VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF CULPEPER

Merrill C. "Sandy" Hall,	)	
and	)	
GG Ashburn, LLC (a Va. Corporation),	)	
and	)	
GG Cascades, LLC (a Va. Corporation),	)	
and	)	
Beyond Fitness, LLC (a Va. Corporation),	)	
and	)	
DGL, LLC (a Va. Corporation),	)	
and	)	
GG Midlothian, LLC (a Va. Corporation)	)	
and	)	
GG Roanoke, LLC (a Va. Corporation)	)	
and	)	
SSGG, LLC (a Va. Corporation)	)	
and	)	
GG Gayton Crossing, LLC (a Va. Corporation)	)	
and	)	
More Fitness, LLC (a Va. Corporation)	)	
Petitioners,	)	
v.	)	**Civil Case No._____**
	)	
His Excellency, The Governor of	)	
The Commonwealth of Virginia,	)	
Ralph S. Northam,	)	
	)	
And	)	
	)	
Dr. M. Norman Oliver,	)	
Virginia State Health Commissioner,	)	
	)	
And	)	
	)	
Gary T. Settle	)	
Virginia State Police Superintendent	)	
	)	
Serve: Attorney General Mark R. Herring,	)	
Office of the Virginia Attorney General,	)	
202 N. Ninth Street, Richmond, Va. 23219	)	
	)	
Respondents.	)	

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PETITIONERS' MEMORANDUM IN SUPPORT OF PETITION FOR AN EMERGENCY, TEMPORARY INJUNCTION

INTRODUCTION

The worldwide outbreak of the COVID-19 pandemic has produced clashes of competing public policy priorities which are inevitable given the emergency situation now facing Virginia. Respondents, guided by good intentions, are trying to contain public health threat with aggressive actions, but, unfortunately, also with limited information. As a result of the Respondents' actions, Petitioners, like other affected citizens and businesses, are struggling to endure and survive the unintended consequences of Respondents' emergency responses to COVID-19. When state actors conjure from the nebulae of unprecedented, emergency powers—and force citizens and businesses into irreparable and permanent ruin—it falls upon the courts of this Commonwealth to provide the lawful and practical solutions to the overreach of the sovereign. While this Court must apply the guiding and sober principles of the Virginia Constitution, statutes, and case law that are paramount to judicial review, it is also inevitable that judiciary take notice of the societal climate outside the courthouse in evaluating this petition. Indeed, the ever-shifting swirl of insecurity about COVID-19—and the mad scrambles of state actors to mitigate it—are the reason Petitioners must call upon this Court's equity power, if they have any hope of saving their businesses from permanent closure.

Petitioner Merrill "Sandy" Hall is a citizen of the Commonwealth residing in Culpeper, and the majority owner of the Petitioner businesses, which are closely held, Virginia companies that own and operate Gold's Gym private membership clubs in Virginia. Since 2005, Hall and several other, individual owners have dedicated their lives, assets, and labor to build and run these companies which, until March 23, 2020, were thriving enterprises

employing over 1100 Virginians while improving the health, fitness, and happiness of over 56,000 club members. On that date, Governor Northam issued Executive Order 53 ("EO 53"), which ordered the immediate "Closure of all public access to recreational and entertainment businesses," into which class "fitness centers" such as Petitioners were assigned. As presently applied and enforced, EO 53 has irreparably injured Petitioners' businesses, and is currently smothering their final breath. Indeed, if these businesses cannot re-open before May 8, 2020, the executive order will force their permanent closure and eliminate the many jobs they sustain. This petition is the last chance of Petitioners to forestall certain and complete ruin, and its injurious effects upon not just the owners, but thousands of employees and customers.

Governor Northam has invoked the Virginia Emergency Services and Disaster Law and whatever powers it may be said to grant him, as authority to issue executive orders imposing unprecedented, categorical restrictions of business operations and movement of citizens, with the stated purpose of reducing disease transmission. Notwithstanding the important goals and the declared emergency, Petitioner petitions this Court for a temporary order permitting the immediate re-opening of their particular, business locations. To this end, the Petitioners present this Court legal arguments that begin with the narrowest focus of why Governor's executive orders do not require the closure of the Petitioner's particular businesses, broadening to serious defects in the overall validity of the executive orders as written and enabled.

First, the Court may declare as a matter of law that the plain language of EO 53 requiring the "Closure of public access" to fitness centers does not apply to Petitioners' businesses, to the extent that they operate with private membership only and no "public access." As a result, the Court should declare Petitioners may open their centers to these

customers under EO 53's plain language, without examining its validity or even embarking upon the remaining examinations of an injunction against its application.

Turning to the broader challenges to the executive orders within the Complaint, Petitioners stress that the factors guiding the Court's discretionary exercise of its equitable injunctive powers still compel a temporary order permitting Petitioners to reopen before undertaking any final ruling on the validity of EO 53. Petitioners have a high likelihood of eventual success in proving the merits of their declaratory judgment claims that EO 53 and 55 represent unprecedented, *ultra vires* exercises of powers that the Governor does not actually have under the Virginia Constitution or Code § 44-146.17. Applying the rationale and holding of *Howell v. McAuliffe,* 292 Va. 320, 788 S.E.2d 706 (2016), the Governor has insufficient support for his asserted powers in historical precedent, a textual analysis of the enabling statute, and the unconstitutional effects of suspension and waiver of fundamental rights under the Virginia Constitution and other applicable laws. While the requested injunctive relief does not require the formal invalidation of EO 53 and 55 now, that inevitable, final conclusion favors granting this temporary relief.

In addition, permitting Petitioners to reopen and operate in a sanitary and safe manner on a temporary basis affects the most equitable balance and loyalty to public interest and policy in saving the Commonwealth's business and promoting fitness. It is also the only means to prevent a permanent and final injury to Petitioners' businesses, which would likewise irreparably harm their owners, employees, and members. By comparison, while the Respondents may theorize there is vague potential for the additional transmission of disease if Petitioners re-open, there is no evidence this will occur, and Petitioners have protocols to prevent it. Finally, the sovereign offices of the Respondents, and the ruinous nature of the injuries means that Petitioners have no chance of any adequate remedy at law. Neither the

impending financial devastation nor the personal impacts could ever be fairly quantified, even assuming the state Respondents were answerable for damages at all.

SUMMARY OF MATERIAL FACTS AND BACKGROUND[1]

On February 7, 2020, the State Health Commissioner declared COVID-19 a communicable disease of public health threat.[2] Subsequently, on 12 March 2020: Executive Order Num. 51 (2020) was signed by Governor Northam on March 12, 2020 (DECLARATION OF A STATE OF EMERGENCY DUE TO NOVEL CORONAVIRUS). On March 23, 2020, Governor Northam issued Executive Order 53 ("EO 53"), which imposes restrictions ranging from limited occupancy to complete closures on certain classes of businesses, premised upon concerns about slowing the spread of COVID-19. Paragraph 4 of EO 53 applies to classes of businesses including "fitness centers" such as Petitioners own and operate. EO 53 states, in relevant part:

> Therefore, by virtue of the authority vested in me by Article V, Section 7 of the Constitution of Virginia, by § 44-146.17 of the Code of Virginia and in furtherance of Executive Order 51, I order the following:
>
> ....
>
> 4. Closure of all public access to recreational and entertainment businesses, effective 11:59 p.m., Tuesday, March 24, 2020 until 11:59 p.m., Thursday, April 23, 2020 as set forth below:
>
> ...
>
> - Fitness centers, gymnasiums, recreation centers, indoor sports facilities, and indoor exercise facilities;

[1] As this memorandum outlines the primary points in support of a Petition for an emergency, temporary injunction as soon as practicable, Petitioners will summarize only the undisputed (or indisputable), primary facts and background necessary for the Court to quickly and fairly assess the elements. Petitioner incorporates the additional details of the Affidavit attached to the verified Complaint, and reserves the right to make additional points at any hearing the Court requires.

[2] Petitioner has been unable to locate any publication of this declaration, but the Governor has repeatedly referenced it and State Health Commissioner Oliver references it in a February 27, 2020 letter titled "Update on COVID-19. *See* http://www.vdh.virginia.gov/clinicians/update-on-covid-19/.

On March 23, 2020, Governor Northam issued Executive Order 55. Paragraph 1 of EO 55 requires all individuals in Virginia to "remain at their place of residence" and excludes business not required to close to the public under EO 53.

At a news conference held at the Executive offices of the Governor on Wednesday, April 15, 2020, the Governor announced an extension of the restrictions from April 24, 2020, to May 8, 2020, with numerous indications of likely, additional extensions, making the duration effectively indefinite. On Friday, April 17th, two days after extending the closure of Petitioner's business, Governor Northam stated at his press conference that in his opinion, "Virginia is not yet or near the point" where he can even consider taking any initial steps to re-open those businesses that he has ordered closed.

As set forth in detail in the Affidavit of Merrill Hall, attached Exhibit A to the Complaint and incorporated herein, Hall was initially unsure of whether Executive Order 53 applied to his private, members-only clubs. EO 53 called for the "Closure of all public access to recreational and entertainment businesses," which does not fairly categorize Petitioner's business, but subsequently references "fitness centers." Hall tried to ascertain as to whether he had a duty to close his private, member-only clubs despite the explicit "Closure of all public access," and whether the Order compelled closure of the operations or their premises. He consulted with local law enforcement, who encouraged him to close under the order. So Hall tasked a management team to provide the best possible notice to employees and notify landlords, vendors, and 56,000 members of his private clubs that EO 53 mandated closure. Immediately, Petitioners began suffering injury. Petitioners were inundated with customer inquiries seeking a freeze on contract payments or canceling contracts completely. As retaining 1100 employees and their payroll expenses was not possible, Petitioners terminated

their employment with the hope that it would be a temporary measure extending no further than April 24, 2020.

Hall sent several communications to the Governor, his Chief of Staff Clark Mercer, and his Director of Policy, Matt Mansell, requesting clarification as to the mandated closure dates under EO 53 and 55, but received no guidance whether April 24, 2020 would end termination of closure for his businesses. Petitioners have taken every possible action to stave off ruin and buy time. Petitioners applied for government relief including Small Business Administration's loan (SBA) and Payroll Protection Plan (PPP). But within one day of applying for the SBA, Petitioners learned the program funds were already depleted. The terms and scope of the program and its forgiveness strictures would be ineffective to prolong the survival of the Petitioner's business in any event.

The financial impact of EO 53 and 55 on Petitioners in less than one month has been crushing. As a result of the chilling effects of EO 53 and 55, Petitioners have suffered combined losses of approximately $36,000,000, and mounting. For instance, Petitioners have approximately $750,000 of rent obligations accruing monthly under lease agreements for business properties. Among other obligations and expenses, Petitioners have equipment maintenance and expenses, the upkeep of relevant business licensing and permits certifications, insurance payments, payments for network systems and bookkeeping systems, and advertising and web costs. But Petitioners' most serious injuries cannot even be quantified into dollars, as the opportunity losses and damage to goodwill on a day-to-day basis is immeasurable, and intensifying with the passage of time.

To put the threat into perspective, because of the comparably devastating and irreparable losses that shutdowns have wreaked upon Gold's Gym's International's corporate-owned locations, the parent company announced on April 16, 2020 that it had

surrendered to the "difficult decision" to permanently close at least thirty-two, corporately owned locations.[3] Petitioners own and operate the same type of businesses and premises, but do not even have the capital, assets, or shareholder base that the International company enjoys. To survive until April 24, 2020, they have taken drastic and creative actions to minimize expenses, stave off defaults, and delay permanent closure, but they have exhausted options and time. They are in multiple breach and default in their own contractual obligations, and have been served default notices at several of locations. Absent the requested relief, and the ability to re-open their businesses within days to generate revenue, their permanent end is certain. On April 15th 2020, the Governor announced that he was extending the mandatory closure of Petitioners' business until at least May 8, 2020. Petitioners' businesses will not survive this long, let alone beyond, unless this Court affords a reasonable, temporary permission to re-open *this week*.

If Petitioners could re-open immediately, they can do so in a safe, sanitary, and responsible manner that minimizes risk to their club members or others within whom they later interact. Indeed, as part of a plan for re-opening on the original schedule of April 24th, Hall prepared (and delivered to the Governor's representatives) proposed safety and hygiene protocols to ensure the safe operation of the health and fitness centers consistent with the government's priorities of preventing Petitioners transmission and ensuring sanitized premises, with uses preserving social distancing. Petitioners are willing to consult with any government personnel on any additional measures that would practically improve safety while permitting operations.

[3] https://www.businessinsider.com/golds-gym-closing-gyms-permanently-list-addresses-2020-4?utm_source=yahoo.com&utm_medium=referral (April 16, 2020).

ARGUMENT

II. The plain terms of EO 53(4) presently permit Petitioners to operate their private-membership clubs, as they can and will operate in compliance with the "Closure of all public access." The Court should declare, as a matter of law, that EO 53 does not restrict their operation with access to private members.

This Court has the opportunity to declare as a matter of law that the plain and simple terms of Executive Order 53(4) permit Petitioners to operate their particular business *now*, without testing the validity of that act or the other factors temporary, injunctive relief. This narrow holding turns upon the simple interpretation of plain and unambiguous language in Executive Order 53 that would permit a fitness center with private membership to operate its business, as long as it is closed to "public access."

The pertinent provisions of Executive Order 53 are as follows:

> 4. Closure of all public access to recreational and entertainment businesses, effective 11:59 p.m., Tuesday, March 24, 2020 until 11:59 p.m., Thursday, April 23, 2020 as set forth below:
>
> ....
>
> - Fitness centers, gymnasiums, recreation centers, indoor sports facilities, and indoor exercise facilities; ....

Executive Order 53 (March 23, 2020).

"Closure of all public access" has no definition in either EO 53 or the Commonwealth Emergency Services and Disaster Law. But EO 53's provisions demonstrate the intent to make it a material condition of closure, as the Governor did not refer to closure of "public access" for any of the other categories of businesses outside clause (4). Paragraph 1 also recognizes a distinction between "public and private in person gatherings of 10 or more individuals," suggesting the Governor understands the distinction to be meaningful, and uses it for a reason.

The Virginia Supreme Court advises that when there is no express definition is provided, "the general rule of statutory construction is to infer the legislature's intent" from

the language used and its ordinary meaning, taking into account the context in which it is used. *Am. Tradition Inst. v. Rector & Visitors of Univ. of Virginia*, 287 Va. 330, 341, 756 S.E.2d 435, 441 (2014) (citations omitted). In addition, because EO 53 purports to be a penal statute enforceable with criminal penalties, "it must be strictly construed, and any ambiguity or reasonable doubt as to its meaning or scope shall be resolved in favor of the" party to whom it is being applied. *Rooney v. Commonwealth*, 27 Va. App. 634, 639–40, 500 S.E.2d 830, 832 (Va. Ct. App. 1998).

The concept of "public access" appears elsewhere in Virginia law, and in analogous contexts involving traffic on business premises. Courts have examined the term's examination with regard to whether certain areas such as business parking lots and rights of way are considered "highways" for the purposes of traffic law jurisdiction. For instance, in *Flinchum v. Commonwealth*, 24 Va. App. 734, 737–38, 485 S.E.2d 630, 631–32 (1997), the Court of Appeals recognized the courts' "consideration of the public access and use factors" that frequently determine whether parking lots are " 'highways' within the statutory meaning of that term." Examining indicia of private premises and uses militating against the concept of public access, *Flinchum* reasoned that "[t]he sporting goods' and repair business' parking lots were not open to the public at all times, but instead 'were open to the public upon ... invitation"; that the business' intent to restrict public access was demonstrated by signs that clearly served to "prohibit ... the entry of motor vehicles operated by members of the public"; and that the businesses "could close [their] doors and bar the public or any person from vehicular travel on all or any part of [their] premises at will." *Flinchum, supra,* 24 Va. App. at 737–38 (internal quotations removed). On these facts, the Court held that the concept of "public access" was defeated, such that "the parking lots upon which Flinchum traversed were improperly classified as 'highways' under Code § 46.2-100."

It is likewise notable that the plain terms of EO 53(4) impose the "closure of all *public access* to" enumerated categories of businesses, not closure of the businesses themselves. This phrasing should guarantee that to the extent fitness centers operate for non-public or private access, they can be open. This is also a rational, common-sense distinction in practice, since Petitioners in fact operate on a business model of private club membership, and can secure their facilities against public entry while remaining open. Virtually all other businesses in the classification of EO(4)—theaters, museums, gymnasiums, recreation centers, indoor sports facilities, etc.—only operate with public access.

Petitioners' interpretation of this concept of "public access" to operate its particular business is also consistent with the stated aims and limitations elsewhere in EO 53. As private-membership clubs with large floor plans, excellent ventilation, and strict sanitary protocols, Petitioner's businesses are more rationally classified as a health-related, essential business promoting health and fitness that will assist in fighting diseases, rather than passive "recreational and entertainment businesses." On these bases, PetitionerS request this Court grant immediate declaratory judgment, as a matter of law, that its businesses are not governed by the restrictions of EO (4).

III. Even if the Court determines that EO 53 mandates closure of private membership fitness centers, the Court should apply its equitable discretion to grant temporary, injunctive relief permitting Petitioners to immediately re-open and operate.

The Virginia Supreme Court has recently confirmed that "[g]ranting or denying a temporary injunction is a discretionary act arising from a court's equitable powers," and is reviewed (if at all) on an abuse of discretion standard. *May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 17–18, 822 S.E.2d 358, 367 (2019). When applying that discretion, "the 'good cause' to be served by injunctions, whether mandatory or prohibitory, has been the

prevention of future wrongs." *WTAR Radio-TV Corp. v. City Council of City of Virginia Beach*, 216 Va. 892, 894, 223 S.E.2d 895, 898 (1976). The Court advises trial courts that "[w]hen there is reasonable cause to believe that the wrong is one that would cause irreparable injury and the wrong is actually threatened or apprehended with reasonable probability, there is good cause for entry of a prohibitory injunction" to prevent further harm. *Id.*, 216 Va. at 895. In addition, the Court has confirmed injunctions will issue when a party establishes the "traditional prerequisites, i.e., irreparable harm and lack of an adequate remedy at law." *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 61, 662 S.E.2d 44, 53 (2008).

The Court has not established the applicable test for injunctive relief, but "most Virginia Circuit courts have evaluated temporary injunctions" applying the most recent iteration of the four-part, sequential test set out by the Fourth Circuit Court of Appeals for preliminary injunctions in federal court. *Freemason St. Area Ass'n, Inc. v. City of Norfolk*, 100 Va. Cir. 172, 2018 WL 9392737, at *9 (City of Norfolk, 2018). This "sequential analysis" supports granting injunctive relief to a Petitioner who establishes: "[(1)] that he is likely to succeed on the merits, [(2)] that he is likely to suffer irreparable harm in the absence of preliminary relief, [(3)] that the balance of equities tips in his favor, and [(4)] that an injunction is in the public interest." *Id.* (surveying authority for applying test of *The Real Truth About Obama, Inc. v. Federal Election Commission*, 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), *aff'd, The Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 607 F.3d 355 (4th Cir. 2010) (per curiam)).

Of these factors, "irreparable harm to the plaintiff and harm to the defendant are the two most important factors" for courts to consider. Christian *Def. Fund v. Winchell & Assoc.*,

Inc., 47 Va. Cir. 148, 1998 WL 972334, at *1 (Fairfax Co. 1998) (citations). Indeed, the more irreparable injury is at issue, the lower a movant's burden to show a likelihood of success on the merits. "A plaintiff's burden to show a likelihood of success on the merits. . . varies according to the harm the plaintiff would be likely to suffer absent an injunction." *Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002); *see also X Corp. v. Doe*, 805 F.Supp. 1298, 1303 (E.D.Va. 1992). In ruling on a motion for temporary injunction, courts may consider "hearsay or other inadmissible evidence," id. at 726, and assertions made by affidavit, *Wood v. City of Richmond*, 148 Va. 400, 408 (1927); see also Va. Code § 8.01- 628 (providing that "[a]n application for a temporary injunction may be supported or opposed by an affidavit").

A. Petitioners are likely to succeed on the merits because EO 53 is an unprecedented, *ultra vires* assertion of unlimited power that exceeds the Governor's authority and effects the suspension of other constitutional and statutory rights and mandates, compelling invalidation under *Howell v. McAuliffe*.

Governor Northam cites two authorities for Executive Order 53: "by virtue of the authority vested in me by Article V, Section 1 of the Constitution of Virginia" and "by § 44-146.17 of the Code of Virginia." EO 53 ("Directive"). If his orders exceed the authority or effects the "suspending power that has been forbidden by our Constitution since 1776," they are an ultra vires act that must be invalidated by the Court. *Howell v. McAuliffe,* 292 Va. 320, 350, 788 S.E.2d 706, 724 (2016) (declaring two executive orders to be in violation of Article I, Section 7 (the anti-suspension provision) and Article II, Section 1 (the voter-disqualification provision) of the Constitution of Virginia)).

1. *Howell v. McAuliffe* commands invalidation of unprecedented executive orders of broad, categorical scope that exceed the powers granted by the cited authorities and effect suspension or waiver of other rights or laws, violating the protections of Virginia Constitution Article 5, Section 12.

In the governing decision of *Howell v. McAuliffe*, the Virginia Supreme Court reviewed Governor McAuliffe's executive orders—which he based upon clemency powers under Virginia Constitution, Article V, Section 12—categorically restoring the rights of felons who had completed their terms of incarceration or supervised release. Evaluating challenges to these orders by a writ of mandamus and prohibition, the Court construed the plain terms of the cited authority and the effects upon other rights and laws contrary to the "anti-suspension provision" of the Virginia Constitution, Article I, Section 7. That provision states: "That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."

Howell articulated the primary standards by which this Court must exercise a "duty of judicial review" to determine whether a Governor's executive order demonstrates "the attributes of an *ultra vires* assertion of the suspending power that has been forbidden by our Constitution since 1776." *Id.*, 292 Va. at 350. The Court endorsed three primary inquiries:

1) Precedent: Whether historical precedent demonstrates that the Governor has "adopted a 'practical construction'" of the enabling language that "has been acquiesced in for a considerable period" or "has been generally accepted as correct," 292 Va. at 339. The Court stressed that whether the Governor's interpretation of his authority reflects a "longstanding 'practice of the government' has traditionally played an important role in informing 'our determination of what the law is,' and the interpretation of prior executives over a long course of years should be treated as 'a consideration of *great weight* in a proper interpretation' of the scope of executive power." *Id.*, 292 Va. at 339-340 (emphasis original, citations omitted).
2) Textual analysis of the source: Whether the text of the source cited by the Governor as authority for the Executive Order plainly or impliedly authorizes the asserted powers. If the "textual argument is overstated" or irreconcilable with other provisions proscribing the Governor's powers, it betrays the claimed authority. 292 Va. 342.
3) Effects upon other provisions or laws: Whether Executive Order "runs afoul of the separation-of-powers principle protected by Article I,

> Section 7 of the Constitution of Virginia" by effecting the suspension or waiver of other laws or rights. 292 Va. at 344. To this end, the Court warned that one obvious "characteristic of an unlawful executive suspension is its expansive scope and generality. The more categorical it is, the less likely it will truly represent a permissible deviation from a general rule of law, and thus, the more likely it will result in a suspension of all or part of" another general provision or law. 292 Va. at 348.

For the reasons described *infra,* EO 53 fails to pass any of the tests proscribed by the Virginia Supreme Court. The first prong of the analysis—precedent of prior executives interpreting the Virginia Emergency Services and Disaster Laws—is easily dispatched against the powers Governor Northam has proclaimed. Despite the Disaster Laws permitting emergency powers in similar iterations since 1973, and numerous prior declarations of emergencies, there is no precedent of a prior Governor exercising emergency powers of any comparable scope, let alone an effort to categorically shut down sectors of businesses for extended periods of time, for any reason. The governor has no precedent to suggest that in the powers invoked for EO 53, he has "adopted a 'practical construction'" of the enabling language that "has been acquiesced in for a considerable period" or "has been generally accepted as correct." *Howell,* 292 Va. at 339.

The limited precedent available suggests that prior governors exercising emergency powers under this scheme have done so with restrained, narrow orders. In *Boyd v. Commonwealth*, 216 Va. 16, 17–18, 215 S.E.2d 915, 916 (1975), the Court reviewed and upheld a misdemeanor conviction for speeding. The Court held that Governor Holton had acted within his powers under Commonwealth of Virginia Emergency Services and Disaster Law of 1973 when he declared a State disaster based upon the nationwide, acute gas shortage, and used his emergency power to order a decrease in the speed limit on state highways to conserve fuel, based upon scientific evidence that it worked. Such a precedent—in which

the Governor properly responded to a disaster with a limited use of emergency powers and a narrow conservation measure—only underscores that EO 53 is a conspicuous outlier of "unprecedented scope, magnitude, and categorical nature," warranting scrutiny for overreach. *Howell,* 292 Va. at 349.

As the following sections demonstrate, EO 53 cannot pass the remaining two prongs of scrutiny under *Howell v. McAuliffe* either. Textual analysis of its cited, enabling sources reveals that the Governor does not have the authority to enact such sweeping, categorical restrictions. Acting *ultra vires*, the Governor has shut down entire sectors of Virginia's economy on the basis of his subjective, special classifications of businesses, including Petitioners, while suspending and suppressing fundamental rights, interests, and laws with the threat of criminal prosecution. It is a compelling case for proper and immediate judicial scrutiny.

2. The Virginia Constitution Article V, Section 7 ("Executive and administrative powers") does not authorize the Governor to close Petitioners' businesses **under EO 53.**

The first authority that Governor Northam cites for the power to enact EO 53 is Virginia Constitution Article V, § 7, "Executive and administrative powers." The terms of this provision do not address executive orders or emergency powers at all, let alone relating to shutting down economic sectors and businesses, and restricting the liberty of citizens. The only potentially relevant clause states: "The Governor shall take care that the laws be faithfully executed." This, of course, is a *limitation* of the Governor's power, not a grant, as the Executive Branch has conceded in previous opinions by its Attorney General. This clause expressly imposes a duty to execute laws, including the Constitution and statutes, *faithfully* within the letter and spirit of those laws. Any such power is necessarily limited by the Constitution, including Article IV, § 1, vesting legislative powers (and additional limitations)

in the General Assembly. In addition, any assertion of "absolute" power to issue an executive order under the Constitution "runs afoul of the separation-of-powers principle protected by Article I, Section 7 of the Constitution of Virginia" setting forth the anti-suspension provision, "an essential pillar of a constitutional republic." *Howell v. McAuliffe*, 292 Va. at 344.

As the Attorneys General of prior Governors have long conceded, these are "strict limitations." Unless the legislature clearly delegates the Governor the power at issue, "[t]he Governor may not exercise any of that power. Thus, the Governor cannot legislate by executive order where an Act of Assembly is required." *See* 1991 Va. Op. Atty. Gen. 41 (1991). Rather, "the power to suspend statutes is vested exclusively in the General Assembly and must be exercised by statute or by joint resolution of that body." *Id.* (citing 1978–1979 Att'y Gen.Ann.Rep. 110, 112, and advising that Governor could neither suspend the enforcement or penalties of Code § 18.2–331, nor the penalties prescribed for its violation in the case of the fraternal or charitable organizations).

In summary, "the Governor may exercise his power as "'chief executive' to ensure that '[the] laws be faithfully executed' [a]s long as that exercise of power does not exceed the authority 'bestowed upon him by the constitution and the laws." 1999 Va. Op. Atty. Gen. 50 (1999). Indeed, in the specific context of executive orders with a potential effect of suspending or waiving other constitutional provisions or statutes, the Attorney General agreed (consistent with the Virginia Supreme Court's subsequent holding in *Howell*) that the anti-suspension provision of Article I, § 7 "imposes strict limitations" on the Governor's power. 1991 Va. Op. Atty. Gen. 41 (1991).

As the Constitution provides no authority for EO 53, the Governor next cites Virginia Code § 44-146.17 as his enabling statute. If "faithfully" interpreted, as the Constitution

requires of the Governor, that statute does enumerate particular emergency powers, as well as limitations. But it contains no authorization—by plain text or implication—to categorically shutter broad sectors of private businesses across the state, or to restrict the movements of citizens unilaterally as EO 53 does. Indeed, Code § 44-156.17 even directs the Governor to follow Title 32.1—where the General Assembly proscribed standards, procedures, and limitations protecting liberty and property interests—to exercise lesser restrictions upon movement than he has done in his recent orders. As in *Howell v. McAuliffe, supra,* this Court should "reject the Governor's contention that a faithful reading of the text .... endorses his assertion of absolute power." 292 Va. at 343.

3. The Governor's Executive Order 53 exceeds his authority under the Virginia Emergency Services and Disaster Law (Code § 44-146.17).

Executive Order 53 (like related EO's 51 and 55) cites Virginia Code § 44-146.17 (part of the Commonwealth of Virginia Emergency Services and Disaster Law of 2000, as amended) as its enabling authority for all of its directives and penalties. First, the General Assembly recited in the Emergency Services and Disaster Law that it intended "To confer upon the Governor ....emergency powers provided herein." Va. Code § 44-146.14 (emphasis added). The definition of an "Emergency" under the Law notes that such a state of emergency "may involve governmental action beyond that authorized or contemplated by existing law because governmental inaction for the period required to amend the law to meet the exigency would work immediate and irrevocable harm upon the citizens...." Va. Code § 44-146.16. But this recognition clearly does not (and could not) itself be an uncircumscribed delegation of power to the Governor to do take any action he believes justified during an emergency, if it violates existing constitutional provisions or laws. It is axiomatic that if text

does not demonstrate that the General Assembly "provided herein" all of the powers exercised by EO 53, the order is invalid and unenforceable *ultra vires* action.

In Code § 44-146.14, the General Assembly lists those powers. The statute makes clear that "The Governor shall have, in addition to his powers hereinafter or elsewhere prescribed by law, the following powers and duties," and proceeds to list ten numbered categories. Of these, only number (1) addresses powers arguably connected with issuing an executive order. Code § 44-146.17(1) sets out six paragraphs with things that the Governor "may" do. There is no express provision authorizing the Governor to issue an executive order shut down entire economic sectors and ban categorical classifications of businesses from operation. As a result, the Court must examine the powers granted in subsection (1) to determine if they fairly imply the legislature intended to grant the Governor the unilateral and unrestricted authority he has exercised. Applying the canons of construction to the plain language, the clear answer is "no."

In evaluating this statutory language, it is first essential to review the rules of construction for the statute at issue. Virginia courts interpret the legislative intent of clear and unambiguous statutes "from the words used, unless a literal construction would involve a manifest absurdity." *Halifax Corp. v. First Union Nat. Bank,* 262 Va. 91, 99–100, 546 S.E.2d 696, 702 (2001). The Court assumes "that the General Assembly chose, with care, the words it used in enacting the statute, and we are bound by those words when we apply the statute." *Id.* Thus, when the terms of an enabling statute are clear and unambiguous, determinations of the authority intended by the legislature turns upon the plain meaning of the words used, and no extrinsic evidence is considered. *Bd. of Sup'rs of Powhatan County v. Reed's Landing Corp.*, 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995); *Harrison v. Day*, 200 Va. 439, 448, 106 S.E.2d 636, 644 (1959).

Because Code § 44-146.17—and by the terms of EO 53, the restrictions in the executive order—are laws enforced by criminal penalty, the court's review of both the statute and EO 53 are subject to strict construction. Code § 44-146.7 states that a limited class of qualifying executive orders—specifically, "those declaring a state of emergency and directing evacuation"—"shall have the force and effect of law and shall be punishable as a Class 1 misdemeanor." The Governor relies upon that provision to declare that violations of EO 53 carry the criminal penalty of a Class 1 misdemeanor.[4] As a result, Code § 44-146.17 and EO 53 must be "strictly construed against the Commonwealth and in favor of the citizen's liberty. 'Such statutes cannot be extended by implication or construction, or be made to embrace cases which are not within their letter and spirit.'" *Lamb v. Commonwealth*, 40 Va. App. 52, 56, 577 S.E.2d 530, 532 (Va. Ct. App. 2003) (quoting *O'Banion v. Commonwealth*, 33 Va.App. 47, 57, 531 S.E.2d 599, 604 (2000) (en banc)); *see also Boon v. Simmons*, 88 Va. 259, 264, 13 S.E. 439, 440 (1891) (construing statute's delegation of power to sell land for non–payment of taxes, and holding that "since these statutes are penal, and the proceedings under them *ex parte,* summary, executive, rather than judicial, and an infringement of the rights of property, only tolerated by reason of necessity, great strictness and exactness in following the law is required in favor of the land–owner."). Finally, in *Howell v. McAuliffe,* the Virginia Supreme Court declared that courts must always take a "cautious and incremental approach to any expansions of the executive power," which EO 53 certainly is. 292 Va. at 341.

There are six paragraphs in Code § 44-146.17(1). Three of them (paragraphs 1, 4, and 5) relate by their terms to executive orders. The first grants the Governor a general

[4] As discussed *infra*, EO 53 is only an emergency order and not also an evacuation order as required under Code § 44-146.17, but the order nonetheless declares that all violations are criminal penalties, so the canon applies.

power to issue rules, regulations, and orders, specifically contemplating "measures" required to carry out a "state or federal emergency services program," which would not pertain to the powers exercised in EO 53.[5] It states that the Governor has the power:

> … to issue such orders as may, in his judgment, be necessary to accomplish the purposes of this chapter including, but not limited to such measures as are in his judgment required to control, restrict, allocate or regulate the use, sale, production and distribution of food, fuel, clothing and other commodities, materials, goods, services and resources under any state or federal emergency services program.

Code § 44-146.17(1) (emphasis added).

If the Governor is relying upon this provision for the authority of the powers set out in EO 53, such a textual argument would "be overstated at best," while conflicting with the spirit of contemporaneous provisions enumerating specific powers. *Howell v. McAuliffe*, 292 Va. at 342. While the language "orders as may, in his judgment, be necessary to accomplish the purposes of this chapter including, but not limited to…" may be fairly stretched to authorize executive orders beyond just those implementing emergency services programs, it would not be justifiable to suggest that the General Assembly intended the "including but not limited to" phrasing to effect an unlimited grant of authority to use executive orders for any kind of restriction the Governor chooses "in his judgment." If this were true, then there would be no need to provide any of the subsequent enumerations of powers or limitations of executive orders particularly that the General Assembly drafted in this statute.

For instance, the second and third paragraphs do not pertain to executive orders or related powers, but they do demonstrate the General Assembly intended to enumerate the specific powers being granted. The second paragraph proscribes the power to adopt and implement the Virginia Emergency Operations Plan, and the third paragraph delegates the

[5] Code § 44-146.16 defines "emergency services," including in connection with "approved state and federal disaster recovery programs," which is not the focus of EO 53 or the powers exercised therein.

power to direct evacuation or restrictions on ingress or egress to an emergency area. If the Governor had the power under the first paragraph to include anything he believed necessary in an executive order, there would be no need to specifically authorize the powers to order an evacuation under the third paragraph.

The text of the fourth paragraph further demonstrates that the powers the Governor invokes in EO 53 are in direct conflict with the General Assembly's textual limitations. The fourth paragraph provides, in part, that "Executive orders, to include those declaring a state of emergency and directing evacuation, shall have the force and effect of law and the violation thereof shall be punishable as a Class 1 misdemeanor in every case where the executive order declares" as much. Code § 44-146.17 (sub. 1). Reading these terms according to the canons of construction, the legislature has provided a limitation on which executive orders may have the force of law and carry criminal penalties—namely, those that both declare an emergency *and* direct evacuation. This is the only reasonable interpretation that affords meaning to the qualifying phrase without ignoring it or rendering the language meaningless surplusage. "Every part of a statute is presumed to have some effect and no part will be treated as meaningless unless absolutely necessary." *Idoux v. Estate of Helou*, 279 Va. 548, 554, 691 S.E.2d 773, 776 (2010). To keep the phrase "those declaring a state of emergency and directing evacuation" from being meaningless surplusage, it must define the limited class of executive orders eligible for the stated force of law and criminal penalties.

The rule requiring strict construction of penal statutes also cements this conclusion. Where a statute makes the breach of another law a Class 1 misdemeanor, it "is criminal in nature, it must be strictly construed, and any ambiguity or reasonable doubt as to its meaning or scope shall be resolved in favor of the defendant." *Rooney v. Commonwealth*, 27 Va. App. 634, 639–40, 500 S.E.2d 830, 832 (Va. Ct. App. 1998); *see also Lewis v. Commonwealth,*

184 Va. 69, 73, 34 S.E.2d 389, 390 (1945) (penal statute had to be strictly construed in favor of defendant, and court "cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself."). Conversely, if the General Assembly intended the fourth paragraph to authorize the Governor to proclaim *all* executive orders to be laws the violation of which is punishable as a Class I misdemeanor, then it must have so stated and not provided the limited class of orders included.

With this in mind, EO 53 directly violates this clause of Code § 44-146.17. EO 53 is an order declaring an emergency, but does not also direct evacuation. Yet it proclaims to have the force of law and Class I misdemeanor penalties for violation of all of its provisions, despite not qualifying. On this basis standing alone, the order is patently *ultra vires*.[6]

Perhaps the strongest evidence of all that EO 53 asserts powers beyond those delegated by the General Assembly comes from an analysis of the fifth paragraph. The fifth paragraph shows the intent of the legislature to enumerate the executive orders the Governor may issue and limit his power to restrict liberties. The text specifically states that his "executive orders declaring a state of emergency may address exceptional circumstances that exist relating to an order of quarantine or an order of isolation concerning a communicable disease of public health threat that is issued by the State Health Commissioner for an affected area of the Commonwealth pursuant to Article 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 of Title 32.1." In this paragraph, the General Assembly empowers the Governor to issue executive orders that relate to quarantines or isolation—i.e., restrictions of movement and liberties—but expressly conditions any such orders upon the procedures and standards set

[6] As EO 53 declares that every one of its provisions are a law enforceable with these criminal penalties, this should invalidate the entire order. Nothing about EO 53 would support a presumption of severability that would save the rest of the order from its *ultra vires* penalty provision. *See Boyles v. City of Roanoke*, 179 Va. 484, 489, 19 S.E.2d 662, 664 (1942).

forth in Title 32.1, Chapter 2. This entire provision would be meaningless surplusage if the first paragraph of Code § 44-146.7(1) intended to broadly authorize Governor to issue any executive order "necessary" in his "judgment" without any limitations. The General Assembly intended that while the Governor was authorized to restrict certain liberties of movement and use through orders of quarantines or isolation, such extraordinary powers could only be exercised within the prescribed limitations of Title 32.1, Chapter 2, and the oversight of the State Health Commissioner.

A review of those provisions in Title 32.1 reinforces the conclusion that the General Assembly did not intend to implicitly grant unlimited power to the Governor in orders affecting the liberty Virginia citizens, let alone the power to unilaterally shutter large sectors of businesses closed and restrict liberties without check. There is, obviously, a reason why the General Assembly drafted laws that enumerate the Governor's power in the specific context of a "communicable disease of public health threat"—the class of emergency at issue with COVID-19—to the laws in Title 32.1, Chapter 2. Unlike Code § 44-146.17, those laws pertain specifically to how the General Assembly anticipated the relevant situation of "Disease Prevention and Control" must be handled, to effect the least restrictive impositions on fundamental rights of liberty and property. Recognizing the special issues that might arise in situations involving public health threats from communicable diseases—including infringements of liberty and property that arise from extreme measures restricting movements or actions, such as orders of quarantine or isolation—the General Assembly enacted a particular Code that proscribes powers administered by the Health Commission, limits those powers with standards, procedures, and definitions.

For instance, Code §§ 32.1-48.05 (exceptional circumstances) and -48.07 (conditions) define the conditions and parameters by which the State Health Commissioner

may order measures restricting movements of citizens through quarantine or isolation. With a clear purpose of protecting civil liberties and property interests, and ensuring a rational, evidence-based threshold for action affecting them, the General Assembly authorizes the restrictions within affected areas according to standards and procedures designed "to assure that any quarantine or isolation is implemented in the least restrictive environment." Va. Code Ann. § 32.1-48.05. The General Assembly also designates the State Health Commissioner, not the Governor, as the responsible expert official for declaring quarantines and implementing all of these procedures and standards. *E.g.,* Code § 32.1-48.08. Such provisions would be pointless if the Governor can always accomplish this, and anything else, by unlimited powers of unregulated executive orders under Code § 44-146.17.

The Governor may protest that EO 53 does not expressly "declare" a quarantine. But that is not the point. EO 53, and the Governor's contemporaneous orders, purport to impose comparable restrictions of liberties that not only fit the definition squarely, but expand the restriction of movements to all persons throughout the state and close down businesses as part of that restriction, in the identical context (preventing spread of "communicable disease of public health threat"):

> "Quarantine" means the physical separation, including confinement or restriction of movement, of an individual or individuals who are present within an affected area, as defined herein, or who are known to have been exposed or may reasonably be suspected to have been exposed to a communicable disease of public health threat and who do not yet show signs or symptoms of infection with the communicable disease of public health threat in order to prevent or limit the transmission of the communicable disease of public health threat to other unexposed and uninfected individuals.

Va. Code Ann. § 32.1-48.06 (emphasis added).

If the General Assembly indeed intended to grant the Governor general power under Code § 44-146.17 as he exercises it in EO 53, it would mean that the General Assembly

erected the more specific, comprehensive scheme in Title 32.1, Chapter 2 for responding to the particular situation of a "communicable disease of public health threat," installed meaningful procedures, standards and protections for quarantines and isolation, for no reason whatsoever. In EO 53 and associated orders, the Governor purports to impose much greater restrictions upon liberty and property interests of the state's citizens and businesses than the General Assembly has seen fit to expressly proscribe under Title 32.1—and wields that more expansive, restrictive power with none of the protective limitations or standards the General Assembly imposed on a similar scenario in a specific, legislative scheme.

In addition to violating the maxim against rendering such comprehensive and specific sister statutes meaningless, such an interpretation of Code § 44-146.17 would also violate the following canon:

> It is firmly established that, "when one statute speaks to a subject generally and another deals with an element of that subject specifically, the statutes will be harmonized, if possible, and if they conflict, the more specific statute prevails." This is so because "a specific statute cannot be controlled or nullified by a statute of general application unless the legislature clearly intended such a result." *Id.*

Gas Mart Corp. v. Bd. of Sup'rs of Loudoun County, 269 Va. 334, 350, 611 S.E.2d 340, 348 (2005).

There is no evidence that the General Assembly "clearly intended" the Governor have an implied power beyond that which it specifically and explicitly granted to the agency in Title 32.1; indeed, its express reference to orders involving isolation or quarantine in Code § 44-146.17 demonstrate a contrary intent. The General Assembly plainly intended Title 32.1, Chapter 2, Article 3.02 to be the specific statute enumerating powers and procedures by which the Executive Branch may restrict liberties during a public health emergency involving a communicable disease of public health threat. To make sure, the General Assembly

plugged that express limitation into Code § 44-146.17(1). Despite this, the Governor has ignored these specific provisions and their limitations, instead claiming even greater, unlimited power to issue sweeping restrictions of individual and business liberties under the generic Code § 44-146.17, without affording citizens any of the protections of Title 32.1.

Textual analysis of Code § 44-146.17 disproves the premise that the legislature has granted the Governor the implied authority to issue Executive Order 53 as drafted. This is plainly ultra vires action, and examination of the Suspension Clause of the Virginia Constitution, as applied in *Howell v. McAuliffe,* cements that conclusion.

4. The Governor's actions under EO 53 violate the provisions of Virginia Constitution Art. I, § 7, as they trample upon fundamental rights and laws contained in the Constitution and Code.

In addition to having no precedential or textual authority in Code § 44-146.17, the Governor's assertion of powers in EO 53 contradicts and effects the suspension of numerous, other laws and constitutional provisions, in violation of the Virginia Constitution. The Suspension Clause states "[t]hat all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised." Va. Const. art. I, § 7. In *Howell v. McAuliffe*, the Virginia Supreme Court upheld the Suspension Clause to void executive orders that effectively superseded existing laws in order to regulate "an indiscriminately configured class … without any regard for their individual circumstances." *Howell v. McAuliffe*, 292 Va. at 348. With the sweeping closures statewide of classes of businesses such as private membership clubs, Governor Northam has attempted the same transgressions with EO 53 on a much broader scale.

If Code § 44-146.17 is interpreted to authorize the Governor to assert the restrictions in EO 53, broadly shuttering special classifications of businesses such as Petitioner's,

preventing employees from working, and restricting the free movement of citizens throughout the Commonwealth from their homes and into restricted businesses, then EO 53 has the effect of suspending and multiple provisions of the Constitution or statute. Obvious examples include:

1. The aforementioned, detailed provisions the General Assembly enacted for the restriction of movements during a public health emergency under Title 32.1, Ch. 2, Art. 3.02;
2. Art. 1, § 11: That no person shall be deprived of his life, liberty, or property without due process of law. As worded and applied to businesses and jobs, EO 53 effects a confiscation by legislative act, delegated to the Governor, without a judicial hearing after due notice, which the Constitution and Virginia common law forbid. *See Fugate v. Weston*, 156 Va. 107, 113, 157 S.E. 736, 738 (1931).
3. Art. 4, § 14, which forbids the General Assembly (and thereby, any executive delegated and exercising a legislative power) from enacting special or private laws affecting classes of businesses, trades, or jobs, and granting others special and exclusive rights.
4. Art. I, § 11, and the provisions of the Takings Clause stating that "No more private property may be taken than necessary to achieve the stated public use."
5. Art. I, § 11: The General Assembly "shall not pass any law impairing the obligation of contracts." EO 53 violates this provision as to multiple express and implied rights and obligations of contractual relationships that Petitioners' businesses have with landlords, vendors, service providers, and employees. In addition, the right to form employment contracts without interference is enshrined in Code § 40.1-53 (Right-to-work in lawful vocations provisions): "No person shall singly or in concert with others interfere or attempt to interfere with another in the exercise of his right to work or to enter upon the performance of any lawful vocation by the use of force, threats of violence or intimidation…"

Each of these provisions or laws recognizes fundamental rights and protections that would permit Petitioner's business and employees to operate presently, but for Governor Northam's ultra vires assertion of powers by executive orders. EO 53, as extended, has the indisputable effect of violating and suspending each of them, and thereby violates the Suspension Clause in Art. I, § 7. According to the precedent of *Howell v. McAuliffe,* the remedy is to strike it down as invalid.

IV. If this Court were to determine that the General Assembly did intend to grant the Governor the implied scope of power he has exercised in Executive Order 53, then Code § 44-146.17 would itself be an unconstitutional delegation of power devoid of meaningful limits, policies, or standards.

If this Court somehow determines that Code § 44-146.17 *does* imply a grant of power to the Governor sufficient to cover the restrictive powers set forth in Executive Order 53, then that means Code § 44-146.17 is itself defective for an improper delegation of power. It is well-established that "delegations of legislative power are valid only if they establish specific policies and fix definite standards to guide the official, agency, or board in the exercise of the power. Delegations of legislative power which lack such policies and standards are unconstitutional and void." *Ames v. Town of Painter*, 239 Va. 343, 349, 389 S.E.2d 702, 705 (1990) (emphasis added). If Code § 44-146.17(1) authorizes EO 53 as written, then it violates this rule.

If the Emergency Services and Disaster Law indeed grants the Governor the expansive powers he wields in EO 53, then the Law would fail to come close to fixing any definite standard for the use of that power. The Disaster Law empowers the Governor "to proclaim and publish such rules and regulations and to issue such orders as may, *in his judgment*, be necessary to accomplish the purposes of this chapter." Va. Code Ann. § 44-146.17(1) (emphasis added). The purpose of the Disaster Law is to "confer upon the Governor ... emergency powers... in order to insure that preparations of the Commonwealth and its political subdivisions will be adequate to ... protect the public peace, health, and safety, and to preserve the lives and property and economic well-being of the people of the Commonwealth." Va. Code Ann. § 44- 146.14(a)(2).

If this provision authorizes general powers exercised in EO 53, then it provides no other standards constraining the Governor's authority beyond his "judgment." Such a

"standard" proscribes nothing; the Governor is granted the unfettered authority to legislate by fiat just about any law or suspension of law that he judges necessary or appropriate. This would be so vague and subjective that no court could ever meaningfully review any governor's order for appropriateness. The Governor, therefore, would stand without any check or balance in time of emergency.

"[T]he General Assembly cannot delegate its legislative power accompanied only by such a broad statement of general policy.... [D]elegations of authority are adequately limited [only] where the terms or phrases employed have a well understood meaning and prescribe sufficient standards to guide the administrator." *Bell v. Dorey Elec. Co.,* 248 Va. 378, 381-2, 448 S.E.2d 622, 624 (1994). Sometimes, "general terms are permissible if those terms get precision from the technical knowledge or sense and experience of men and thereby become reasonably certain." *Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 286, 318, 749 S.E.2d 176, 192–93 (2013). A standard of wide-open, subjective "judgment" does not approach this minimal threshold.

Deeply embedded in the Virginia legal tradition is "a cautious and incremental approach to any expansions of the executive power." *Gallagher v. Commonwealth*, 284 Va. 444, 451, 732 S.E.2d 22, 25 (2012). This tradition reflects our belief that the "concerns motivating the original framers in 1776 still survive in Virginia," including their skeptical view of "the unfettered exercise of executive power." *Id. See Howell v. McAuliffe*, 292 Va. 320, 327, 788 S.E.2d 706, 710 (2016). If this Court holds that the General Assembly intended, through grant of general, implied powers in Code § 44-146.17, to grant the Governor this unfettered authority to respond in times of disaster based solely on "judgment," such delegation would violate the Virginia Constitution.

V. If the Court does not grant Petitioners temporary, injunctive relief from the provisions of EO 53 permitting them to operate, their businesses, owners, employees, and members will suffer irreparable injury.

In the absence of *immediate* injunctive relief permitting them to re-open and operate, Petitioners will suffer certain and irreparable harm in the form of permanent closure of their businesses and the jobs they represent. In addition, even if they could somehow revive, their losses would be immeasurable and impossible to quantify. Irreparable harm and a lack of adequate legal remedy are the "traditional prerequisites" justifying injunctive relief. *Levisa Coal Co., supra*, 276 Va. at 61 (injunction necessary for continuing trespass against property of business). "The "irreparable harm to the plaintiff and harm to the defendant are the two most important factors" for courts to consider when determining whether to award temporary injunctive relief. *Christian Def. Fund v. Winchell & Assoc., Inc.*, 47 Va. Cir. 148, 1998 WL 972334, at *1 (Fairfax Co. 1998) (citations). If ever there were a case demonstrating irreparable harm to a business, it would be one in which a long-successful business is suddenly being strangled into permanent closure by a categorical, state ban on any operation, for reasons unconnected to its particular circumstances. For a business, there is no greater or more irreparable injury than what Petitioners face in a matter of days unless this Court uses its power to restore their pre-closure *status quo.*

This case is likewise a compelling case because irreparable injury to Petitioners' businesses not only affects individual owners with personal guarantees, but all of the Petitioners' contractual relationships. This means that closure of Petitioners' businesses also injures countless others in irreparable ways incapable of meaningful measure. It means breaches or defaults to lenders of debt service payments, vendors of payments owed, lessors of rent due. It deprives the various governments of tax revenue. Perhaps most compelling, it ends the job opportunities for 1,100 Virginia citizens. And it deprives all of Petitioners'

thousands of customers of their preferred venue for maintaining and improving their personal fitness and health. If this process carries out, it will in turn ruin the reputations, credit, and future credibility of Petitioner Hall and the other business owners associated with Petitioners.

Pertinent to the present case, the Supreme Court of Virginia has held that "an injunction will lie "where the remedy at law is not as complete and as fully adequate as an injunction suit, or where the threatened or attempted enforcement of a void statute or ordinance will do irreparable injury to a person in interfering with the exercise of such a common fundamental personal right." *Thompson v. Smith*, 155 Va. 367, 387, 154 S.E. 579, 586 (1930) (Injunction lies to restrain chief of police from enforcing invalid ordinance provision authorizing him to revoke driver's permit). The Court has long been willing to apply injunctive relief to undo the effect of laws that unreasonably injure the use and enjoyment of private property, *see Bristol, etc., Co. v. Bristol*, 97 Va. 304, 33 S. E. 588 (1899); or the right to conduct a lawful business. *Parrish v. City of Richmond,* 119 Va. 180, 89 S.E. 102 (1916).

It is abundantly clear that EO 53 and 55 interfere with fundamental rights of liberty and property. Because these orders have caused and will cause Petitioners, and all the people connected with their enterprises, immediate, immense and irreparable injury for which there is no adequate remedy or compensation at law, temporary injunctive relief should be granted until the Court is able to issue a final judgment on the claims of the Complaint.

VI. The balance of equities favors granting Petitioners temporary injunctive relief until final judgment on the merits. Petitioners will operate their businesses with stringent procedures of sanitization and social distancing that minimize any risk of spreading the disease, effecting the primary health promotion and disease prevention goals of the government while still operating and employing 1,100 people.

Granting Petitioners the requested relief has the significant benefit of re-opening their businesses and facilitating their survival, while fertilizing all of the benefits for 1,100 employees of gainful employment, and for 56,000 Virginians who have been deprived the use of Petitioners' facilities, a means to improve their health and fitness. The equities clearly tip in Petitioners' favor.

Respondents will likely argue that the theoretical risk of the transmission of coronavirus in the particular setting of a private membership club an inference that the equities favor the state. But as set forth in the Affidavit, Petitioners operate large-scale, modern, well-ventilated, and roomy facilities. They have a comprehensive protocol ready to ensure that any operations will preserve social distancing and ensure that all equipment and premises remain sanitized. In addition, Petitioners remain willing to work with any recommendations of Respondents to minimize any risks. Petitioners' businesses are unquestionably better situated to maintain ideal indoor, social distancing protocols—and to effect purposes more essential for health—than other businesses that the executive orders currently permit to stay open, such as ABC liquor stores. Petitioner's business *promotes* health and exercise, and is not a "recreational and entertainment businesses" involving passive, public use. In such circumstances, Petitioners —as well as their owners, employees, vendors, and members—should get the benefit of any balance of equities.

In addition, Respondents should not be able to hijack this element by trading away a burden to produce specific, evidentiary justifications particular to Petitioners' business, for the general fear of a pandemic and theoretical risk. It is self-evident that most of the members who will attend Petitioners' facilities during this time period are healthier and more active than the most vulnerable categories of people pre-disposed to severe effects from COVID-19. Its risk of transmission and illness, for all people and the people they later contact, is

certainly is present and primary, regardless of the business where this may occur. But the overall prevalence and severity of this disease still remains largely uncertain and unpredictable, and it would be contrary to equity to permit the Commonwealth to use this uncertainty to argue that the unknowable risks of disease transmissions during Petitioners' operation outweighs the proven, direct benefits of that operation to thousands of people.

In addition, the Court should likewise consider the very real and demonstrated economic collapse and shortfalls, particularly for wage earners such as Petitioners employ, of the Governor's executive orders. While detailed economic data is not yet available to fully assess the severity and extent of damage to Virginia's economy, experts predict that there will be a significant decline in the Commonwealth's GDP for the long-term, with massive unemployment claims stressing an already strained public purse.[7]

In considering the balance of equities, it is likewise material that the Governor chose not to utilize alternative, less restrictive options available for emergency responses that reflect a more equitable and balanced plan, without the wholesale confiscation of property and liberty rights. In addition to the proscribed procedures for isolation and quarantine under Title 32.1, previously discussed, he has the Commonwealth of Virginia Emergency Operations Plan. These guidelines were most recently reviewed and signed in conjunction with Executive Order 42 on September 3, 2019, and provide powers and actions for the event of a Statewide emergency or disaster to save lives, protect public health, safety, and property, restore essential services, and enable and assist with economic recovery. Nowhere within this EO 42 or accompanying Plan was the suspension of business operations contemplated.

[7] *See* John Blackwell "As Virginia's jobless claims soar, Richmond Fed economists expect a hit to Virginia's economy, but duration is uncertain," *Richmond Times* (Mar. 20, 2020), https://www.richmond.com/business/as-virginias-jobless-claims-soar-richmond-fed-economists-expect-a-hit-to-virginias-economy-but/article_bc61aece-bebd-5fbc-96d6-5d4e664bda32.html.

Finally, Respondents face no comparable, direct injury or economic losses if Petitioners are permitted to operate their private membership clubs. Compared to the irreparable and permanent injuries the Petitioners face if they must remain shuttered, and the impact of such injuries upon the financial security of thousands of real people and their families, the balance tips decisively in favor of Petitioners.

VII. An injunction furthers public policy because it protects the sacred principles of enforcing contractual obligations, while EO 53 and 55 violate numerous, constitutional provisions.

As a general matter, Virginia courts justify injunctions that have the effect of enforcing valid contracts because "it is in the public interest to see parties abide by their contractual obligations." *Great Am. Ins. Co. v. Gross,* E.D. Va. No. CIV.A. 305CV159, 2005 WL 1048752, at *6 (E.D. Va. May 3, 2005); *see also Moller-Maersk A/S v. Escrub Systems, Inc.*, 2007 WL 4562827, 4 (E.D.Va. 2007) ("it is also in the public's interest to preserve the status quo and protect the sanctity of contracts, intellectual property rights, and patent material."). EO 53 and 55 are causing Petitioners to violate and default on innumerable contracts effecting thousands of people, and involving millions of dollars. In addition, as written and applied, EO 53 and 55 violate numerous fundamental rights and policies enshrined in Virginia Constitution, Article I, § 11, including the prohibition of "any law impairing the obligation of contracts." While there is no question that public policy favors supporting a general effort to preserve the public health, that policy is undermined by irreparable devastation of the classes of business Petitioners operate, as well as the loss of jobs for thousands.

In addition, if public policy is tied to promoting health, then Petitioners' private membership clubs certainly have a *compelling* case for operating. Physical fitness has innumerable, positive health benefits such as maximizing personal strength, flexibility, and

performance; reducing costly burdens on the labor force from absenteeism and reducing health care expenses; preventing or reducing the serious diseases and disorders connected with poor physical health, obesity, circulation, and respiration; improving mental health and cognitive function, as well as coping skills; and pertinent to the instant priorities, boosting the immune system.

CONCLUSION

If this Court does not immediately grant the requested, temporary relief, Petitioners' businesses will dissolve, injuring thousands of people irrevocably. The Court may take simple steps to prevent this tragic and certain outcome, and defer a ruling on the validity and enforceability of EO 53 and 55 for a later time. As the Petitioners have set forth, the Court is likely to conclude at a future point that those executive orders do exceed the authority granted by the General Assembly in Code § 44-146.17, while trampling numerous, fundamental rights. As a result, Petitioners respectfully request this Court grant the requested injunction and permit them to re-open until final judgment on the merits.

Respectfully Submitted,

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Certificate of Service

I hereby certify that a true copy of the foregoing was hand-delivered to the offices of the Honorable Mark R. Herring, Attorney General of the Commonwealth of Virginia, at 202 N. 9th Street, Richmond, Virginia, 23219, this 21st day of April, 2020.