ 3203), or may be maintained in a separate
document. (§ 3205(c).)

- 1 • **Testing.** Employers must provide COVID-19 testing to employees at no cost and
2 during working hours if the employee is exposed to a COVID-19 case (§
3 3205(c)(3)) or has been present in an exposed workplace that has been identified as
4 the location of an outbreak or when there are three or more COVID-19 cases in an
5 exposed workplace within a 14-day period (§ 3205.1(b)(1).)
- 6 • **Exclusion from Workplace.** Employers must exclude from the workplace all
7 employees who have COVID-19 or have been exposed to COVID-19 for a period
8 of 10 to 14 days, consistent with current public recommendations or orders (§
9 3205(c)(10)-(11); Executive Order N-84-20). Employers must continue and
10 maintain workers' earnings, seniority, and all other employee rights and benefits
11 during this exclusion period, unless the COVID-19 illness or exposure is shown to
12 be nonoccupational. (§ 3205(c)(10)(C).)
- 13 • **Major COVID-19 Outbreaks.** Employers shall provide twice weekly COVID-19
14 testing when there are 20 or more COVID-19 cases in an exposed workplace within
15 a 30-day period. (§ 3502.2(a), (b).)
- 16 • **COVID-19 Prevention in Employer-Provided Housing.** Employers who
17 provide housing to employees shall prioritize housing unit assignments to minimize
18 exposure by housing together, in order, (i) family members and (ii) residents who
19 work in the same crew or at the same worksite; shall ensure the premises are of
20 sufficient size and layout to permit at least six feet of physical distancing between
21 residents, and that beds are spaced at least six feet apart; and shall effectively isolate
22 COVID-19 exposed residents from all other occupants. (§ 3205.3(b), (c), (h).)
- 23 • **Employer-Provided Transportation.** Employers who provide employees with
24 motor vehicle transportation to and from work shall prioritize shared transportation
25 assignments to minimize exposure in the same manner as they do shared housing;
26 and shall ensure that the vehicle operator and any passengers are separated by at
27 least three feet during the operation of the vehicle. (§ 3205.4(b), (c).)
- 28

PROCEDURAL BACKGROUND

The National Retail Federation (NRF) Plaintiffs filed their action in San Francisco Superior Court on December 16, 2020. The Western Growers Association (WGA) Plaintiffs filed their similar action in Los Angeles County Superior Court on December 31, 2020. On January 19, 2021, the Court entered an order on the parties' stipulation to transfer the latter case and assign it to this Court for decision. On January 28, 2021, after circulating a tentative ruling in the form of a written order, the Court held a hearing on both motions. The parties were granted leave to file supplemental post-hearing briefs. On February 11, 2021, the Court heard the WGA Plaintiffs' motion to complete the administrative record. This order resolves the plaintiffs' applications for a preliminary injunction in both related cases, which raise common (although not identical) issues.⁵

DISCUSSION

The question before the Court is whether Plaintiffs have met their burden to show entitlement to a preliminary injunction, an "extraordinary remedy." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) "As its name suggests, a *preliminary* injunction is an order that is sought by a plaintiff *prior to a full adjudication of the merits of its claim*. [Citation.] To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (*White v. Davis* (2003) 30 Cal.4th 528, 554.) As a general matter, "the question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*Id.*) "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Butt*

⁵ The Court granted the applications of various interested parties to file *amicus curiae* briefs in support of both parties. However, *amici* may not expand the factual record before the Court nor present issues not raised by the parties. (See *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1046, fn. 12 ["an amicus curiae accepts the case as he finds it and may not launch out upon a juridical expedition of its own unrelated to the actual appellate record" (internal quotations omitted)].) The Court has considered those briefs within those constraints.

1 v. *State of California* (1992) 4 Cal.4th 668, 677-678.)

2 In other words, “the standard for granting injunctive relief involves balancing competing
3 public interests—the harm if an injunction issues versus the harm if the project is allowed to
4 proceed. ‘It is well established that when injunctive relief is sought, consideration of public policy
5 is not only permissible but mandatory.’” (*Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th
6 837, 854.) “The burden is on the party seeking the preliminary injunction to show all of the
7 elements necessary to support issuance of a stay.” (*Id.*) Finally, “[w]here, as here, the defendants
8 are public agencies and the plaintiff seeks to restrain them in the performance of their duties, public
9 policy considerations also come into play. There is a general rule against enjoining public officers
10 or agencies from performing their duties. [Citations.] This rule would not preclude a court from
11 enjoining unconstitutional or void acts, but to support a request for such relief the plaintiff must
12 make a significant showing of irreparable injury.” (*Tahoe Keys Property Owners’ Assn. v. State*
13 *Water Resources Control Board* (1994) 23 Cal.App.4th 1459, 14711.) These factors apply with
14 equal force where, as here, a party is seeking a preliminary injunction barring a state agency from
15 enforcing emergency regulations. (See, e.g., *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 303-304
16 [reversing preliminary injunction barring State of California’s enforcement of interim emergency
17 regulations].)

18 For the following reasons, the Court concludes that Plaintiffs have not shown a likelihood
19 of success on the merits of their claims. (See Part I, *infra.*) Even if they were able to do so, the
20 balance of interim harms weighs heavily in favor of the continued implementation and enforcement
21 of the ETS regulations; thus, injunctive relief is not warranted. (See Part II, *infra.*)

22
23 **I. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON**
24 **THE MERITS OF THEIR CLAIMS.**

25 Plaintiffs premise their requests for a preliminary injunction on three principal claims. First,
26 they contend that the Board violated the Administrative Procedure Act by adopting the ETS
27 Regulations on an emergency basis, rather than following the usual notice and comment procedure.
28 Second, they contend that certain of the ETS Regulations exceed Cal/OSHA’s authority. Third,

1 they claim that the ETS Regulations violate due process. The Court addresses each claim in turn.

2 **A. The Board's Emergency Finding Is Supported By Substantial Evidence.**

3 Plaintiffs' central challenge is to the Board's adoption of the ETS Regulations on an
4 emergency basis. Plaintiffs assert that the circumstances surrounding the ETS Regulations "did not
5 warrant emergency adoption," and that the Board's Finding of Emergency "failed to meet the
6 requirements to demonstrate the existence of an emergency so immediate and serious that it made
7 allowing notice and meaningful public comment inconsistent with the public interest." (NRF
8 Memo. at 10:9-12; WGA Memo. at 12:18 [contending that "[t]he Board failed to demonstrate a
9 workplace emergency"].) The Court is unpersuaded.

10
11 **1. The Board Properly Found That The COVID-19 Pandemic
12 Constitutes An Emergency Necessitating Immediate Action.**

13 California's Administrative Procedure Act, Gov. Code § 11340 *et seq.*, generally requires
14 state agencies that seek to adopt regulations to circulate them for public notice and comment, a
15 process that requires "lengthy proceedings." (*Doe v. Wilson*, 57 Cal.App.4th at 306.)⁶ However,
16 the APA authorizes a state agency to adopt a regulation as an emergency regulation if it makes a
17 finding that the adoption of the regulation is necessary to address an "emergency." (Gov. Code §
18 11346.1(b)(1).) "Emergency" is defined as "a situation that calls for immediate action to avoid
19 serious harm to the public peace, health, safety, or general welfare." (Gov. Code § 1132.545.) Any
20 finding of an emergency shall include "a description of the specific facts demonstrating the
21 existence of an emergency and the need for immediate action, and demonstrating, by substantial
22 evidence, the need for the proposed regulation to effectuate the statute being implemented,
23 interpreted, or made specific and to address only the demonstrated emergency. The finding of
24 emergency shall also identify each technical, theoretical, and empirical study, report, or similar
25 document if any, upon which the agency relies." (*Id.* § 11346.1(b)(2).) "A finding of emergency
26 based only upon expediency, convenience, best interest, general public need, or speculation, shall

27 ⁶ Plaintiffs' counsel estimated at the hearing that with the 45-day required notice period (Gov. Code
28 § 11346.4), a full-blown notice and comment process would have consumed approximately four
months. (RT (Jan. 28, 2021) at 75:21-76:7; see also *Pulaski v. California Occupational Safety and
Health Standards Board* (1999) 75 Cal.App.4th 1315, 1323 [referring to "protracted saga of
rulemaking, comments and public hearings" leading to Board's promulgation of regulation].)

1 not be adequate to demonstrate the existence of an emergency.” (*Id.*) “If the situation identified in
2 the finding of emergency existed and was known by the agency adopting the emergency regulation
3 in sufficient time to have been addressed through nonemergency regulations . . . , the finding of
4 emergency shall include facts explaining the failure to address the situation through nonemergency
5 regulations.” (*Id.*) The Office of Administrative Law reviews the adopted regulations and may
6 disapprove them if, among other things, “it determines that the situation addressed by the
7 regulations is not an emergency.” (*Id.* § 11349.6(b).)

8 Such a regulation will become effective on an interim basis for a period of up to 180 days.
9 (*Id.* § 11346.11(e).)⁷ An emergency regulation may be declared to be invalid “upon the ground that
10 the facts recited in the finding of emergency . . . do not constitute an emergency within the
11 provisions of Section 11346.1.” (*Id.* § 11350(a).) In a proceeding under section 11350, a court
12 may only consider the following evidence: (1) the rulemaking file; (2) the finding of emergency;
13 (3) an item that is required to be included in the rulemaking file but is not, for the sole purpose of
14 proving its omission; and (4) any evidence relevant to whether a regulation is required to be
15 adopted. (*Id.* § 11350(d).)

16 “In the leading case concerning the validity of such emergency regulations, [citation], the
17 court supported the issuance of the emergency regulations and held: ‘What constitutes an
18 emergency is primarily a matter for the agency’s discretion.’” (*Doe v. Wilson*, 57 Cal.App.4th at
19 305-306, quoting *Schenley Affiliated Brands v. Kirby* (1971) 21 Cal.App.3d 177, 194-195.) “Under
20 *Schenley*, a court is not necessarily bound by an agency’s determination of the existence of an
21 emergency, but the court must accord *substantial deference* to this agency finding, and may only
22 overturn such an emergency finding if it constitutes an abuse of discretion by the agency.” (*Id.*)
23 Indeed, as another court has observed, “the term ‘emergency’ has been given a practical,
24 commonsense meaning in the California case law: ‘[E]mergency has long been accepted in
25 California as an unforeseen situation calling for immediate action. This is the meaning of the word
26 that obtains in the mind of the lawyer as well as in the mind of the layman.’” (*Id.*, quoting *Sonoma*

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28 ⁷The Governor extended this six-month period by 120 days in Executive Order N-71-20. (AR Tab 1K6 at 2; Tab 1K52 at ¶ 40.)

1 *County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 276-277.)
2 Plaintiffs fail adequately to address this controlling authority.⁸

3 Plaintiffs do not seriously contend—nor could they—that the COVID-19 pandemic is
4 anything other than a genuine emergency in any intelligible sense of the word. (See *Sonoma County*
5 *Organization etc. Employees*, 1 Cal.App.4th at 277 [“an emergency may well be evidenced by an
6 imminent and substantial threat to public health or safety”]; WGA Memo. at 12:21-22
7 [acknowledging that “COVID-19 is unquestionably a public health emergency”].) Rather, Plaintiffs
8 contend that “[t]here is no reason that the regular rulemaking process, which involves public
9 comment . . . , could not have begun in March 2020,” which COVID-19 was first recognized in the
10 United States. (NRF Memo. at 10:16-17; WGA Reply at 10:12-13 [“The Governor’s emergency
11 declaration should have been impetus enough for the Board to consider taking action back in
12 March.”].) That contention is insupportable. As the Board found, in “the early stage of the
13 pandemic,” stay-at-home orders had initially “flattened the curve” in California, the existing ATD
14 standard protected employees in healthcare and other workplaces most affected by the pandemic,
15 and the expected extent and length of the pandemic were unclear. However, “cases began to rise
16 precipitously in October and November 2020. [The prior g]uidance is not sufficient to address the
17 present increase in cases and the risk of occupational spread. . . . The present threat of exponential
18 growth in COVID-19 cases demands immediate action.” (AR 3E1 at 1-2.) This discussion readily
19 satisfies the statutory requirement that the agency’s finding of emergency include “facts explaining
20 the failure to address the situation through nonemergency regulations.” (Gov. Code §
21 11346.1(b)(2).)

22 Indisputable data readily illustrates the point. According to the California Department of
23

24 ⁸ The WGA Plaintiffs briefly dismiss *Doe v. Wilson* in a footnote as unsupported by “reasoned
25 analysis,” and suggest that it is no longer authoritative because the Legislature amended section
26 11346.1 effective January 1, 2007. However, they cite nothing in the language or legislative history
27 of that amendment which suggests that the Legislature intended to abrogate the substantial evidence
28 standard and direct courts to exercise their “independent judgment,” as Plaintiffs contend. To the
contrary, the amended language continues to provide that the agency shall demonstrate, “by
substantial evidence,” the need for the proposed regulation. (Gov. Code § 11346.1(b)(2).) As
discussed below, the requirement that courts defer to an agency’s finding of an emergency is
entirely consistent with the substantial evidence standard that governs judicial review of
administrative agencies’ findings.

Public Health, on March 4, 2020, when Governor Newsom issued his proclamation of a state of emergency, California had 53 confirmed cases and one reported death—*one*—from COVID-19. On May 20, 2020, when the Board received the petition requesting it to create new temporary emergency standards, there were 84,057 confirmed cases and 3,436 deaths. By November 19, 2020, when the Board issued its Finding of Emergency, those numbers had risen to over *one million* confirmed cases (1,059,267) and 18,466 deaths.⁹ The same day, the Governor and the State Department of Public Health, noting “an unprecedented, rapid rise in COVID-19 cases across California,” issued a stay at home order applicable between 10 PM and 5 AM in counties that were seeing the highest rates of positive cases and hospitalizations in order to slow the surge in transmission of the virus.¹⁰ (See also *South Bay United Pentecostal Church*, 985 F.3d at 1134–1135 [“in late October, case rates began to climb, then to skyrocket exponentially. . . . [¶] From mid-November to mid-December, the number of new cases per day in California jumped from 8,743 to more than 35,000. The number of COVID-19 patients hospitalized statewide grew from 777 on November 15 to 13,645 on December 14. . . . As of January 19, California became the first state to record more than three million cases. On January 21, 2021, the State recorded a record 736 deaths in a single day, bringing the total of Californians who have died from the virus to 35,004.” (footnotes omitted)].)

In short, in March 2020, the COVID-19 pandemic was still in its initial, relatively modest wave; a second, larger wave began to rise after the Memorial Day holiday in late May; and by late October, it entered its most deadly phase thus far.¹¹ As the Board accurately explains, “any passage

⁹ “State Officials Announce Latest COVID-19 Facts,” *cdph.ca.gov*. The Court takes judicial notice of these official statistics released by the California Department of Public Health.

¹⁰ “State Issues Limited Stay at Home Order to Slow Spread of COVID-19,” *gov.ca.gov*.

¹¹ See, e.g., “Half of U.S. Coronavirus Deaths Have Come Since Nov. 1,” *The New York Times* (Feb. 10, 2021) [“The winter wave has been the pandemic’s deadliest period”]; “California, Besieged by Virus for Months, Has Most Deaths in U.S.,” *The New York Times* (Feb. 9, 2021); “Covid-19: Virus Hammers California as Deaths and Hospitalizations Surge,” *The New York Times* (Feb. 1, 2021). As the Ninth Circuit observed in late January, “The State of California is facing its darkest hour in its fight against the COVID-19 pandemic, with case counts so high that intensive care unit capacity is at 0% in most of Southern California. To slow the surging community spread, California’s public health and epidemiological experts have crafted a complex set of regulations that restrict various activities based on their risk of transmitting the disease and the projected toll on the state’s healthcare system.” (*South Bay United Pentecostal Church*, 985 F.3d at 1131.)

1 in time from the start of the declared emergency to the effective date of the ETS [Regulations] was
2 indicative of an evolving and worsening health crisis requiring evolving and escalating
3 governmental actions.” (See also *Midway Venture LLC*, 2021 WL 222006, at *3 [“These [public
4 health] restrictions shifted as the pandemic ebbed and flowed and as scientists better understood
5 the transmission of the virus.”].) Under these circumstances, Plaintiffs’ contentions that the Board
6 abused its discretion in finding an emergency and that it should have acted many months earlier are
7 untenable.

8 The WGA Plaintiffs’ reliance on the unpublished federal court decision in *Chamber of*
9 *Commerce of United States v. U.S. Department of Homeland Security* (N.D. Cal. Dec. 1, 2020),
10 2020 WL 7043877 is misplaced. There, the court held that two federal agencies’ delay in
11 promulgating interim final rules regarding the H-1B visa program did not fall within the good cause
12 exception to the federal APA, which authorizes an agency to excuse the Act’s notice and comment
13 requirements “when the agency for good cause finds . . . that notice and public procedure thereon
14 are impracticable, unnecessary, or contrary to the public interest.” (*Id.* at *6, citing 5 U.S.C. §
15 533(b)(B).) *Chamber of Commerce* is inapposite, for several reasons. First, it held that a court
16 should review *de novo* an agency’s decision to invoke the good cause exception, rejecting the
17 agencies’ argument that a court should defer to their findings. (*Id.* at *6-*7.) In contrast, under
18 California’s APA, there is no “good cause” exception, and courts must defer to an agency’s finding
19 of emergency if it is supported by substantial evidence. Second, the court held that the agencies
20 could not justify their delay on the basis of the COVID-19 pandemic, pointing out that the issue of
21 domestic unemployment that the rules sought to address had been on their agenda since 2017, long
22 before the pandemic, and that the rules themselves acknowledged that “corrective measures should
23 have been taken long ago.” (*Id.* at *8.) In contrast, the ETS Regulations were promulgated on an
24 emergency basis not to address a longstanding issue that predated the pandemic, but rather precisely
25 to address COVID-19 and its effects on employee safety and health. Third, “Defendants did not
26 suggest in the Rules—or at oral argument—that they are intended to be a temporary solution until
27 the ‘emergency situation has been eased by their promulgation.’” (*Id.* at *10.) In contrast, the ETS
28 Regulations are in effect only for a limited period of time.

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1 *Standards Board* (1999) 75 Cal.App.4th 1315, 1329 [rejecting challengers’ claim that Board failed
2 to cite any studies in support of new standard adopted to address repetitive motion injuries or to
3 adequately explain the broad rule that it adopted, observing that “The fact that the Board cited only
4 six documents is not determinative, given that it was not required to cite any,” and “the record is
5 replete with articles and reports” supporting the Board’s action].)¹²

6 Plaintiffs acknowledge that the Board’s finding discusses the spread of COVID-19 in
7 general, but insist that it “does not establish any nexus, supported by specific facts, between
8 COVID-19 transmission and the workplace to justify emergency rulemaking.” (WGA Memo. at
9 13:5-6.) Plaintiffs assert that the Finding does not cite any studies or other evidence “showing
10 California workplaces have been a vector for spread of COVID,” and insist that as a result, the
11 Board’s finding of an emergency is based on “speculation.” (*Id.* at 13:8-17; see also *id.* at 14:6-7
12 [contending that Cal/OSHA “failed to provide any evidence California workplaces are vectors for
13 spread of COVID-19”].) It is worth pausing to recognize just how fatuous this argument is. As is
14 now well-known, “Because the primary mode of transmission is person-to-person, any activity that
15 brings individuals together increases the risk of additional infections. The more individuals that
16 gather together, and the longer they spend together, the greater the risk.” (*Midway Venture LLC*,
17 2021 WL 222006, at *3.) In other words, the virus spreads *any place* where persons gather and
18 come into contact with one another—whether it happens to be an office building, a meatpacking
19 plant, a wedding reception, a business conference, or an event in the Rose Garden of the White
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24 ¹² Plaintiffs protest that the ETS Regulations are unnecessary because they and their members are
25 already doing everything they can to protect employees by following existing standards and
26 regulations. But regulators are not required, Polyanna-like, to assume good faith on the part of all
27 regulated entities; they must act to *prevent* avoidable injuries, even if they are caused by a small
28 minority of employers. In fact, even under the existing ATD, IIDD, and other standards, Cal/OSHA
has issued numerous citations for COVID-19 related violations against a wide variety of employers,
including employers in the agricultural, construction, manufacturing, and retail (grocery) sectors.
(See State of California, Department of Industrial Relations, Cal/OSHA, “Citations for COVID-19
Related Violations,” dir.ca.gov/dosh/COVID19citations.html.)

1 House.¹³ Workplaces, where employees often spend eight hours a day or more in close proximity
2 to one another, are no exception, which of course is why the pandemic has emptied innumerable
3 office buildings, stores, shopping centers, restaurants, and bars around the world.¹⁴ The virus is
4 also spread among persons residing together in housing and on buses and other transportation,
5 whether they are private or employer-provided. The Board did not need to wait to adopt emergency
6 regulations until scientific studies were completed to confirm these obvious facts. As it correctly
7 observes, “elevating the evidentiary standard and waiting for researchers to conduct and publish
8 further studies would result in more workplace infections, illnesses, and deaths, exacerbating the
9 emergency and defeating the purpose of the expedited emergency rulemaking process.” (Supp. Br.
10 at 5:9-11.)

11 Plaintiffs do not submit any admissible contrary evidence.¹⁵ But even if they had, the
12 governing substantial evidence standard requires a court to “accept all evidence which supports the
13 successful party, disregard the contrary evidence, and draw all reasonable inferences to uphold the
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15 ¹³ Of course, not all workplaces pose an identical risk of transmission and infection. In the *South*
16 *Bay Pentecostal Church* case, “California presented evidence that retail and grocery stores pose a
17 lower transmission risk than indoor worship, primarily because those establishments do not involve
18 individuals congregating to participate in a group activity.” (985 F.3d at 1144.) Nonetheless, there
is no blinking the obvious reality that places of employment where employees come into contact
present a risk of transmission of the virus.

19 ¹⁴ Plaintiffs assert that they are not aware of studies specifically documenting the spread of COVID-
19 in retail or agricultural workplaces. As one court recently observed in rejecting a similar
20 argument, “Without evidence of the depth of Plaintiffs’ ‘knowledge’ or the extent to which
21 transmissions have been accurately traced, such an argument is meaningless.” (*Mitchell*, 2020 WL
22 7647741, at *5, fn.3.) But even the WGA Plaintiffs acknowledge that the infection positivity rate
23 among farmworkers in employer-provided housing “was initially a problem in certain agricultural
24 locales, such as Ventura County.” (WGA Reply at 11, fn. 4.) Moreover, the Board submitted
evidence of reports it had received from local health departments of hundreds of COVID-19
outbreaks (3 or more cases within a 14-day period) resulting in thousands of cases in retail trade
and agriculture and food manufacturing workplaces. (Heinzerling Decl. ¶ 5.) While that evidence
was not before the Board when it adopted the ETS Regulations, the Court considers it in connection
with the balance of interim harms.

25 ¹⁵ The NRF Plaintiffs’ reliance on “the recent studies and data provided with Plaintiffs’ Complaint”
26 (Memo. at 11:8-9) is misplaced. An unverified complaint is not “evidence” that can serve as a
27 basis for a preliminary injunction. (Code Civ. Proc. § 527(a); Cal. R. Ct. 3.1306(a).) In any event,
28 bare citations to studies or other materials on the Internet, without any supporting declarations or
expert testimony, are not properly considered by the Court. “[A]nyone can put anything on the
Internet. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even
subject to independent verification absent underlying documentation.” (*People v. Beckley* (2010)
185 Cal.App.4th 509, 515-516.)

1 [administrative decision].” (*M.N. v. Morgan Hill Unified School Dist.* (2018) 20 Cal.App.5th 607,
2 616 (citation omitted).) “Only if no reasonable person could reach the conclusion reached by the
3 administrative agency, based on the entire record before it, will a court conclude that the agency’s
4 findings are not supported by substantial evidence.” (*Doe v. Regents of Univ. of Cal.* (2016) 5
5 Cal.App.5th 1055, 1073 (citation omitted).) As the parties challenging the administrative decision,
6 it is Plaintiffs’ burden to establish that the Board abused its discretion by rendering a decision not
7 supported by substantial evidence. (*M.N.*, 20 Cal.App.5th at 631.) Plaintiffs have not carried that
8 burden.

9 10 **3. The Addendum Does Not Undermine The Board’s Action.**

11 The WGA Plaintiffs direct a great deal of rhetorical fire at the Addendum to the Finding of
12 Emergency, attacking it as an “after-the-fact justification” for the ETS Regulations that was
13 purportedly adopted in violation of the APA or the Bagley-Keene Open Meeting Act. (WGA
14 Memo. at 17:11-18:8.) Plaintiffs even go so far as to contend that the Board’s failure to include
15 the Addendum in its original notice of proposed emergency action, “standing alone,” is “sufficient
16 basis to invalidate the ETS,” and constitutes an “admission that the [Finding of Emergency] was
17 inadequate.” (WGA Reply at 7:27-8:2, 13:3-4.) However, the brief Addendum is a weak reed that
18 cannot possibly support the weight that Plaintiffs would place upon it.

19 The facts are as follows. After holding a properly-noticed public meeting on November 19,
20 2020 to discuss the proposed ETS Regulations, the Board voted to adopt those regulations. Board
21 staff then submitted the proposed Regulations, finding of emergency, and other required documents
22 to the Office of Administrative Law (OAL), which is charged with reviewing proposed regulations
23 (Gov. Code § 11349.1), and with approving or disapproving proposed emergency regulations.
24 (Gov. Code § 11349.6(a) [“prior to the adoption of the regulation as an emergency, [OAL] shall
25 approve or disapprove the regulation.”].) (Shupe Decl. ¶ 4.) On November 25, 2020, during the
26 course of its review, OAL requested further information be added to the finding of emergency and
27 authorized Board staff to prepare an addendum. (*Id.* ¶ 6; Escobar Decl. ¶ 5.) On November 29,
28 2020, Board staff submitted the Addendum, which included a short summary of the facts leading

1 to the emergency rulemaking effort. (*Id.* ¶ 7; AR Tab 3E1.) A revised version of the Addendum
2 was sent to OAL the next day by a Cal/OSHA attorney. (*Id.* ¶ 8.) On November 30, 2020, before
3 approving the emergency regulations and filing them with the Secretary of State, OAL added the
4 addendum to the finding of emergency, and the final regulations, finding and addendum then were
5 posted on the Board’s website. (*Id.* ¶¶ 9-11; Escobar Decl. ¶ 7.)

6 The approach taken by the Board and OAL here is consistent with the procedure dictated
7 by the APA and routinely followed by administrative agencies in California. OAL is to review
8 emergency regulations adopted by an agency within 10 days after their submittal, and must post a
9 notice of the filing of a proposed emergency regulation to allow for five days of public comment
10 “unless the emergency situation clearly poses such an immediate serious harm that delaying action
11 to allow public comment would be inconsistent with the public interest.” (Gov. Code §
12 11349.6(b).) An agency may add material to a rulemaking file that has been submitted to OAL for
13 review if addition of the material does not violate other requirements of the APA. (Gov. Code §
14 11349.2.)

15 The practice of an administrative agency issuing addenda in response to public comments
16 or queries from OAL, far from a cause for suspicion, is entirely unremarkable. (See, e.g., *California*
17 *Assn. of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 293-300 [after
18 issuing notice of emergency rulemaking and holding public hearing, Department of Health Care
19 Services issued notice of consideration of proposed amendments and final statement of reasons,
20 including two addendums addressing comments received, and then provided additional responses
21 to issues raised during OAL’s review]; Escobar Decl. ¶ 8 [OAL has approved other emergency
22 rulemakings where the promulgating agency has issued an addendum].)¹⁶

23 In any event, even if the Board arguably committed some technical violation of the APA or
24 of the Bagley-Keene Open Meeting Act in issuing the Addendum to its 57-page Finding of

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26 ¹⁶ See also *California Practice Guide: Administrative Law* (The Rutter Group Dec. 2020) ¶ 26:173
27 [describing a hypothetical scenario similar to that involved here, where after “the OAL reviewing
28 attorney has contacted to an agency representative to advise that they will not recommend approval
of the agency’s proposed emergency adoption because the finding of emergency is inadequate,”
the agency representative “states over the phone it is imperative OAL approve the emergency
regulation, listing a series of recent incidents,” and “OAL then quickly approves the adoption after
receiving the revised, fact-heavy finding.”].

Emergency, any error on this record was inconsequential. The Addendum comprised a total of one page and one-half of text in seven paragraphs, as well as correcting the dates of four of the documents relied upon by the Board. (AR Tab 3E1.) The text briefly summarized the history of the pandemic and the regulatory backdrop to the Board's action. Virtually all of it merely reiterated information found elsewhere in the administrative record or widely known and readily subject to judicial notice. (See also pp. 13-14, *supra*.) Nothing in the Addendum materially alters the Court's analysis of whether the Board's action was supported by substantial evidence.¹⁷ Thus, at a minimum, the Board's action substantially complied with the APA. "Failure to comply with every procedural facet of the APA, however, does not automatically invalidate a regulation." (*Pulaski*, 75 Cal.App.4th at 1328.) A court "may" declare a regulation to be invalid only for "a substantial failure to comply" with the APA. (Gov. Code § 11350(a); see *California Assn. of Medical Products Suppliers*, 199 Cal.App.4th at 303-304, 307.) "Substantial compliance . . . means actual compliance in respect to the substance essential to every reasonable objective of the statute. . . . Where there is compliance as to all matters of substance technical deviations are not to be given the stature of noncompliance. . . . Substance prevails over form." (*Pulaski*, 75 Cal.App.4th at 1328.)¹⁸

B. The Board Had Authority to Adopt The Emergency Regulations.

Plaintiffs' second major claim is that the Board exceeded its authority by promulgating regulations that are outside Cal/OSHA's enforcement authority. The NRF Plaintiffs concede that Cal/OSHA has "broad authority to regulate workplace safety," but insist that its jurisdiction "does

¹⁷ Plaintiffs take specific issue only with a single sentence of the Addendum, which contains a statement they characterize as "debatable." (WGA Memo. at 6:13.) In the context of explaining the need to supplement existing regulations, that sentence states, "Investigations in the field over the summer, along with rising positivity rates, showed that employers were struggling to address the novel hazards addressed by COVID-19." (AR Tab 3E1, at 1-2.)

¹⁸ The same principle applies to the Bagley-Keene Act. (Gov. Code § 11130.3(b)(3) ["An action [taken in violation of the Bagley-Keene Act] shall not be determined to be null and void if. . . [t]he action taken was in substantial compliance with Sections 11123 and 11125"].) Here, as in *North Pacifica LLC v. California Coastal Com.* (2008) 166 Cal.App.4th 1416, "the [Board's] actions demonstrate a good faith effort to notify interested persons and the public about the date, location, and purpose of the hearing. In doing so, the [Board] acted in a manner that was consistent with the open meeting objectives of the Bagley-Keene Act and thereby substantially complied with the act's notice requirements." (*Id.* at 1433.)

1 not extend to regulating wages” or requiring employees to take COVID-19 tests “without any
2 evidence that the hazard is work-related.” (NRF Memo. at 11:27-12:2.)¹⁹ Similarly, the WGA
3 Plaintiffs contend that the Board lacks authority to regulate employer-provided housing and
4 transportation, among other areas, insisting that those and other provisions of the ETS Regulations
5 “do not regulate occupational safety and health hazards arising from working conditions because
6 they do not address health hazards at the place where work is performed,” but rather “regulate
7 conduct occurring outside of the workplace.” (WGA Memo. at 19:1-5.) The Court is unpersuaded.

8 The Board was created by the Legislature as part of the California Occupational Safety and
9 Health Act of 1973, Lab. Code § 6300 *et seq.* “Cal-OSHA was enacted to secure ‘safe and healthful
10 working conditions’ by ‘enforc[ing] effective standards’ and ‘encouraging employers to maintain
11 safe and healthful working conditions.’” (*Murray Co. v. Occupational Safety & Health Appeals*
12 *Bd.* (2009) 180 Cal.App.4th 43, 54, citing Lab. Code § 6300.) Labor Code section 142.3 authorizes
13 the Board to adopt, amend or repeal occupational safety and health standards and orders, and
14 provides that the Board “shall be the only agency in the state authorized to adopt occupational
15 safety and health standards.” (Lab. Code § 142.3(a)(1); see also *Pulaski*, 75 Cal.App.4th at 1323.)

16 The Division (Cal/OSHA) enforces those standards, inspecting workplaces and issuing
17 citations for health and safety violations. (Lab. Code § 142.) It is vested with “the power,
18 jurisdiction, and supervision over every employment and place of employment in this state, which
19 is necessary adequately to enforce and administer all laws and lawful standards or orders, or special
20 orders requiring such employment and place of employment to be safe, and requiring the protection
21 of the life, safety, and health of every employee in such employment or place of employment.”
22 (Lab. Code § 6307.) This language grants the Division “exceedingly broad authority to enforce
23 regulations to protect the health and safety of employees throughout the state.” (*United Air Lines,*
24 *Inc.*, 32 Cal.3d at 767.) In enforcing occupational safety and health standards, the Division is
25 empowered to “[d]eclare and prescribe what safety devices, safeguards, or other means or methods
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27 ¹⁹ In their post-hearing brief, the NRF Plaintiffs attempt to walk back their prior admission that the
28 Board has “broad authority,” asserting instead that the Board is “an agency with limited authority”
to implement “broad health policy.” (Supp. Br. at 5:11.) As discussed in text, Plaintiffs got it right
the first time.

1 of protection are well adapted to render the employees of every employment and place of
2 employment safe as required by law or lawful order,” and to “[r]equire the performance of any
3 other act which the protection of the life and safety of the employees in employments and places
4 of employment reasonably demands.” (Lab. Code § 6308.)

5 “Of all the activities undertaken by an administrative agency, quasi-legislative acts are
6 accorded the most deferential level of judicial scrutiny. [Citation.] ‘The courts exercised limited
7 review of legislative acts by administrative bodies out of deference to the separation of powers
8 between the Legislature and the judiciary, to the legislative delegation of administrative authority
9 to the agency, and to the presumed expertise of the agency within its scope of authority.’” (*Pulaski*,
10 75 Cal.App.4th at 1331.) In considering whether the ETS Regulations are a valid exercise of the
11 Board’s power to adopt standards necessary for the administration of the Occupational Safety and
12 Health Act, and the Division’s power to prescribe such safeguards as the protection of employees’
13 life and safety reasonably demands, “the judicial function is limited to determining whether the
14 regulation (1) is within the scope of the authority conferred and (2) is reasonably necessary to
15 effectuate the purpose of the statute. Moreover, these issues do not present a matter for the
16 independent judgment of [a court]; rather, both come to this court freighted with the strong
17 presumption of regularity accorded administrative rules and regulations. And in considering
18 whether the regulation is ‘reasonably necessary’ under the foregoing standards, the court will defer
19 to the agency’s expertise and will not superimpose its own policy judgment upon the agency in the
20 absence of an arbitrary and capricious decision.” (*Moore v. California State Bd. of Accountancy*
21 (1992) 2 Cal.4th 999, 1014-1015 (citations and internal quotations omitted); see also *California*
22 *Assn. of Medical Products Suppliers*, 199 Cal.App.4th at 303 [“In considering the validity of
23 regulations, the courts’ ‘function is to inquire into the legality of the regulations, not their
24 wisdom.’”].)

25 Here, the two key provisions to which the NRF Plaintiffs principally object fall comfortably
26 within the Board’s and Cal/OSHA’s broad statutory mandates. *First*, Plaintiffs object to section
27 3205(c)(10), which requires the exclusion of exposed employees from the workplace for a limited
28 period of time, and mandates that employers pay their wages and other benefits while the employees

1 are excluded “and otherwise able and available to work.” The Board found that this paid leave
2 provision is “necessary to limit transmission of COVID-19 in the workplace. Toward this end, it
3 is important that employees who are COVID-19 cases or who had exposure to COVID-19 do not
4 come to work. Maintaining employees’ earnings and benefits when they are excluded from the
5 workplace is important in ensuring that employees will notify their employers if they test positive
6 for COVID-19 or have an exposure to COVID-19, and stay away from the workplace during the
7 high-risk exposure period when they may be infectious.” (AR Tab 1E at 19-20.) Thus, the
8 challenged regulation is reasonably necessary to protect workplace safety and employees’ health.
9 As it also “encourages employers to give due attention to enforcement matters,” it “promotes the
10 legislative purposes. Accordingly, it is neither ‘clearly erroneous [n]or unauthorized.’” (*Murray*
11 *Co.*, 184 Cal.App.4th at 54; see *Pulaski*, 75 Cal.App.4th at 1336 [health and safety statutes such as
12 Cal-OSHA “are designed to *prevent* [work-related] illnesses or injuries from occurring.”].)

13 Significantly, there is nothing novel about the requirement that employers maintain
14 workers’ pay and benefits while they are on medical leave. As Plaintiffs concede (NRF Memo. at
15 12 fn. 5), Cal/OSHA for decades has enforced similar regulations requiring employers to maintain
16 employees’ earnings, seniority, rights, and benefits if they are removed from work due to exposure
17 to lead, other toxic substances, or an airborne infectious disease. (E.g., 8 Cal. Code Regs. §§
18 1532.1, 5199(h)(8)(B); see also AR Tab 5 at 287 [“Medical removal and protection of pay have
19 been implemented by federal OSHA and Cal/OSHA since the 1970s in the lead standards and many,
20 many other health regulations.”].)²⁰ Cal/OSHA’s longstanding administrative interpretation of its
21 authority to implement its governing statute is entitled to great weight. (*Western States Petroleum*
22 *Ass’n v. Department of Health Services* (2002) 99 Cal.App.4th 999, 1006 [“An administrative
23 agency’s construction of the authority vested in the agency to carry out a statutory provision is
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25 ²⁰ The recent federal OSHA guidance (see pg. 26 & fn. 22, *infra*) recommends that in order to
26 minimize the negative impact of quarantine and isolation on workers, employers should “consider
27 implementing paid leave policies to reduce risk for everyone at the workplace,” and explains that
28 the Families First Coronavirus Response Act “provides certain employers 100% reimbursement
through tax credits to provide employees with paid sick leave or expanded family and medical leave
for specified reasons related to COVID-19 through March 31, 2021.” It similarly warns, “Policies
that encourage workers to come to work sick or when they have been exposed to COVID-19 are
disfavored.”

1. entitled to great weight and will be followed unless it is clearly erroneous or unauthorized.”]; see
2. also *Moore*, 2 Cal.4th at 1017-1018 [“a presumption that the Legislature is aware of an
3. administrative construction of a statute should be applied if the agency’s interpretation of the
4. statutory provisions is of such longstanding duration that the Legislature may be presumed to know
5. of it”].)

6. *Second*, Plaintiffs challenge the Board’s regulatory requirement that employees who are
7. exposed to COVID-19 when there is an outbreak in the workplace be tested to avoid spreading the
8. virus to other employees. (§ 3205.1(b).) This is also an eminently proper exercise of its statutory
9. authority.²¹ Contrary to Plaintiffs’ argument, the Board’s authority to act is not limited to situations
10. where it can definitively prove that a given employee’s illness or exposure occurred in the
11. workplace—rather than at home, in a restaurant, on public transportation, or somewhere else. Even
12. assuming that such proof were feasible (Plaintiffs elsewhere insist it is not), the virus is just as
13. contagious and the risk to other employees *in the workplace* is the same. “California’s experts cited
14. studies published by the Centers of Disease Control that estimate, on average, one individual
15. infected with COVID-19 goes on to infect an additional 2.5 people, and each of those persons
16. infects 2.5 more. Thus, the risk of community spread grows exponentially with each additional
17. infected person.” (*South Bay United Pentecostal Church*, 985 F.3d at 1148.)

18. The NRF Plaintiffs, asserting that the ETS Regulations are more extensive and stringent
19. than emergency regulations adopted by occupational and health agencies in several other states,
20. complain that they are unnecessarily burdensome, asserting that Cal/OSHA could have
21. differentiated among different industries and exposure risk levels, and could have implemented the
22. testing and other requirements more flexibly. In fact, the ETS Regulations substantially parallel
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26. _____
27. ²¹ Again, recent federal OSHA guidance is to similar effect, stating that employers should “[f]ollow
28. state or local guidance and priorities for screening and viral testing in workplaces. Testing in the
workplace may be arranged through a company’s occupational health provider or in consultation
with the local or state health department.”

1 guidance that federal OSHA adopted two months later, on January 29, 2021.²² While the new
2 federal guidance is comprised of both advisory recommendations and mandatory safety and health
3 standards, it is well established that a state has “sovereign powers over occupational safety and
4 health” and may establish “more stringent standards than those developed by Fed/OSHA [citation]
5 or grant to its own occupational safety and health agency more extensive jurisdiction than that
6 enjoyed by Fed/OSHA.” (*United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.*
7 (1982) 32 Cal.3d 762, 772-773; see also *Solus Industrial Innovations, LLC v. Superior Court* (2018)
8 4 Cal.5th 316, 340 [“Federal OSHA’s provisions related to the enforcement of state plans are
9 concerned with ensuring enforcement that is at least as effective as the federal standards; nothing
10 in the federal act suggests a concern with enforcement that exceeds federal requirements.”].) That
11 the federal government or other states may have taken different approaches does not establish that
12 the Board acted arbitrarily and capriciously in adopting the ETS Regulations. Just as in *Pulaski*, a
13 “rational basis” for the challenged regulations is “readily apparent from the record,” and this Court
14 cannot conclude that they are irrational, arbitrary, or in excess of the Board’s rulemaking authority.
15 (75 Cal.App.4th at 1331-1336 [regulation adopting standards for ergonomics in the workplace
16 designed to minimize the instances of injury from repetitive motion was within Board’s rulemaking
17 authority]; *Henning v. Division of Occupational Saf. & Health* (1990) 219 Cal.App.3d 747, 755-
18 757 [Cal/OSHA had authority to adopt regulations governing employers and contractors engaging
19 in asbestos-related work].)²³

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21 ²² U.S. Department of Labor, Occupational Safety and Health Administration, “Protecting Workers:
22 Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace,”
23 <https://www.osha.gov/coronavirus/safework>.) Significantly, on January 21, 2021, President Biden
24 issued Executive Order 13999, which directed the Secretary of Labor, among other things, to issue
revised guidance to employers on workplace safety during the COVID-19 pandemic, and to
consider whether any emergency temporary standards on COVID-19 are necessary and, if so, to
issue them by March 15, 2021. (“Protecting Worker Health and Safety,” 86 Fed. Reg. 7211 (Jan.
26, 2021).)

25 ²³ Plaintiffs point to a general statement of legislative intent in the APA declaring that “agencies
26 shall actively seek to reduce the unnecessary regulatory burden on private individuals and entities
27 by substituting performance standards for prescriptive standards wherever performance standards
28 can be reasonably expected to be as effective and less burdensome” (Gov. Code § 11340.1.)
However, Plaintiffs omit to quote the very next sentence: “It is the intent of the Legislature that
neither the Office of Administrative Law nor the court should substitute its judgment for that of the
rulemaking agency as expressed in the substantive content of adopted regulations.” (*Id.*) Section
11340.1 adds little or nothing of substance to the analysis.

1 The WGA Plaintiffs level a distinct attack at Cal/OSHA's authority to enforce the ETS
2 Regulations under Labor Code section 6303. That statute broadly defines the "place of
3 employment" over which Cal/OSHA exercises jurisdiction, but excludes "a place where the health
4 and safety jurisdiction is vested by law in, and actively exercised by, any state or federal agency
5 other than the division." (Lab. Code § 6303(a).) Arguing that other state agencies have authority
6 to regulate paid leave, transportation, housing, and public health procedures such as isolation and
7 quarantine, Plaintiffs contend that those agencies' exercise of authority over those areas divests
8 Cal/OSHA of authority to regulate them, and that the provisions of the ETS Regulations bearing
9 on these areas exceed the Board's authority. (WGA Memo. at 19:7-19, 21:1-22:20.) The Court
10 disagrees.

11 The California Supreme Court has squarely held that the "limited exemption" found in
12 Labor Code section 6303(a) "does not comply into play simply because there is another agency that
13 has the power or discretion to enact some regulations affecting employee health or safety. Instead,
14 the exemption applies only in much narrower circumstances, where the other agency in the
15 picture—like the division itself—has been *specifically mandated* to regulate the working
16 environment within its aegis for the protection of the employees' health and safety." (*United Air*
17 *Lines*, 32 Cal.3d at 767, 770.) The statutory exemption "simply reflects a legislative assumption
18 that the division's jurisdiction is not necessary when the exemption applies because the safety of
19 the place of employment will be adequately protected by another agency." (*Id.*) "[T]he Labor
20 Code is to be liberally interpreted to achieve a safe work environment and . . . the allocation of
21 health and safety jurisdiction between different agencies should be construed in a manner that
22 minimizes any potential gap in coverage. To allow the mere mention of safety in another agency's
23 enabling legislation to displace [Cal/OSHA] would be totally out of step with this approach." (*Id.*
24 at 771.) The exemption is to be given a "narrow interpretation," which "furthers the broad remedial
25 purposes of the legislation." (*Id.*)

26 Thus, in *United Air Lines*, the Court held that although the Federal Aviation Authority had
27 promulgated a regulation requiring airlines to develop maintenance manuals including the subject
28 of worker safety and had approved such manuals, because the FAA was not statutorily mandated

1 to protect the health and safety of workers at an airline's ground maintenance facility, it was not
2 "vested by law" with the "health and safety jurisdiction" over a place of employment within the
3 meaning of section 6303(a) so as to oust Cal/OSHA of jurisdiction. (*Id.*; see also, e.g., *Davis v.*
4 *Pine Mountain Lumber Co.* (1969) 273 Cal.App.2d 218, 226 [California Highway Patrol's
5 jurisdiction over safety on public highways does not displace Safety Board's regulations with
6 respect to employment condition on highway].)²⁴

7 Here, the WGA Plaintiffs point to a number of different federal, state and county agencies
8 that have some jurisdiction over a subject matter covered by the ETS Regulations to which they
9 object, including the Division of Labor Standards Enforcement (employee wages), the Department
10 of Housing and Community Development (employee housing), the U.S. Department of Labor
11 (housing of H-2A visa workers), the California Highway Patrol and the Public Utilities Commission
12 (farm labor vehicles), and state and county public health officers (testing, isolation, and quarantine).
13 However, like the FAA, none of those agencies is "*specifically mandated* to regulate the working
14 environment within its aegis for the protection of the employees' health and safety." (*United Air*
15 *Lines, Inc.*, 32 Cal.3d at 770.)²⁵ Under *United Air Lines*, the mere fact that they have some
16 regulatory responsibility in those areas does not divest Cal/OSHA of jurisdiction. (See also *Solus*
17 *Industrial Innovations, LLC*, 4 Cal.5th at 330 [noting that "Cal/OSHA provisions also recognize
18 some concurrent local entity jurisdiction"].) Notably, moreover, Plaintiffs do not question
19 Cal/OSHA's authority to enforce the Board's ATD and IIPP regulations, although they cover some
20 of the same subject matters, as Plaintiffs themselves emphasize.

21
22 ²⁴ A recent Cal/OSHA action provides another illustration. On February 1, 2021, Cal/OSHA cited
23 the State Department of Corrections and Rehabilitation (CDCR) and penalized it in the amount of
24 \$396,070 for a number of COVID-19-related violations at the San Quentin State Prison, including
25 failing to report to the Division that employees at the Prison had been hospitalized with COVID-
26 19; failing to establish an effective plan to minimize exposure of staff to COVID-19; transferring
suspect and confirmed cases between housing units; and failing to isolate inmates with suspected
or confirmed COVID-19 cases. (https://www.dir.ca.gov/dosh/Coronavirus/Citations/02.01.2021-San-Quentin-State-Prison_1480866.pdf) While CDCR itself undoubtedly has and exercises
authority to regulate how the prisons are run, including the practices to be followed by prison staff,
does not oust Cal/OSHA of jurisdiction to regulate these occupational safety and health violations.

27 ²⁵ For example, while the CHP and the PUC oversee the safe operation of farm labor vehicles, their
28 jurisdiction extends to such matters as the structural safety of the vehicles, the size of seats, and the
installation of seatbelts, not to distancing passengers to avoid the spread of communicable diseases
such as COVID-19. (See 13 Cal. Code Regs. § 1270.3.)

1 Finally, having found that Plaintiffs have not established a likelihood of prevailing on their
2 challenge to the ETS Regulations, the Court is also unpersuaded by Plaintiffs' fallback argument
3 that it should sever and enjoin only those regulations to which they object. As the Board points
4 out, those provisions—requiring the testing of exposed workers, paid leave for workers in isolation
5 or quarantine, and the adoption of key safety measures in employer-provided housing and
6 transportation—are at the heart of its attempt to curb the spread of COVID-19. This Court will not
7 gut the ETS Regulations on a piecemeal basis.

8 **C. Plaintiffs Have Not Shown A Likelihood Of Prevailing On Their Due**
9 **Process Claim.**

10 The NRF Plaintiffs devote a total of about one page in their moving papers to their
11 argument that the ETS Regulations violate procedural and substantive due process, and they
12 abandon the argument altogether in their reply brief. To the extent that this argument merely repeats
13 Plaintiffs' challenge to the Board's emergency findings, it adds nothing to the APA argument.²⁶ In
14 any event, Plaintiffs' perfunctory discussion, which is devoid of citation to a single federal or state
15 case, falls far short of meeting Plaintiffs' burden to show a likelihood of success.

16 The WGA Plaintiffs' due process argument is no more persuasive. They argue briefly that
17 the ETS Regulations violate due process on their face because they do not provide employers with
18 any mechanism to obtain relief from the regulations' potential effects on their businesses. (WGA
19 Memo. at 25:24-27:13.) Plaintiffs are wrong: the Board and Cal/OSHA provide just such a

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24 ²⁶ While Plaintiffs complain in passing of purported "puzzling ambiguities" in the regulations (NRF
25 Memo. at 15:5), they make no attempt to show that the regulations are so unclear as to render them
26 unconstitutionally vague. "A court may only sustain a facial challenge to a regulation when it is
27 'arbitrary, capricious or without rational basis.'" (*Pulaski*, 75 Cal.App.4th at 1332 [trial court
28 abused its discretion when it struck a provision in a regulation as "unnecessary surplusage and
ambiguous"]; see also *California Assn. of Medical Products Suppliers*, 199 Cal.App.4th at 319
[argument that emergency regulations lacked the minimum level of clarity required by the APA
and had resulted in "confusion" did not provide a legal basis for a court to invalidate the
regulations].)

1 mechanism: temporary and permanent variances.²⁷ Plaintiffs’ facial attack on the Regulations
2 therefore fails. Plaintiffs’ factually unsupported assertion in their reply brief that such variances
3 “usually take several months before approval” (WGA Memo. at 16:18-19) is entitled to no weight.
4 In any event, Plaintiffs’ challenge is not ripe, as they do not show they have applied for such
5 variances. (See *1041 20th Street, LLC v. Santa Monica Rent Control Bd.* (2019) 38 Cal.App.5th 27,
6 46 [“a basic prerequisite to judicial review of administrative acts is the existence of a ripe
7 controversy”].)

8 Finally, the WGA Plaintiffs object to the presumption created by the ETS Regulations that
9 COVID-19 cases and exposures are work-related, which it characterizes as “a de facto irrebuttable
10 presumption.” (WGA Memo. at 24:22-25:23.) Although the ETS Regulations contain a specific
11 exception “where the employer demonstrates that the COVID-19 exposure is not work related”
12 (8 Cal. Code Regs. § 3205(c)(10)(C), EXCEPTION 2), Plaintiffs protest that this exception is
13 “illusory” and is inconsistent with the Labor Code. (*Id.*) Plaintiffs are wrong. In fact, SB 1159,
14 which became effective as urgency legislation on September 17, 2020, codified a closely similar
15 COVID-19 presumption created by the Governor’s Executive Order N-62-20. (AR Tab 1K4.)
16 Specifically, for workers’ compensation purposes, that legislation creates a presumption that an
17 employee’s illness or death resulting from COVID-19 arises out of and is in the course of
18 employment if the employee tested positive for or was diagnosed with COVID-19 within 14 days
19 after the employee performed labor or services at the employee’s place of employment at the
20 employer’s direction. (Lab. Code § 3212.86(b), (e).) The same presumption applies to employees
21 who test positive during an outbreak at the employee’s specific place of employment, where the
22 employer has five or more employees. (Lab. Code § 3212.88(a), (b), (e).) In each case, as under
23 the ETS Regulations, the presumption is disputable (i.e., rebuttable) and may be controverted by
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25 ²⁷ An employer may be able to obtain a permanent variance from the Board upon a showing that it
26 has an alternate program “which will provide equal or superior safety for employees” (Lab. Code
27 § 143(a)); a temporary variance from Cal/OSHA if it is unable to comply with the standard and is
28 “taking all available steps to safeguard his employees against the hazards covered by the standard”
and has an effective program for coming into compliance with the standard as quickly as practicable
(Lab. Code §§ 6450, 6451); or permission from Cal/OSHA to allow isolated or quarantined
employees to return to work on the basis that their continued removal would create undue risk to a
community’s health and safety. (§ 3205(c)(11)(E).)

1 other evidence. (*Id.* § 3212.86(e), 3212.88(e).) In particular, the latter statute states that evidence
2 relevant to controverting the presumption “may include, but is not limited to, evidence of measures
3 in place to reduce potential transmission of COVID-19 in the employee’s place of employment and
4 evidence of an employee’s nonoccupational risks of COVID-19 infection.” (*Id.* § 3212.88(e)(2).)

5 The rebuttable presumption created by the ETS Regulations is entirely consistent with these
6 legislative provisions, and is well within the Board’s authority. (See *Pulaski*, 75 Cal.App.4th at
7 1335-1337 [in light of “the problematic nature of identifying repetitive motion injuries as work-
8 related,” upholding Board regulation requiring employers to institute a program designed to
9 minimize RMIs in the workplace whenever two or more employees performing repetitive tasks had
10 reported such injuries within a twelve-month time span and the RMIs were predominantly caused
11 by work-related tasks].) Like the objections to the predominant cause provision of the RMI
12 regulation in *Pulaski*, Plaintiffs’ prediction that “[i]t would be impossible for an employer to prove
13 COVID-19 could not have been contracted in the workplace” (WGA Memo. at 25:-23) “is made
14 without citation to the record and rests on pure speculation.” (*Pulaski*, 75 Cal.App.4th at 1337.)

15 **II. THE BALANCE OF INTERIM HARMS AND THE PUBLIC INTEREST**
16 **WEIGH HEAVILY IN FAVOR OF CONTINUED IMPLEMENTATION**
17 **AND ENFORCEMENT OF THE EMERGENCY REGULATIONS.**

18 Even if Plaintiffs were able to establish some likelihood of prevailing on one or more of
19 their claims, the Court concludes that preliminary injunctive relief would not be warranted because
20 both the balance of interim harms and the public interest weigh heavily in favor of continued
21 implementation and enforcement of the ETS regulations. (See *Cohen v. Board of Supervisors*
22 (1985) 40 Cal.3d 277, 289 [“Even if the trial court had found for appellants on the ‘likelihood of
23 success on the merits’ factor, it nevertheless could have refused to issue a preliminary injunction if
24 it found that the interim harm to appellants did not outweigh the interim harm to respondents.”];
25 *Leach v. City of San Marcos* (1989) 213 Cal.App.3d 648, 651, 657-663 (emphasis added) [affirming
26 denial of preliminary injunction where, although taxpayer presented un rebutted evidence which
27 suggested he would prevail on the merits of his challenge to city’s redevelopment plan, he presented
28 no evidence an injunction was necessary to prevent irreparable harm pending a trial on the merits
of his claims].)

1 **A. Plaintiffs Have Failed To Demonstrate Irreparable Harm.**

2 “An injunction cannot issue in a vacuum based on the proponents’ fears about something
3 that may happen in the future. It must be supported by actual evidence . . .” (*Korean Philadelphia*
4 *Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084; see also *People*
5 *ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1136-1137 [issues of fact underlying a preliminary
6 injunction are subject to review under the substantial evidence standard].) Here, the Court finds
7 that Plaintiffs’ showing of irreparable harm is weak at best, and speculative and conjectural at worst.

8 At the outset, the Court discounts Plaintiffs’ claim of irreparable harm in light of several
9 considerations. First, Plaintiffs repeatedly complain that many of the ETS Regulations are
10 unnecessary because they “needlessly duplicate safety protocols that were already in place.” (NRF
11 Memo. at 1:26, 4:8-9 & fn. 2 [“large portions of the emergency regulations are overlapping and/or
12 duplicative”]; WGA Memo. at 14, fn. 7 [“Except to the extent it exceeds the Board’s authority, the
13 ETS duplicates existing enforceable guidance and regulations.”].)²⁸ To the extent that the ETS
14 Regulations merely reiterate or clarify existing regulations to which Plaintiffs are already subject,
15 Plaintiffs cannot credibly contend that complying with them poses a threat of irreparable harm.

16 Second, the ETS Regulations as adopted by the Board are in effect only through the end of
17 September 2021.²⁹ With any luck, as the vaccination effort picks up steam and the numbers of new
18 cases, hospitalizations, and deaths continue to drop, California will be out of the woods by that time
19 and the emergency regulations will no longer be needed, at least in their current form. The limited
20 duration of the current regulations further undermines Plaintiffs’ claim of irreparable harm.

21 Third, Plaintiffs overstate the obligations imposed on employers by the ETS Regulations.
22 For example, at the hearing, the NRF Plaintiffs argued that under the paid leave provision, an
23 employer “literally would be required to exclude somebody who is just near somebody with
24

25 ²⁸ The NRF Plaintiffs can’t seem to make up their mind, since at the same time as they insist that
26 the ETS Regulations are duplicative, they contend that they “impose largely unprecedented and
 significant new requirements in relation to COVID-19.” (Memo. at 7:4-5.)

27 ²⁹ The APA provides that no emergency regulation shall remain in effect more than 180 days unless
28 the adopting agency has complied with the normal notice and comment requirements. (Gov. Code
 § 11346.1(e).) The Governor’s Executive Orders extended that expiration period by 60 days and
 an additional 60 days. (Exec. Orders N-71-20 and N-40-20.)

COVID for an indefinite period of time, potentially” while paying the exposed employee his or her full wages and benefits, even if the employee were hospitalized for 90 days. (RT at 23:25-24:1, 29:11-14, 29:28-30:12.) As the Board pointed out, however, the ETS Regulations impose no such “indefinite” obligation on employers. Rather, employers are required to exclude employees with COVID-19 exposure from the workplace only for 14 days after the last known exposure to a COVID-19 case. (§ 3205(c)(10)(B).) Further, the requirement that employers continue to pay exposed employees applies only to employees excluded from work for this reason “and otherwise able and available to work.” (§ 3205(c)(10)(C).) Thus, contrary to Plaintiffs’ contention, the regulation would *not* require an employer to continue to pay benefits to an employee hospitalized for a lengthy period of time. As the regulation itself explains, this provision “does not apply to any period of time during which the employee is unable to work for reasons other than protecting persons at the workplace from possible COVID-19 transmission.” (*Id.*, EXCEPTION: 1.) Moreover, the regulation provides that “[e]mployers may use employer-provided sick leave benefits for this purpose and consider benefit payments from public sources in determining how to maintain earnings, rights and benefits, where permitted by law and when not covered by workers’ compensation.” (§ 3205(c)(10)(C).) In other words, employers may offset payments by the amount employees receive in other benefit payments (e.g., state disability insurance, unemployment insurance, or workers’ compensation).

Plaintiffs’ emphasis on the cost to employers of mandatory testing of employees suffers from similar exaggeration. The regulations state that where a place of employment has been identified by a local health department as the location of a COVID-19 outbreak or when there are three or more COVID-19 cases in an exposed workplace within a 14-day period, the employer “shall provide COVID-19 testing to all employees at the exposed workplace except for employees who were not present” during the outbreak or the relevant 14-day period, and that “COVID-19 testing shall be provided at no cost to employees during employees’ working hours.” (§ 3205.1(b)(1).) The regulation does not state that employers must bear the cost of such testing, and indeed the Board has since posted guidance clarifying that employers can comply with this requirement by taking advantage of free testing available to the public. As the Board shows, its

1 posted Frequently Asked Questions (FAQs) and detailed online industry guidance address a number
2 of implementation issues that employers have raised, and state that through February 1, 2021,
3 Cal/OSHA exercised its enforcement discretion not to assess monetary penalties for violations of
4 the newly-adopted ETS Regulations.³⁰ The Board's and Cal/OSHA's regulatory approach is
5 entirely reasonable in the context of a fast-moving public health crisis with frequent new
6 developments—of which the recent emergence of new, highly contagious variants of the virus is
7 only one example.

8 The NRF Plaintiffs' claim of irreparable harm is principally based on the contention that
9 compliance with the ETS Regulations would be "financially burdensome." Plaintiffs assert that if
10 their businesses suffer an outbreak of COVID-19, they may be required to exclude employees from
11 their places of employment for a considerable period of time and to shoulder the cost of testing
12 multiple employees, which may subject them to significant financial harm and even the risk of
13 being forced out of business. Plaintiffs do not show, however, that even a single retailer has
14 suffered significant costs as a result of complying with these requirements in the more than 60 days
15 that the ETS Regulations have been in effect.³¹

16 The WGA Plaintiffs attempt a more ambitious showing of irreparable harm. They not only
17 complain about the costs of complying with the ETS Regulations, but raise the spectre that if they
18 are required to do, it could result in labor shortages and loss or destruction of crops, and thereby
19 potentially jeopardize the State's food supply chain. (WGA Memo. at 9:19-20, 30:16-31:22.) As
20 with the NRF Plaintiffs' showing, however, the WGA Plaintiffs do not show that the ETS
21 Regulations have caused such serious effects since they went into effect on November 30, 2020,
22 much less that any such injury is imminent or certain. (See *East Bay Municipal Utility Dist. v.*
23 *Dept. of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1113, 1126 ["An injunction properly
24 issues only where the right to be protected is clear, injury is impending and so immediately as only
25

26 ³⁰ See "COVID-19 Emergency Temporary Standards Frequently Asked Questions,"
27 <https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html>; "Industry guidance to reduce
28 risk," <https://covid19.ca.gov/industry-guidance/>.

³¹ Much of the NRF Plaintiffs' showing is comprised of inadmissible hearsay. The Court sustains
the Board's evidentiary objections on that and other grounds to portions of the Harned Declaration
(¶¶ 9-11, 17-20) and the Martz Declaration (¶¶ 10, 12, 15, 19-21).

1 to be avoided by issuance of the injunction.”].) Moreover, that the WGA Plaintiffs are engaged in
2 essential services does not negate their employees’ right to effective workplace safety protections
3 to safeguard their health and lives and those of their co-workers and families. And employers may
4 apply for temporary variances and variances to ensure continuity of operations, and may mitigate
5 their economic losses by seeking government support and loans.

6 To be sure, the Court does not for a moment minimize the economic and other harm caused
7 by the pandemic and doubtless suffered by Plaintiffs and their member businesses, among scores
8 of other businesses and individuals throughout the State and around the world. As the Court of
9 Appeal recently observed,

10 Restrictions imposed to combat the spread of COVID-19 have caused great personal and
11 economic suffering as well. Individuals cannot travel or meet with friends and loved ones.
12 Businesses have closed or drastically curtailed their operations. Employees have lost their
13 jobs and their livelihoods. State and local governments face declining revenues even as
14 demands for their services increase.

15 (*Midway Venture LLC*, 2021 WL 222006, at *2.) But these widely experienced effects are those
16 that flow from the pandemic and the stay-at-home orders and other restrictions, not specifically
17 from the ETS Regulations in particular. Plaintiffs have not persuasively shown that they would be
18 irreparably harmed by complying with those regulations. In any event, even if some individual
19 retail and agricultural businesses would incur substantial financial costs in order to comply with
20 the ETS Regulations in the event of a workplace outbreak, or even were forced out of business as
21 a result, those pecuniary burdens, in the Court’s view, cannot outweigh the potential public health
22 risks posed by an injunction enjoining the Board from taking effective action to address the serious
23 public health threat posed by COVID-19.

24 **B. Enjoining Enforcement Of The Emergency Regulations Would
25 Jeopardize Workers And The Public Health.**

26 On the other side of the balance, an order enjoining the Board from enforcing the emergency
27 regulations threatens to seriously jeopardize worker safety and the public health. As the Board
28 observes, “if this Court grants Plaintiffs’ requested injunction, numerous workers in California
would suffer severe and irreparable harm given that the spread of COVID-19 continues to increase

1 at a record pace and workplaces are not immune from this serious illness or its heightened spread.
2 Many workers depend on their employers for their safety during their shifts . . . , and should they
3 become ill, their family, friends, and other members of the public they encounter face the risk of
4 infection. Thus, failure to adequately protect workers not only impacts them but could have far
5 reaching permanent repercussions for the public at large.” Those risks outweigh Plaintiffs’
6 concerns about the potential financial and other costs of complying with the ETS Regulations. (See
7 *Barenfeld v. City of Los Angeles* (1984) 162 Cal.App.3d 1035, 1042 [“a choice between potential
8 financial loss on the part of the Plaintiffs versus potential loss of life on the part of the public”
9 warrants denial of an injunction].)

10 Two considerations are paramount here. *First*, “[s]temming the spread of COVID-19 is
11 unquestionably a compelling interest.” (*Roman Catholic Diocese of Brooklyn v. Cuomo* (2020)
12 141 S.Ct. 63, 67 (per curiam); accord, *Bayley’s Campground, Inc. v. Mills* (1st Cir. Jan. 19, 2021),
13 2021 WL 164973, at *4 [“the interests in ‘protecting [state’s] population from further spread of the
14 COVID-19 virus and preventing [state’s] health care system from being overwhelmed’ by those
15 infected with it are ‘compelling state interests.’”].)

16 *Second*, judges “are not public health experts, and we should respect the judgment of those
17 with special expertise and responsibility in this area.” (*Roman Catholic Diocese*, 141 S.Ct. at 68;
18 see also *id.* at 73 [“the COVID-19 pandemic remains extraordinarily serious and deadly. . . . courts
19 therefore must afford substantial deference to state and local authorities about how best to balance
20 competing policy considerations during the pandemic.” (Kavanaugh, J., concurring)].) The judicial
21 deference to which a state agency is normally entitled is, if anything, heightened in the current
22 circumstances of the response to an extraordinary and rapidly changing health crisis. As Chief
23 Justice Roberts observed in his separate opinion in *South Bay United Pentecostal Church v.*
24 *Newsom* (2020) 140 S.Ct. 1613,

25 The precise question of when restrictions on particular social activities should be lifted
26 during the pandemic is a dynamic and fact-intensive matter subject to reasonable
27 disagreement. Our Constitution principally entrusts “[t]he safety and health of the people”
28 to the politically accountable officials of the States “to guard and protect.” When those
officials “undertake[] to act in areas fraught with medical and scientific uncertainties,” their
latitude “must be especially broad.” Where those broad limits are not exceeded, they should

1 not be subject to second-guessing by an “unelected federal judiciary,” which lacks the
2 background, competence, and expertise to assess public health and is not accountable to the
3 people.

4 That is especially true where, as here, a party seeks emergency relief in an interlocutory
5 posture, while local officials are actively shaping their response to changing facts on the
6 ground.

7 (Id. at 1613-1614 (citations omitted).)

8 Significantly, the foregoing quotations are drawn from cases in which churches and other
9 houses of worship challenged orders imposing restrictions on attendance at religious services. As
10 such, they implicated the Free Exercise Clause of the First Amendment, triggering the strict scrutiny
11 test, which requires restrictions to be narrowly tailored to serve a compelling state interest. (See
12 *Roman Catholic Diocese*, 141 S.Ct. at 67-68 [“The restrictions at issue here, by effectively barring
13 many from attending religious services, strike at the very heart of the First Amendment’s guarantee
14 of religious liberty.”]; *Calvary Chapel Dayton Valley v. Sisolak* (9th Cir. 2020) 982 F.3d 1228,
15 1232-1233.) But the ETS Regulations, which apply to places of employment including retail stores
16 and agricultural operations, pose no such constitutional concerns. “Absent a First Amendment
17 concern or other reason for heightened scrutiny, the [state and county public health restrictions] are
18 valid if they are rationally related to a legitimate governmental interest.” (*Midway Venture LLC*,
19 2021 WL 222006, at *2 [reversing preliminary injunction against state’s regional stay-at-home
20 order, which did not implicate First Amendment, and thus rational basis review applied]; accord,
21 *Mitchell v. Newsom* (C.D. Cal. Dec. 23, 2020) 2020 WL 7647741, at *4 [same].) Plaintiffs have
22 not cited a single case outside the unique context of religious exercise, nor is the Court aware of
23 one, in which a court enjoined emergency public health orders intended to slow the spread of the
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1 virus.³²

2 In short, weighing the interim harms to Plaintiffs, affected employees, and the public
3 interest, the Court determines that the balance weighs heavily in favor of protecting employees'
4 occupational health and the public interest, and cannot justify the issuance of extraordinary
5 injunctive relief.

6 CONCLUSION

7 One court recently denied restaurants' request for a preliminary injunction against state
8 orders prohibiting indoor dining in the following words, which apply equally here:
9

10 An extraordinary public-health crisis like the COVID-19 pandemic requires an
11 extraordinary response. In deciding what that response must be, the executive branch
12 faces a Hobson's Choice: impose restrictions sure to effect economic harm to industries
13 already facing crippling financial difficulties, or set less onerous rules sure to increase the
14 rate of infections and fatalities attributable to the pandemic. It is a truly awful policy
15 conundrum.

16 At issue here, defendants' determination that the restaurant industry must yield to the
17 greater concerns of public health is a rational and wholly appropriate policy justification
18 for the limited-time mitigation orders. . . . In light of the conclusions set forth herein, we
19 cannot provide any remedial assistance, and we must defer to other branches of
20 government to address the restaurant industry losses.

21 (*M. Rae, Inc. v. Wolf* (M.D.Pa. Dec. 23, 2020) 2020 WL 7642596, at *10; see also, e.g., *Midway*
22 *Venture LLC*, 2021 WL 222006, at * 2 ["Balancing these risks and harms in the midst of a deadly
23

24 ³² Numerous courts across the country have refused to enjoin a wide variety of emergency orders
25 issued in response to the COVID-19 public health crisis. (See, e.g., *Bayley's Campground, Inc.*,
26 2021 WL 164973 [Governor's executive order requiring out-of-state travelers to self-quarantine
27 upon arrival for 14 days]; *Big Tyme Investments, L.L.C. v. Edwards* (5th Cir. Jan. 13, 2021) 2021
28 WL 118628 [executive order prohibiting on-site consumption of alcohol and food at bars]; *Hopkins*
Hawley LLC d/b/a Seaport House v. Cuomo (S.D.N.Y. Feb. 9, 2021) 2021 WL 465437 [executive
orders restricting restaurant dining]; *Oakes v. Collier County* (M.D.Fla. Jan. 27, 2021) 2021 WL
268387 [county emergency order requiring everyone in certain businesses to wear face coverings];
Weiss Haus v. Cuomo (E.D.N.Y. Jan. 11, 2021) 2021 WL 103481 [governor's executive order
requiring travelers to complete health form]; *Let Them Play MN v. Walz* (D.Minn. Dec. 18, 2020)
2020 WL 7425278 [governor's executive order imposing prohibitions on social gatherings and
youth sports]; *Lawrence v. Polis* (D.Colo. Dec. 4, 2020) 2020 WL 7348210 [public health orders
issued by governor and executive directors of state and city health departments imposing occupancy
limitations and other restrictions on restaurants' operation]; *Desrosiers v. Governor* (Mass. 2020)
486 Mass. 369 [governor's emergency orders closing certain businesses and imposing restrictions
on gatherings].)

1 pandemic is exceedingly difficult. It is a responsibility primarily entrusted to our elected
2 officials, who are ultimately accountable to the public.”)]; *Plaza Motors of Brooklyn, Inc. v.*
3 *Cuomo* (E.D.N.Y. Jan. 22, 2021), 2021 WL 222121, at *9 [“Serious public consequences could
4 result if Defendants are enjoined from enforcing the restrictions, as it could undermine both the
5 City and State’s ongoing effort to save lives and ultimately reopen businesses. The current public
6 health crisis presents a dynamic situation fraught with uncertainty. In these unprecedented times,
7 it is not the Court’s role to second-guess the decisions of state officials who have the expertise to
8 assess the COVID-19 pandemic and institute appropriate measures. The Plaintiffs’ interest in
9 continuing to conduct . . . sales is clearly outweighed by the Government and the public’s interest
10 in slowing the spread of COVID-19 and protecting the health and safety of all [residents].”).) As
11 another court put it, “the Court cannot quarterback the state’s response to the COVID-19
12 pandemic from the bench.” (*Hopkins Hawley LLC d/b/a Seaport House*, 2021 WL 465437 at
13 *10.)

14 For the foregoing reasons, Plaintiffs’ applications for a preliminary injunction are denied
15 in their entirety.

16 **IT IS SO ORDERED.**

17
18 DATED: February 25, 2021


Judge Ethan P. Schulman
San Francisco Superior Court Judge

CGC-20-588367

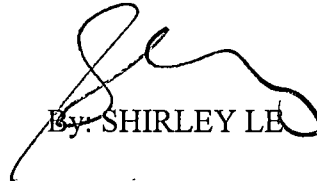
NATIONAL RETAIL FEDERATION, ET AL VS.
CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, ET AL

CPF-21-517344

WESTERN GROWERS ASSOCIATION, ET AL VS.
CALIFORNIA OCCUPATIONAL SAFETY, ET AL

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on February 25, 2021 I served the foregoing **order denying plaintiffs' applications for preliminary injunction** on each counsel of record or party appearing in propria persona by causing a copy thereof to be served electronically by email sent to the email addresses indicated below:

Date: February 25, 2021


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