V I R G I N I A :

IN THE CIRCUIT COURT OF VIRGINIA BEACH

WILLIAM G. DILLON, JR. and TAMPICO ENTERPRISES, INC. dba ABBEY ROAD PUB & RESTAURANT (a Va. Corporation) Plaintiffs, v. HON. RALPH S. NORTHAM (In his official capacity as Governor of the Commonwealth of Virginia) and M. NORMAN OLIVER (In his official capacity as State Health Commissioner) and Gary T. Settle (In his official capacity as Virginia State Police Superintendent) Defendants. Serve: Attorney General Mr. R. Herring Office of the Virginia Attorney General 202 N. 9th St., Richmond, VA 23219	)	Case No. CL2000381200

COMPLAINT, APPLICATION FOR TEMPORARY INJUNCTION AND DECLARATORY JUDGMENT, VERIFIED PETITION FOR WRIT OF MANDAMUS, AND MEMORANDUM OF LAW IN SUPPORT THEREOF

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COMPLAINT AND APPLICATION FOR TEMPORARY INJUNCTION

COME NOW the Plaintiffs, William G. Dillon, Jr. and Tampico Enterprises, Inc. dba Abbey Road Pub & Restaurant, by and through their counsel, and hereby bring this verified action against Ralph S. Northam, in his official capacity as Governor of the Commonwealth of Virginia, M. Norman Oliver, in his official capacity as the State Health Commissioner, and Gary T. Settle, in his official capacity as Superintendent of the Virginia State Police, and move this Court for the following:

(1) a declaratory judgment finding that Directive A2 as set forth in the current version of Amended Executive Order 65 and Amended Order of Public Health Emergency 6 and Directives A3 and C as set forth in the current version of Executive Order 63 and Order of Public Health Emergency 5 constitute *ultra vires* acts of Governor Ralph S. Northam and Commissioner M. Norman Oliver in violation of the Constitution of Virginia, the Emergency Services and Disaster Law of 2000 (Va. Code §44.1-146.13, *et seq.*), Va. Code §§32.1-13, 32.1-20, 35.1-10; and the Administrative Process Act (Va. Code §2.2-4000, *et seq.*); and

(2) a declaratory judgment finding that Directive A2 as set forth in the current version of Amended Executive Order 65 and Amended Order of Public Health Emergency 6 is arbitrary and capricious and void for vagueness; and

(3) a declaratory judgment finding that Directive A2(a) of the current version of Amended EO 65 and Amended HO 6 allows the Plaintiffs to operate Abbey Road at 100% capacity; and

(4) immediate entry of a temporary injunction, on an emergency basis and without bond, enjoining Governor Ralph S. Northam, the Superintendent of the Virginia State Police, and all law enforcement divisions, agencies, and officers within the Commonwealth, and the Virginia Department of Health from enforcing, in any manner (and under threat of criminal penalty) against the Plaintiffs Directive A2 as set forth in the current version of Amended Executive Order 65 and Amended Order of Public Health Emergency 6 and Directives A3 and C as set forth in the current version of Executive Order 63 and Public Health Emergency 5, and permanent injunctive relief that the Court may find appropriate; and

(5) issuance of a writ of mandamus, with payment of costs as permitted by Va. Code §8.01-648, directing that, because the current versions of Amended EO 65 and Amended HO 6 and EO 63 and HO 5 are unconstitutional and otherwise *ultra vires* with their limitations on restaurants and requirements that people wear masks, respectively, that the Governor provide notice to the residents of the Commonwealth of Virginia that restaurants and people are no longer limited by these orders, and that no law enforcement department, division, agency, or officer in the Commonwealth has the discretion to enforce the provisions of the current version of Amended

EO 65 and Amended HO 6 governing restaurants and the current version of EO 63 and HO 5 requiring people to wear masks, respectively; and

(6) further relief pursuant to and in accordance with such declaratory judgment, to include permanent injunctive relief, the Plaintiffs' costs, and such other and further relief as the Court may deem appropriate under the circumstances.

INTRODUCTION

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, 298 (James Madison).

This case arises from the decision by Ralph S. Northam, the Governor of Virginia ("the Governor") beginning on March 12, 2020 to restrict the activities of 8.6 million Virginians via a series of broadly worded Executive Orders, thereby (i) infringing upon civil rights in Virginia, including the right to peaceably assemble and attend religious services, and (ii) depriving certain persons of the right under Article I, §11 of the Virginia Constitution inter alia to own and utilize their private property. These orders were issued under color of a "public emergency" and bear no legislative imprimatur. Nor have they been reviewed on the merits by a court of competent jurisdiction.

In fact, the state legislature has not been called into session since March 12, 2020, when it adjourned *sine die* for the year, except for a one-day

"veto session" on April 22, 2020, which solely addressed the Governor's actions on bills previously passed. As of the date of this filing, the "Government by Executive Order" has been in effect for 96 days and counting, with no end in sight. It is on its face a continuing violation of the United States and Virginia Constitutions.

ISSUES PRESENTED

1. Does the Governor have the ability to suspend the laws of the Commonwealth and announce unilateral edicts limiting civil and constitutional rights for an indefinite period of time?

2. Does the Governor have the ability to announce a "public emergency" and unilaterally close (or vastly limit) the activities of private citizens and businesses and require healthy citizens to wear a mask in public for an indefinite period of time?

3. Do the Governor and the Commissioner have to follow the procedures of the Virginia Administrative Procedural Act in enacting policies which have a sweeping impact on the lives and activities of all Virginians and operate as a de facto closing of certain Virginia businesses?

4. Do the actions of the Governor and the Commissioner constitute a taking without just compensation or due process, in violation of the Virginia Constitution?

5. Are the actions by the Governor and the Commissioner inherently arbitrary and capricious?

PARTIES

1. Plaintiff William G. Dillon, Jr. is a citizen of the Commonwealth of Virginia. He is the fee simple owner of real property in the Commonwealth of Virginia, and he is the President and Director of Tampico Enterprises, Inc., dba Abbey Road Pub & Restaurant, that is the subject of this litigation. Plaintiff Dillon has filed contemporaneously with this pleading an Affidavit to verify his claims. (Exhibit A)

2. Plaintiff Tampico Enterprises, Inc., dba Abbey Road Pub & Restaurant, is a Virginia Corporation organized under the laws of the Commonwealth of Virginia, authorized to transact business under the authority of the Virginia State Corporation Commission, with its headquarters in Virginia Beach, Virginia, and with an address of 203 22nd Street, Virginia Beach, Virginia 23451.

3. Defendant Ralph S. Northam is the Governor of the Commonwealth of Virginia, (hereinafter "Governor Northam" or "the Governor" or "Governor"), and he is responsible for the promulgation and execution of numerous orders, including but not limited to Amended Executive Order 65 and Amended Order of Public Health Emergency 6 and Executive Order 63 and Order of Public Health Emergency 5, that have directly affected and have caused harm to the Plaintiffs.

4. Defendant M. Norman Oliver is the State Health Commissioner of the Commonwealth of Virginia (hereinafter "Commissioner Oliver" or "the

Commissioner" or "Commissioner"), and he is responsible for the promulgation and execution of numerous orders, including but not limited to Amended Executive Order 65 and Amended Order of Public Health Emergency 6 and Executive Order 63 and Order of Public Health Emergency 5, that have directly affected and have caused harm to the Plaintiffs.

5. Defendant Gary T. Settle is the Superintendent of the Virginia State Police, and he is responsible, among other things, for the enforcement of Virginia State Code and criminal violations of executive orders.

6. At all relevant times, the Governor and the Commissioner acted under color of state law, i.e. by issuing orders which create new mandates that are purportedly pursuant to provisions of Virginia law and subject citizens and businesses to criminal penalties of up to 1 year in jail and up to a $2,500.00 fine for each violation under authority of state law.

JURISDICTION AND VENUE

7. This Court has jurisdiction to grant the relief sought pursuant to Va. Code §§8.01-184, 8.01-620, and 8.01-645.

8. Venue is proper and preferred in this Court pursuant to Va. Code §§8.01-261(15)(c), 8.01-261(1)(a), and (15), and 8.01-261(5).

STATEMENT OF FACTS

9. In late February of 2020, public officials in Virginia became increasingly aware of the presence of COVID-19, which was a pandemic

that had originated in the Wuhan province of China and was spreading to other nations.

10. On March 5, 2020, near the end of the 2020 legislative session, officials of the Governor's Executive Branch, including Commissioner Oliver, held a briefing for members of the General Assembly regarding the issue of "coronavirus" (i.e. COVID-19) and the potential impact on Virginia.

11. At that time, officials focused on practical health tips, such as encouraging frequently washing one's hands, covering one's mouth when coughing, refraining from touching one's face, and avoiding crowds if one becomes sick. No mention was made of closing schools or of shutting down businesses. As of that date, no reported cases had been reported in Virginia.

12. On February 7, 2020, Commissioner Oliver purportedly claimed COVID-19 to be a disease of public health threat. **See** the first paragraph of Order of Public Health Emergency One, Order of the Governor and State Health Commissioner Declaration of Public Health Emergency, issued March 17, 2020.[1]

13. On Sunday, March 8, 2020, the first reported cases of COVID-19 were confirmed in Virginia.

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[1] The Plaintiffs request the Court to take judicial notice of all cited executive orders and orders of public health emergency.

14. Shortly thereafter, reports of COVID-19 in Virginia spread quickly and the situation changed dramatically.

15. The current population of Virginia is estimated to be 8,626,027.[2] As of June 12, 2020, the Virginia Department of Health has reported the following aggregated statistics for the population of the Commonwealth of Virginia:

I. 53,211 positive tests for COVID-19[3]

ii. 5,445 hospitalized for COVID-19[4]

iii. 1,534 fatalities caused by COVID-19[5] [6]

16. The current population of Virginia Beach is estimated to be 447,841.[7] As of June 12, 2020, the Virginia Department of Health has reported the following aggregated statistics for the population of Virginia Beach:

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[2] See World Population Review,estimate of Virginia population at https://worldpopulationreview.com/states/virginia-population/

[3] This includes positive tests dating back to March, meaning that the overwhelming majority of those persons tested positive have returned to daily living. Notably, the testing in Virginia has been limited to those persons "showing symptoms" of COVID-19 rather than the public in general, flowing from the logical presumption that non-symptomatic persons are less likely to have COVID-19.

[4] 3 As with the "positive tests," this is an aggregated number, with the current hospitalization number being closer to 1,000 persons. *See* https://www.vdh.virginia.gov/coronavirus/.

[5] 4 Using the baseline population of 8.6 million Virginians, the VDH data means that 0.002% has tested positive for COVID-19 and 0.0003% have been hospitalized.

[6] The statistics from the Virginia Department of Health ("VDH") include both actual and "probable" cases for COVID-19 so as to avoid an under-count.

[7] See World Population Review. The estimate is based on projections of the latest US Census estimates. https://worldpopulationreview.com/us-cities/virginia-beach-population/

I. 847 positive tests for COVID-19

ii. 107 hospitalized for COVID-19

iii. 27 fatalities caused by COVID-19

17. Even accounting for the inability to test every Virginian, it is apparent that over 99.9% of Virginians are not suffering from COVID-19.

18. More pertinently, the VDH statistics show that persons most susceptible to COVID-19, i.e. most likely to be infected and then to perish, are primarily located in nursing homes and long-term care centers. Over half of all COVID-19 deaths in Virginia are from citizens that are older than 80 years of age. Three-quarters of all COVID-19 deaths in Virginia are from citizens 70 years of age and older.

The Governor Issues First Executive Order (EO 51)
Anticipating Coronavirus Spread

19. When COVID-19 arrived in Virginia, with the first diagnosed case on March 8, 2020, there was no immediate call to close the economy. That changed swiftly.

20. On March 12, 2020, Governor Northam issued EO 51, in which he declared that a State of Emergency existed in the Commonwealth of Virginia regarding the potential spread of COVID-19, a communicable disease of public health threat. That declaration took no steps to impose new law on citizens or businesses in Virginia but rather asserted means of assistance; authorized rules of expedition for the government to enter contracts; and activated existing statutory provisions regarding price

gouging. Among other things, EO 51 ordered the implementation of the Commonwealth Virginia Emergency Operations Plan, as amended, along with other appropriate state plans. EO 51 indicated that it would be effective for exactly 90 days, from March 12, 2020 until June 10, 2020, unless sooner amended or rescinded by further executive order.

21. Subsequently, the Governor and Commissioner issued a number of executive orders and orders of public health emergencies (along with amendments) severely limiting rights of assembly, commercial activity, and other private actions of citizens throughout Virginia under a complicated and broad regulatory structure that has exposed businesses and citizens, to criminal penalties for failure to comply. All of the executive orders and orders of public health emergencies issued by Governor Northam and Commissioner Northam, respectively, regarding the novel coronavirus (COVID-19) have been made unilaterally by the Governor and by the Commissioner without any consultation, much less a recorded vote, by the General Assembly.

22. EO 51 was amended by Governor Northam on May 26, 2020 by Amended EO 51, in which the Governor declared that “a state of emergency **continues** to exist in the Commonwealth of Virginia with respect to our response to the potential spread of COVID-19, a communicable disease of public health threat (emphasis in original).” Amended EO 51 is in effect at the time of the filing of this pleading. It

appears that the Governor's declared extension of the state of emergency regarding the Commonwealth's response to the novel coronavirus (COVID-19) pandemic may remain in effect until June 30, 2021 pursuant to Va. Code §44-146.17(1), unless amended, rescinded, or reissued by further executive order.

Entry of Executive Orders Limiting the Activities of Private Businesses on a Mass Basis

23. On March 17, 2020, Governor Northam and Commissioner Oliver executed a document titled Order of the Governor and State Health Commissioner, Declaration of Public Health Emergency. This document also appears to be known as "Order of Public Health Emergency One." The Governor had announced new measures to combat COVID-19 by increasing social distancing to inhibit spread of the virus by limiting the seating capacity in restaurants, fitness centers, and theaters to ***10 or fewer patrons***, yet the document indicated that, "***Observations of 10 or more patrons*** in a restaurant, fitness center, or theater may result in immediate operation permit suspension (emphasis added)." In addition, the document indicated that the penalty for violating the limitation on the number of patrons in the listed establishments was both a Class 1 misdemeanor and a Class 3 misdemeanor under two different statutes. The document includes the following order and penalties for violating it:

> "NOW THEREFORE, the Governor and State Health Commissioner hereby issues this order declaring a public health emergency resulting from the spread of COVID-19 virus affecting the health and safety of Virginians, and restricts the number of

> patrons allowed in permitted restaurants to 10 patrons or less in order to inhibit spread of the virus. Observations of 10 or more patrons in a restaurant, fitness center, or theater may result in immediate operation permit suspension per the Food Regulations at 12VAC5-42 l-3770 (Summary Suspension of a Permit.) by a district health director as authorized by the State Health Commissioner. Additionally, violation of an emergency order issued pursuant to § 32.1-13 of the *Code of Virginia* is punishable as a Class I misdemeanor pursuant to § 32.1-27 of the Code of Virginia, and a violation of an emergency order issued pursuant to § 35.1-12 of the *Code of Virginia* is punishable as a Class 3 misdemeanor pursuant to § 35.1-7 of the *Code of Virginia*. Additionally, the Commissioner may seek injunctive relief in circuit court for violation of this Order, pursuant to §§ 32.1-27 and 35. l-7 of the *Code of Virginia*."

The orders contained within the document were effective retroactively to March 16, 2020, and they continued in full force and effect until the document was amended three days later on March 20, 2020 by Amended HO 1. Because of the orders contained within both documents, the Plaintiffs' restaurant, Abbey Road, was prohibited from having more than (10) customers inside of it, although Abbey Road had been issued an Occupancy Load Permit by the Virginia Beach Fire Department indicating that the its occupancy load may not exceed 220. (Exhibit B)

24. Amended HO 1 contained the following orders:

> "NOW THEREFORE, the Governor and State Health Commissioner hereby issue this Order declaring a public health emergency resulting from the spread of COVID-19 virus affecting the health and safety of Virginians, and restrict the number of patrons allowed in restaurants, as defined in § 35.1-1 of the *Code of Virginia*, fitness centers, and theaters, as defined in §5.2-2820 of the *Code of Virginia*, to 10 patrons or less in any such establishment in order to inhibit spread of the virus. Any willful violation or refusal, failure, or neglect to comply with this Order, issued pursuant to § 32.1-13 of the *Code of Virginia*, is punishable as a Class 1 misdemeanor pursuant to §32.1-27 of the *Code of Virginia*. In addition, the observation of 11 or more patrons in a restaurant may result in immediate operation permit suspension per the Food Regulations at 12VAC5-421-3770 (Summary Suspension of a Permit) by a district health director as authorized by the State Health Commissioner. The State Health

> Commissioner may also seek injunctive relief in circuit court for violation of this Order pursuant to §32.1-27 of the *Code of Virginia*.
>
> WHEREAS, this Order hereby amends the Order dated March 17, 2020, shall be effective as of March 16, 2020, and shall remain in full force and effect until amended or rescinded. Citation of this Order shall be Commonwealth of Virginia Amended Order of Public Health Emergency One."

The document remained in full force and effect until it was amended by EO 53, executed by the Governor on March 23, 2020.

25. On March 20, 2020, Governor Northam issued EO 52, which directed the State Health Commissioner to increase the licensed bed capacity of any general hospital or nursing home.

26. On March 23, 2020, Governor Northam issued EO 53. To the Plaintiffs' knowledge, never before in the history of the Commonwealth has any Governor - and there have been 72 before the current occupant of that office - claimed to possess the extraordinary and unilateral authority to, with the stroke of a pen, and without action by the General Assembly, close entire categories of businesses throughout the entire Commonwealth. The Order closed certain recreational and entertainment businesses, severely limited the operations of non-essential retail businesses, restaurants and dining establishments, and banned gatherings of more than ten (10) people. It also closed all K-12 schools for the remainder of the academic school year. Later Orders required Virginians to stay home except for essential travel. Directive 3 ordered the closure of all dining and congregation areas in restaurants, dining establishments, food courts, breweries,

microbreweries, distilleries, wineries, tasting rooms, and farmers markets effective 11:59 p.m., Tuesday, March 24, 2020 until 11:59 p.m., Thursday, April 23, 2020, but permitted these entities to continue to offer delivery and take-out services.

EO 53, which prescribed a Class 1 misdemeanor for any violations, specifically referenced the "expertise of public health officials and their models for continuing spread of COVID-19 throughout the Commonwealth and the nation." None of those models were attached to or incorporated into the Order, and no effort has been made ex post facto to determine if the models were accurate.[8]

EO 53 was amended by Amended EO 53, issued April 15, 2020, by Second Amended EO 53, issued May 4, 2020, by EO 61 and HO 3, issued May 8, 2020, by Amended EO 61 and Amended HO 3, issued May 19, 2020, by Second Amended EO 61 and Second Amended HO 3, issued May 28, 2020, by Third Amended EO 61 and Third Amended HO 3, issued June 2, 2020, by EO 62 and HO 4 issued May 12, 2020, and by Amended EO 62 and Amended HO 4, issued May 14, 2020.

Pursuant to Directive 3 of Second Amended EO 53, dining and congregation areas in restaurants, dining establishments, food courts breweries, microbreweries, distilleries, wineries, tasting rooms, and farmers

[8] Now that the pandemic has lasted nearly three (3) months, it is easily possible to compare the epidemiological statistics between Virginia, which has instituted strict lockdown policies since March 23rd and other states with similar demographics (Georgia, Florida, Texas, Missouri) which instituted few, if any, restrictive measures.

markets had been ordered to be closed from 11:59 p.m., Tuesday, March 24, 2020 until 11:59 p.m., Thursday, May 14, 2020. As of May 15, 2020, EO 53 and its progeny no longer affect the Plaintiffs.

For one magic minute from Thursday, May 14, 2020 at 11:59 p.m. until midnight, dining and congregation areas in Virginia restaurants, dining establishments, food courts, breweries, microbreweries, distilleries, wineries, tasting rooms, and farmers markets were not ordered to be closed by orders issued by Governor Northam or Commissioner Oliver. For the final minute of Thursday May 14, 2020, these entities could offer indoor and outdoor seating at full capacity. At the stroke of midnight, however, EO 61 and HO 3 took effect and restricted their business operations. Among other things, Directive A(2) of the document ordered that they "may operate delivery, take-out, and outdoor dining and beverage services" only at 50% of the load on the certificate of occupancy, if applicable, and with other restrictions.

27. On March 25, 2020, Governor Northam and Commissioner Oliver issued Public Health Emergency Order 2, which prohibited all inpatient and outpatient procedures and surgeries that require PPEs which, if delayed, are not anticipated to cause harm to the patient by negatively affecting the patients' health outcomes or leading to disability or death. This order excluded outpatient visits delivered in hospital-based clinics, the full suite of family planning services and procedures, or the performance of

surgery that if delayed or canceled would result in the patient's condition worsening. The orders contained within the document were ordered to remain in full force and effect until April 24, 2020. The effective date of HO 2 was extended until 11:59 p.m., April 30, 2020, by [Amended] HO 2.

28. On March 30, 2020, Governor Northam issued EO 55. Directive 2 of EO 55 ordered the prohibition of all public and private in-person gatherings of more than 10 individuals. The 10-person limit included parties, celebrations, religious, or other social events, whether they occur indoors or outdoors. The restriction on gatherings did not apply to the operation of businesses not required to close to the public under EO 53 or to the gathering of family members living in the same residence. EO 55 was amended by Amended EO 55, issued April 15, 2020, by Second Amended EO 55, issued May 4, 2020, by EO 61 and HO 3, issued May 8, 2020, by Amended EO 61 and Amended HO 3, issued May 19, 2020, by Second Amended EO 61 and Second Amended HO 3, issued May 28, 2020, by Third Amended EO 61 and Third Amended HO 3, issued June 2, 2020, by EO 62 and HO 4, issued May 12, 2020, and by Amended EO 62 and Amended HO 4, issued May 14, 2020. EO 55 expired on June 4, 2020 at 11:59 p.m. by Directive C(6) of EO 65 and HO 6, executed by Governor Northam and by Commissioner Oliver on June 2, 2020, and effective June 5, 2020. Directive B(2) of the Order prohibited all public and private in-person gatherings of greater than 50 individuals.

29. On May 8, 2020, Governor Northam and Commissioner Oliver executed EO 61 and HO 3. The Order began easing business, gathering, and traveling restrictions originally imposed by EO 53 and EO 55 issued in March of 2020. The Order began by memorializing the Governor's issuance of executive orders in a purported attempt to reduce the spread of the novel coronavirus (COVID-19) and "to make necessary ventures outside of your home safer." Among other things, Second Amended EO 61 and Second Amended HO 3 expressly authorized restaurants to offer outdoor dining and beverage services, albeit at 50% capacity and with other restrictions, for the first time since the Governor ordered the closure of all dining areas of restaurants in EO 53 beginning 11:59 p.m. on Tuesday, March 24, 2020. The Order indicated that "Virginia's efforts and sacrifices ***seem to have slowed the spread of the virus*** (emphasis added)," which appears to be a tacit admission by Governor Northam and Commissioner Oliver that their infliction of numerous orders upon the public that have caused harm to the Plaintiffs had no empirical effect upon slowing the spread of the virus.

30. On May 19, 2020, Governor Northam and Commissioner Oliver executed Amended EO 61 and Amended HO 3, which was effective Friday, May 15, 2020. The Order authorized additional activities upon the public beaches in the City of Virginia Beach, which had been restricted to fishing and exercising. The Order did not indicate a reason why it was amended.

31. On May 28, 2020, Governor Northam and Commissioner Oliver executed Second Amended EO 61 and Second Amended HO 3, which was effective Friday, May 15, 2020. The Order allowed additional activities on all of the public beaches and racetracks in the Commonwealth of Virginia. The Order did not indicate a reason why it was amended.

32. On May 26, 2020, 78 days after Governor Northam declared a public emergency regarding the novel coronavirus (COVID-19), Governor Northam and Commissioner Oliver executed EO 63 and HO 5, which was effective Friday, May 29, 2020. The express purpose of the Order is to "make sure workers are safe as they interact with customers" by requiring patrons to wear cloth face coverings when they are inside of a building in which a business operates. This document currently affects all Virginians and visitors to the Commonwealth aged 10 and over, who are now ordered to wear a face mask anytime they enter and remain inside of a retail business, regardless of their personal circumstances or the type of business environment. The Order has had an immediate and chilling effect on service businesses, which rely on person-to-person contact.
Directive A(3) of the Order provides, in pertinent part:

> "All patrons in the Commonwealth aged ten and over, when entering, exiting, traveling through, and spending time inside food and beverage establishments, including but not limited to, restaurants, dining establishments, food courts, breweries, microbreweries, distilleries, wineries, tasting rooms, and farmers markets, when permitted to reopen for indoor dining, shall cover their mouth and nose with a face covering, as described and recommended by the CDC."

Directive C specifies the punishment for a violation of the Order to be punishable as a Class 1 misdemeanor:

> "The Virginia Department of Health shall have authority to enforce this Order. Any willful violation or refusal, failure, or neglect to comply with this Order, issued pursuant to § 32.1-13 of the *Code of Virginia*, is punishable as a Class 1 misdemeanor pursuant to § 32.1-27 of the *Code of Virginia*. The State Health Commissioner may also seek injunctive relief in circuit court for violation of this Order, pursuant to § 32.1-27 of the Code of Virginia."

The Order indicates that it is in furtherance of Amended EO 51 and Amended EO 61 and Amended HO 3. No medical data was cited for issuing this order. The Order has no end date. Directive C of the Order indicates that any willful violation or refusal, failure, or neglect to comply with this Order, issued pursuant to §32.1-27 of the Code of Virginia, is punishable as a Class 1 misdemeanor pursuant to §32.1-27 of the Code of Virginia and that the Virginia Department of Health shall have the authority to enforce the Order, although its employees have no misdemeanor arrest authority pursuant to Va. Code §19.2-81. At the time of the filing of this pleading, this document continues to affect the Plaintiffs.

33. On June 2, 2020, Governor Northam and Commissioner Oliver executed Third Amended EO 61 and Third Amended HO 3. The Order became effective Friday June 5, 2020. The Order applied to the Northern Virginia Region and the City of Richmond. The Order indicates:

> "As the majority of the Commonwealth moves into Phase Two pursuant to Executive Order 65 and Order of Public Health Emergency Six (2020), the Northern Virginia Region (Counties of Arlington, Fairfax, Loudoun, and Prince William, a d the Cities of Alexandria, Fairfax, Falls Church, Manassas, Manassas Park, as

> well as the Towns of Dumfries, Herndon, Leesburg, and Vienna) and the City of Richmond will remain in Phase One."

The plain reading of the Order indicates as of Friday June 5, 2020, the Plaintiffs are no longer affected by the issuance of Second Amended EO 61 and Second Amended HO 3, which was executed by Governor Northam and Commissioner Oliver on May 28, 2020, and became effective Friday, May 15, 2020. Directive A(2) of the document had expressly allowed restaurants to offer outdoor dining and beverage services, albeit at 50% capacity and with other restrictions.

34. On June 2, 2020, Governor Northam and Commissioner Oliver executed EO 65 and HO 6. The Order was effective Friday, June 5, 2020. The subheading of the document is: Phase Two Easing of Certain Temporary Restrictions Due to Novel Coronavirus (COVID-19) Excluding the City of Richmond and the Northern Virginia Region (2020). Directive A(2) of the Order expressly allowed indoor (and outdoor) dining at Virginia restaurants, with restrictions, for the first time since the Governor ordered the closure of all dining areas of restaurants at 11:59 p.m. on Tuesday, March 24, 2020 pursuant to Directive 3 of EO 53. Directive A(14) of EO 65 and HO 6 indicated that the Virginia Department of Health had the authority to enforce section A of the Order, that any willful violation or refusal, failure, or neglect to comply with an order issued pursuant to §32.1-27 of the Code of Virginia was punishable as a Class 1 misdemeanor pursuant to §32.1-27 of the Code of Virginia, and that the State Health

Commissioner could also seek injunctive relief in circuit court for violation of section A of the Order pursuant to §32.1-27 of the Code of Virginia.

35. On June 5, 2020, Governor Northam and Commissioner Oliver executed Amended EO 65 and Amended HO 6. The Order included the City of Richmond and the Northern Virginia Region into Phase 2 effective Friday, June 9, 2020. At the time of the filing of this pleading, this Order continues to affect the Plaintiffs, as it includes the restrictions on restaurants and penalty provisions appearing in EO 65 and HO 6.

Phases for "Re-Opening" Virginia

36. In anticipation of "re-opening" Virginia, the Governor has announced in the past few weeks "Forward Virginia Guidelines" which set forth various "phases" for the relaxation of the unilateral strictures. At the present, there are three official phases: Phase Zero (i.e. the initial set of prohibitions under EO 53), Phase One, and Phase Two. There is ostensibly a Phase Three, but its formal structure and prohibitions have not been released or made public.

37. Notably each phase contains a long list of restrictions which fundamentally limit the ability of businesses to function, as well as limiting the right of patrons to make their own decisions over: (i) how to gather with friends and family; (ii) where to eat; (iii) what to wear; and (iv) and how to spend their recreational time. See copies of cited orders attached hereto.

38. Pursuant to EO 65 and HO 6, the majority of the counties, cities, and towns in the Commonwealth entered Phase Two on June 5, 2020. Pursuant to Amended EO 65 and Amended HO 6, which was effective Friday June 12, 2020, all of Virginia is now in Phase Two.

39. Consequently, and as a direct and proximate result of Governor Northam's issuance of executive orders and Commissioner Oliver's issuance of orders of public health emergency, which have restricted the business operations of restaurants, and which require people in the Commonwealth aged 10-years-old and above to wear masks when seated inside of one, the Plaintiffs have been financially harmed, and they have been exposed to the risk of criminal prosecution and defending civil actions initiated by the Virginia Department of Health.

The Plaintiffs have sustained significant financial losses, which are difficult to quantify. March 2020 gross sales of Abbey Road ($55,971.17) were 64% down from March 2019 gross sales ($153,588.70). April 2020 gross sales ($11,880.85) were 93% down from April 2019 gross sales ($159,400.80). May 2020 gross sales ($88,719.40) were 56% down from May 2019 gross sales ($201,590.64). Total gross sales for March - May 2020 were down a total of $358,008.72 from March - May 2019 gross sales. Each day that passes that the Plaintiffs are unable to operate Abbey Road at full capacity, they will continue to incur significant and irreparable financial losses.

LAW[9]

40. Art. I, §I of the Virginia Constitution states:

> That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter a state of society, they cannot, by any compact, deprive or divert their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

41. Art. I, §6 of the Virginia Constitution states:

> That all men …have the right of suffrage and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their consent, or that of their representatives duly elected or bound by any law which they have not, in like manner, assented for the public good.

42. Art. I, §7 of the Virginia Constitution 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.

43. Art. I, §11 of the Virginia Constitution states:

> That no person shall be deprived of his life, liberty or property except by due process of law. That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access and damage to the residue caused by the taking.

44. Art. I, §12 of the Virginia Constitution states:

> That the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people to peaceably to assemble, and to petition the government for the redress of grievances.

[9] The Plaintiffs have listed several of the laws discussed herein for the convenience of the Court.

45. Article IV, §14 of the Virginia Constitution sets forth the powers and limitations of the General Assembly.

46. Article V, §7 of the Virginia Constitution, which provides executive and administrative powers to the Governors of the Commonwealth of Virginia, directs that "[t]he Governor shall take care that the laws be faithfully executed."

47. Va. Code §19.2-81 authorizes warrantless arrests by members of the State Police, Sheriffs of the various counties and cities, and their deputies, members of any county police force or any duly constituted police force of any city or town, and others LEO's who are listed in the statute. The statute does not list employees of the Virginia Department of Health to be authorized to conduct warrantless arrests.

48. The "Commonwealth of Virginia Emergency Services and Disaster Law of 2000" (hereinafter "the Act") is codified at Va. Code §44-146.13, *et seq.* The purposes of the Act are listed in Va. Code §44-146.14, which provides, in pertinent part:

> (a) Because of the ever present possibility of the occurrence of disasters of unprecedented size and destructiveness resulting from enemy attack, sabotage or other hostile action, resource shortage, or from fire, flood, earthquake, or other natural causes, and in order to insure that preparations of the Commonwealth and its political subdivisions will be adequate to deal with such emergencies, and generally to provide for the common defense and 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***, it is hereby found and declared to be necessary and to be the purpose of this chapter:
>
> (1) To create a State Department of Emergency Management, and to authorize the creation of local organizations for

emergency management in the political subdivisions of the Commonwealth;

(2) To confer upon the Governor and upon the executive heads or governing bodies of the political subdivisions of the Commonwealth emergency powers provided herein; and

(3) To provide for rendering of mutual aid among the political subdivisions of the Commonwealth and with other states and to cooperate with the federal government with respect to the carrying out of emergency service functions. (emphasis added)

49. Virginia Code §44-146.16 defines the word "Disaster" as follows:

"Disaster" means (I) any man-made disaster including any condition following an attack by any enemy or foreign nation upon the United States resulting in substantial damage of property or injury to persons in the United States and may be by use of bombs, missiles, shell fire, nuclear, radiological, chemical, or biological means or other weapons or by overt paramilitary actions; terrorism, foreign and domestic; also any industrial, nuclear, or transportation accident, explosion, conflagration, power failure, resources shortage, or other condition such as sabotage, oil spills, and other injurious environmental contaminations that threaten or cause damage to property, human suffering, hardship, or loss of life; and (ii) any natural disaster including any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, drought, fire, ***communicable disease of public health threat***, or other natural catastrophe resulting in damage, hardship, suffering, or possible loss of life (emphasis added).

50. Virginia Code §44-146.16 defines the term "State of Emergency" as follows:

"State of emergency" means the condition declared by the Governor when in his judgment, the threat or actual occurrence of an emergency or a disaster in any part of the Commonwealth is of sufficient severity and magnitude to warrant disaster assistance by the Commonwealth to supplement the efforts and available resources of the several localities, and relief organizations in preventing or alleviating the damage, loss, hardship, or suffering threatened or caused thereby and is so declared by him."

51. Virginia Code §44-146.16 defines the term "Emergency services" as follows:

"Emergency services" means the preparation for and the carrying out of functions, other than functions for which military forces are primarily responsible, to prevent, minimize and repair injury and damage resulting from disasters, together with all other activities necessary or incidental to the preparation for and carrying out of the foregoing functions. These functions include, without limitation, fire-fighting services, police services, medical and health services, rescue, engineering, warning services, communications, radiological, chemical and other special weapons defense, evacuation of persons from stricken areas, emergency welfare services, emergency transportation, emergency resource management, existing or properly assigned functions of plant protection, temporary restoration of public utility services, and other functions related to civilian protection. These functions also include the administration of approved state and federal disaster recovery and assistance programs."

52. Virginia Code §44-146.17(7) provides, in pertinent part:

> "[w]henever in the opinion of the Governor, ***the safety and welfare of the people of the Commonwealth require the exercise of emergency measures*** due to a threatened or actual disaster, ***he may declare a state of emergency*** to exist (emphasis added)."

The Governor's issuance of an executive order to declare a state of emergency, or otherwise, is an exercise of an emergency measure under the Act.

53. Virginia Code §44-146.17 provides, in pertinent part:

> "The Governor shall be Director of Emergency Management. He shall take such action from time to time as is necessary for the adequate promotion and coordination of state and local emergency services activities relating to the safety and welfare of the Commonwealth in time of disasters."

54. Virginia Code §44-146.17(1) further provides, in pertinent part:

> "The Governor shall have, in addition to his powers hereinafter or elsewhere prescribed by law, the following powers and duties: (1) 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 including, but not limited to such measures as are in his judgment required to control, restrict, allocate or regulate the use, sale, production and distribution of food, fuel, clothing and other commodities, materials, goods, services and resources under any state or federal emergency services programs."

55. Virginia Code §44-146.17(1) further provides, in pertinent part:

> "[The Governor] may adopt and implement the Commonwealth of Virginia Emergency Operations Plan, which provides for state-level emergency operations in response to any type of disaster or large-scale emergency affecting Virginia and that provides the needed framework within which more detailed emergency plans and procedures can be developed and maintained by state agencies, local governments and other organizations."

56. Virginia Code §44-146.17(1) further provides, in pertinent part:

> "Executive orders, ***<u>to include those declaring a state of emergency and directing evacuation</u>***, 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 that its violation shall have such force and effect.

The Plaintiffs argue that the words, "to include those declaring a state of emergency and directing evacuation," are words of limitation; therefore, the Act only allows an executive order issued by the Governor that (1) declares a state of emergency and (2) directs an evacuation to declare that a violation of the order is punishable as a Class 1 misdemeanor.

57. Virginia Code §44-146.18(A) provides that during a declared emergency, the Department of Emergency Management shall revert to the operational control of the Governor.

58. Virginia Code §44-146.18(B)(1) provides that the Department of Emergency Management shall in the administration of emergency services and disaster preparedness programs, in coordination with political subdivisions and state agencies, ensure that the Commonwealth has up-to-date assessments and preparedness plans to prevent, respond to, and recover from all disasters including acts of terrorism.

59. Virginia Code §44-146.18(B)(3) provides that the Department of Emergency Management shall promulgate plans and programs that are conducive to adequate disaster mitigation preparedness, response, and recovery programs.

60. Virginia State Code §44-146.26 provides, in pertinent part:

> "It shall be the duty of every organization for emergency management established pursuant to this chapter and of the officers thereof to execute and enforce such orders, rules and regulations as may be made by the Governor under authority of this chapter."

61. Virginia Code §32.1-13 provides, in pertinent part, that the State Board of Health:

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

62. Virginia Code §32.1-20 authorizes the State Health Commissioner to act for the State Board of Health when it is not in session. The statute provides:

> "The Commissioner shall be vested with all the authority of the Board when it is not in session, subject to such rules and regulations as may be prescribed by the Board."

63. Virginia Code §35.1-10[10] provides, in pertinent part:

> "Nothing in this title applicable to restaurants shall prevent the Commissioner from taking whatever action he deems necessary to control the spread of ***preventable*** diseases as set forth in Title 32.1, including but not limited to the exclusion of employees, the medical examination of any employee, the

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[10]This Section of the Code is cited in Amended EO 65 and Amended HO 6 and in EO 63 and HO 5 as authority for the Commissioner to issue the emergency health orders, although the statute it is inapplicable because COVID-19 in not a preventable disease.

> immediate closing of a hotel, restaurant, summer camp, or campground, and the taking of samples for testing (emphasis added)."

The term "preventable disease" is not defined in Title 32.1. However, the term appears in §32.1-39. The term "vaccine-preventable disease" appears in three statutes in Title 32.1: Va. Code §§32.1-46.01(B)(12), 32.1-47, and 32.1-47.1. Because there is no vaccine for COVID-19, it is not a preventable disease pursuant to Title 32.1.

64. Virginia Regulation 12VAC5-421-3770 provides, in pertinent part, that a director of health is authorized to summarily suspend a permit to operate a restaurant if the director finds that the continued operation of it constitutes a substantial and imminent threat to the public health.

65. Virginia Code §2.2-4000, *et seq.* is known as the Administrative Process Act.

ARGUMENT

A. **STANDARD FOR GRANTING TEMPORARY INJUNCTION**

66. In granting a temporary injunction, the Court must look to the following criteria: (1) the likelihood of success on the merits; (2) whether the Plaintiffs are likely to suffer irreparable harm if the injunction is not granted; (3) whether the balance of equities tips in the Plaintiffs' favor; and (4) a showing that the injunction would not be adverse to the public interest. *See The Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009) (applying the test set forth in *Winter v. NRDC, Inc.*, 555

U.S. 7 (2008)). *See also McEachin v. Bolling*, 84 Va. Cir. 76, 77 (Richmond Cir. Ct. 2011).

67. Virginia courts have widely adopted the Real Truth analysis in the absence of any specific elemental test from the Supreme Court of Virginia or applicable statutes. *See, e.g., BWX Techs., Inc. v. Glenn*, 2013 Va. Cir. LEXIS 213 (Lynchburg Cir. Ct. 2013); McEachin at 77. *See also CPM Va., L.L.C. v. MJM Golf, L.L.C.*, 94 Va. Cir. 404, 405 (Chesapeake Cir. Ct. 2016)(listing several Virginia Circuit Courts which have used the federal four-part test).

68. The basis for a declaratory judgment and the reasons for the issuance of a temporary injunction showing the likelihood of success on the merits is addressed in sections B-H, *infra*.

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

70. However, a cursory review of the Constitution and those statutes lends no support to the broad powers asserted in the executive orders. First, the orders impermissibly infringe on constitutional rights without any due process. Second, they violate the fundamental requirement that public laws be passed by elected representatives, not

applied unilaterally by the Executive branch. Further, assuming that Virginia is in a sustained (and indefinite) state of public emergency, the EOs are in excess of the authority granted to the Governor by statute. Finally, the orders are not compliant with the procedures required by law.

B. Orders are Facially Unconstitutional

71. “Deeply embedded in the Virginia legal tradition is ‘a cautious and incremental approach to any expansions of the executive power.’” *Howell v. McAuliffe*, 292 Va. 320, 327, 788 S.E.2d 706, 710 (2016) (quoting *Gallagher v. Commonwealth*, 284 Va. 444, 451, 732 S.E.2d 22, 25 (2012)).

72. In furtherance of that, our Constitution has consistently maintained, in one form or another since 1776, “[t]hat all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.” VA. CONST. Art. I, § 7 (emphasis added). *See generally Howell*, 292 Va. at 344-48, 788 S.E.2d at 720-22.

73. Likewise, the Constitution provides that citizens “cannot be taxed, or deprived of, or damaged in, their property for public uses, without their consent, or that of their representatives duly elected or bound by any law which they have not, in like manner, assented.” VA CONST. Art. I, §6.

74. In other words, the Commonwealth of Virginia is a “democracy,” in which laws are enacted by its elected assembly.

75. Under this guiding principle, this Court has consistently reviewed executive orders to ensure that they do not exceed the authority granted to the executive by the constitution or by the legislature. *See Boyd v. Commonwealth*, 216 Va. 16, 215 S.E.2d 915 (1975).

76. Notably, the previous, constitutional executive orders have had limited scope, e.g. in restoring the right to vote for ex-felons. No executive order in Virginia history has authorized the complete shut-down of the Virginia economy, the closing of Virginia's public schools, a ban on lawful assemblies. Cf. VA. CONST. Art. I, § 11 ("That no person shall be deprived of his life, liberty or property except by due process of law").[11]

77. The latter prohibition renders Amended EO 65 and Amended HO 6 facially unconstitutional.

Right to Assembly

78. In Virginia, as throughout the United States, the right to assembly is constitutionally guaranteed and "fundamental". VA. CONST. Art. I, § 12; *York v. Danville*, 207 Va. 665, 669, 152 S.E.2d 259, 263 (1967). This Court has held that Virginia's guarantee of this right is co-extensive with the First Amendment to the Constitution of the Untied States. *Elliott v. Commonwealth*, 267 Va. 464, 473-74, 593 S.E.2d 263, 269 (2004).

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[11] "That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use … No more private property may be taken than necessary to achieve the stated public use." See id.

79. Any limitations on this right must be narrowly tailored. *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746 (1989).[12]

80. First, the limitations in the EO's are of an indefinite nature which is by its very nature not narrowly tailored. "A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227, 110 S. Ct. 596, 605 (1990).

81. Additionally, the restrictions are not narrowly tailored insofar as there is no logical (much less medical) basis provided for the different treatments of assemblies. After all, Directive C(1)(e) of Amended EO 65 and Amended HO 6 allows Home Depot to have 100% of its occupancy capacity indoors at any given time (composed of shoppers who are strangers), yet Directive A(11) of the Order allows a maximum of 50 people to attend an outdoor concert at the Filene Center located at Wolf Trap Farm Park, which has a seating capacity of 7,000.[13]

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[12]The Plaintiffs concede the obvious fact that the EO's limitations of "in-person" assemblies to ten persons is facially "content neutral," per First Amendment jurisprudence. *See e.g., Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 104 S. Ct. 3065 (1984). However, recent events have shown that the Commonwealth will permit assemblies of thousands of people on public streets – while not permitting *de minimis* gatherings on private property.

The Plaintiffs likewise concede that the Commonwealth has a significant state interest in the health of its citizens. *Id.*

[13]The Filene Center, named in honor of Mrs. Shouse's parents, Mr. and Mrs. Lincoln Filene (of the now-defunct department store chain), is the major indoor/outdoor performance venue at Wolf Trap Farm Park. It has seating for 7,000 both under cover and on the lawn in a more casual style. It has approximately 3,800 in-house seats and 3,200 lawn seats. *See* Wikipedia, https://en.wikipedia.org/wiki/Wolf_Trap_National_Park_for_the_Performing_Arts

82. In sum, the Executive Orders on their face are an impermissible restriction on the constitutional right of assembly. They deprive the Plaintiffs of their liberty and property, i.e. their business operations and proceeds, without anything resembling due process. Cf. Art. I, §11.

C. <u>Orders Exceed Authority Granted to Executive</u>

83. Even were they not facially unconstitutional, the EOs greatly exceed the powers given to the executive in multiple ways. At a high level, they violate the Virginia constitutional guarantees against "suspending laws" and taking property "without due process" or a vote by "their representatives duly elected." See VA. CONST. Art. I, §§6, 7 and 11.

84. This defect is fundamental and ongoing and there is (and has been) no attempt to remedy it by calling a special session of the legislature.

85. They also exceed the authority granted to the official insofar as the Governor is acting on powers the General Assembly does not have (and therefore could not delegate). Further, the General Assembly's statutory grant of emergency powers does not envision the current length of this process. Finally, the statutes upon which the Governor relies expressly detail his powers to deal with communicable diseases, and the EOs have gone well beyond those powers.

i. The Governor Has No Authority to Create Local Criminal Laws

86. At the outset, the emergency powers given to the Governor by the legislature are naturally limited by the powers the legislature itself possesses, i.e., the legislature cannot grant what it does not have.

87. The Constitution has specific limitations on the General Assembly's ability to enact "local, special, or private law," most relevantly forbidding local laws "[f]or the punishment of crime." VA. CONST. Art. 4, §14(1). As detailed supra, the EOs and HOs expressly had made certain acts criminal in the Northern Virginia region - i.e. the in-public gathering of more than 10 persons - which are legal in the rest of the state (under Phase 2). As of Friday June 12, 2020, the Northern Virginia region has joined the rest of the state in Phase 2 pursuant to Amended EO 65 and Amended HO 6.

88. The Governor asserts that he is acting pursuant to his powers as provided by the General Assembly. Therefore, the separation of the Northern Virginia Region is unconstitutional because it is an exercise of a power that the General Assembly could not delegate because it is specifically excluded pursuant to VA. CONST. Art. 4, §14(1).

89. Even were the Governor to vacate the criminal enforcement of the "special legislation" EOs, they would still be unconstitutional. Such "special acts" require a two-thirds vote by the General Assembly, and there is nothing in the statutes to suggest that the Governor may enact such

‘laws’ by fiat - even if on the “request of local officials.” Amended EO 62 and Amended HO 4. *See* Art. 7, §1.

ii. Statutory Definition of “Emergency” Prohibits EOs

90. Even were they constitutional temporarily as an emergency measure, the EOs have been in operation for an unlawful amount of time, without any attempt at legislative ratification, and thus must be enjoined.

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

92. In plain English, a “public emergency” is a period of time during which the Chief Executive must act because there is insufficient time to “amend the law” through legislative means. *See id. See also Wisconsin Legislature v. Palm*, 2020 Wisc. LEXIS 121 (“Constitutional law has generally permitted the Governor to respond to emergencies without the need for legislative approval … But the Governor’s emergency powers are

premised on the inability to gain legislative approval given the nature of the emergency”).

93. In regard to COVID-19, the state of emergency was declared on March 12, 2020 - i.e. almost exactly three (3) months ago. Ironically, March 12th was the same day that the Virginia State Legislature adjourned its regular session, so (nearly) all members of the legislature were physically present in Richmond at that time.

94. The Governor could have issued a contemporaneous request for the legislature to remain in session to address this emergency. *See* VA. CONST. Art. 4, §6 (“The Governor may convene a special session of the General Assembly when, in his opinion, the interest of the Commonwealth may require . . .”).

95. By the Plaintiffs’ count, the Governor, either acting alone or jointly with the Commissioner, has issued no fewer than thirty (30) separate orders (and amendments) to address this exigency since the Governor declared an “Emergency.”

96. There has been no statement of the Governor regarding the inability to “amend the law to meet the exigency” that is COVID-19. The Governor has made no requests for the legislature to convene for an emergency session - as he did following the shooting in Virginia Beach in 2019, when the legislature was called into special session just weeks

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

97. Here, neither the Governor nor the Commissioner can point to articulable principles, in the Constitution or in the Code, that provide the justification, much less the framework, for the Executive Branch to issue sweeping prohibitions, to impose criminal sanctions on citizens and on businesses, and to shut them down indefinitely without any attempt to gain legislative approval.

iii. EOs Exceed Authority Related to 'Communicable Diseases'

98. Chapter 44 and Chapter 32.1 have specific and detailed statements from the legislature concerning "evacuations," "quarantines," "isolations," and the provision of goods and services. Despite referencing these statutes in the EOs, neither the Governor nor the Commissioner have actually followed the requirements laid out in their provisions.

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

100. To date, no such orders of quarantine or isolation under Title 32.1 have been issued, nor could such broad orders - covering the entire populace of Virginia - ever be issued.

101. Unlike the indefinite EO"s at issue, an "order of quarantine" requires the Commissioner to "specify the duration of the quarantine." Va. Code §32.1-48.09(A)(v).

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

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

104. Isolation orders have even more stringent prerequisites. First, they relate only to specific individuals; consequently, they provide no authority for the executive orders at issue. Va. Code §32.1-48.02(A).

Additionally, they afford due process rights to the affected individual which have not been provided here, such as the right to petition for a hearing. Va. Code §32.1- 48.03. None of those rights have been provided here.

105. In short, the Governor appears, both implicitly and through briefs on related cases, to rely on general emergency authority outside of this specific provision related to quarantine and isolation. *See* Va. Code §44-146.17(1) ("The Governor shall have . . . the following powers and duties . . . [t]o proclaim and publish such rules and regulations and to issue such orders as may, in his judgment, be necessary to accomplish the purposes of this chapter including, but not limited to . . . ."); Response to Verified Petition For Writ of Mandamus at 27, *Marrs v. Northam, et al.*, Record No. 200573 ("the Governor is authorized to issue orders that go beyond" those which are specifically delineated).

106. The idea that the Governor can go beyond the specific provisions of Title 32.1 would, of course, render those stringent provisions meaningless. Why even have a detailed set of standards for "quarantine" if the Executive Branch can ignore it?

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

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

109. When there are no orders of quarantine or isolation, the Governor cannot create his own regulatory structure, untethered to the Code or to the VAPA, to restrict the rights of citizens, especially without any evidence they have been infected or even exposed to COVID-19. Any reliance upon a general grant of powers to address emergencies is improper where the legislature has specifically granted powers, with limitations, to the Governor relating to such diseases.

D. <u>Orders Are Inconsistent With Procedural Requirements</u>

110. In addition to the emergency powers provided to the Governor by the Code, the HOs also rely on the powers provided in Title 32.1 of the Virginia Code. However, these powers are subject to limitations and oversight, which have been wholly ignored.

111. Specifically, "all orders and regulations under the provisions of" Title 32.1 shall be governed by "[t]he provisions of the Administrative Process Act (§2.2-4000 et seq.)." Va. Code §32.1-24.

112. Under Va. Code §32.1-13, i.e. the "public emergency" statute, there are parallel concerns on the historically unprecedented use of the

provision as authority to create expansive new law. Va. Code §32.1-13 is the authority that belongs, in the first instance, to the Virginia Board of Health.

113. The Board of Health did not meet in February, March, April or May 2020, the very months when COVID-19 was most relevant. The Board finally met on June 4, 2020.

114. At the June meeting, the process and substance behind the Commissioner’s health orders was not on the agenda, and it was not discussed in any meaningful ways. In other words, neither the Commissioner nor the Board have had a hearing or public comment period on the substance or process behind the orders.

115. Va. Code §32.1-13 authorizes the Board of Health to make separate orders and regulations to meet any emergency not provided for by general regulations to suppress contagious and infectious diseases. Nothing in that statute exempts these “special orders and regulations” from the VAPA. Indeed, it has been over four months since the initial declaration of COVID-19 as a “public health threat.” There is absolutely no reason why the Board has failed to make any of the requisite findings.

116. The VAPA is intended to be a default or catch-all source of administrative due process, applicable whenever the basic law fails to provide process. In summary, the VAPA governs an agency's actions, except where that agency's basic law provides its own due process or

where the VAPA expressly exempts a particular agency or its actions. *School Bd. v. Nicely*, 12 Va. App. 1051, 1060, 408 S.E.2d 545, 550 (1991) (citation omitted). *See* Va. Code §§ 2.2-4002. Accordingly, the VAPA applies to both Va. Code §44-167.17 and §32.1-13.

117. In the present matter, Title 32.1 expressly authorizes special orders in emergency situations, thus confirming that these are administrative regulations. *See* Va. Code §§32.1-13 and -26. Likewise, there is no exemption provided by the VAPA for the various emergency orders. *See* Va. Code §§2.2-4000, *et seq.* Therefore, the VAPA controls.

118. The VAPA defines a covered agency. "Agency" means any authority, instrumentality, officer, board or other unit of the state government empowered by the basic laws to make regulations or decide cases. Va. Code §2.2-4101. Without the status of operating as an administrative agency, neither Governor Northam nor Commissioner Oliver would have any authority to create law, even to fill in the legislative gaps.

119. The VAPA provides that a "Rule" or "regulation" means any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws. Va. Code §2.2-4101. This definition covers the mandates in the orders.

120. The Governor and Commissioner have violated all pertinent provisions of the VAPA in enacting their respective orders.

121. The Governor and Commissioner have not invoked or followed the conditions of §2.2-4011, which specifically speaks to "emergency regulations," i.e. "those necessitated by an emergency situation." Notably, even if the Governor and Commissioner had followed these provisions, they still would have to follow the VAPA.

122. In addition, the Governor and the Commissioner have violated §2.2-4007.01(A) by failing to provide the Registrar of Regulations with a Notice of Intended Regulatory Action.

123. The Governor and Commissioner have violated §2.2-4007.02 regarding public participation guidelines.

124. The Governor and Commissioner have violated §2.2-4007.03 regarding informational proceedings, i.e. by failing to give notice of the proposed orders prior to their issuance. The statute states that the failure to comply with its requirements cannot be deemed to be mere harmless error.

125. The Governor and Commissioner have violated §2.2-4007.04 by failing to provide an economic impact analysis for each EO. Again, with so much time that has passed since the issuance of EO 51, there is no excuse that EO 51 and every subsequently issued EO issued under the Act regarding COVID-19 do not have an economic impact analysis in order to understand the regulations and to provide a basis for judicial review.

126. The Governor and the Commissioner have violated §2.2-4007.04:01, which requires certain departments to give notice to certain individuals of the new regulatory change.

127. The Governor and Commissioner have violated §2.2-4007.05 by failing to submit the proposed regulation, the summary, and the concise statement required by the statute to the Registrar.

128. The Governor and the Commissioner have violated §2.2-4007.1 by failing to prepare a regulatory flexibility analysis for small businesses.

129. The Governor and the Commissioner have violated §2.2-4112 by failing to file the regulation with the Registrar of Regulations.

130. Notably, the VAPA's requirements are designed to benefit both rational decision making and judicial review. All that has been provided is what is stated in declarative form in the orders. There is no evidence unless generally cited, no analysis of impacts, no "less restrictive" alternatives considered, no record upon which the Governor and the Commissioner have relied. There is no evidence the Commissioner has sought input from the Board of Health, the agency that has been delegated the powers of §32.1-13 by the Virginia legislature.

131. In the instant case, the Governor and the Commissioner have inflicted a dramatically burdensome and extensive regulatory scheme upon

the Commonwealth's citizens and businesses, with only reference to emergency provisions, but with no stated legislative principals that guide it. The legislature could not have permissibly delegated such a broad and open-ended source of authority to the Governor, and it did not do so.

132. The Governor and the Commissioner have ignored the relevant Code chapters. Apparently, the two have determined that the protections to citizens and businesses that are contained therein are not useful or desirable. *See* Va. Code §2.2-4012(D).

133. The massive shutdown of businesses and incursions on civil liberties cannot be justified by the specific provisions of the law cited by the Governor and by the Commissioner as authority to issue the EOs and HOs.

134. Nothing in the substantial regulatory scheme spanning months without end can be deemed to be "necessary to accomplish the purposes of this chapter" without specific references to intelligible statements, limitations, and principles. The Governor and the Commissioner have provided insufficient basis beyond the construct that COVID-19 is a public health threat. The Governor and the Commissioner have assumed unlimited regulatory authority and ability to create law, in direct contrast to the detailed provisions of the relevant chapters.

135. The decisions made by the Governor and by the Commissioner are inherently arbitrary and capricious because they make unsupported

and often meaningless distinctions between commercial activities, while voiding en masse the ability of persons such as Plaintiff Dillon to earn a living.

E. The Legislature has no authority under the Virginia Constitution to Delegate its Duty to Legislate to the Governor.

136. By including a penalty provision, the various EOs issued by the Governor and by the Commissioner have the force and effect of criminal laws.

137. However, the Plaintiffs can find no authority pursuant to Article IV of the Virginia Constitution that allows the legislature to delegate its duty to promulgate laws to the Governor.

138. In addition, the Plaintiffs can find no specific delegation of authority by the legislature to the Governor to create law.

139. The Supreme Court of Virginia has stated that the legislative branch is bound by its duty to determine and to declare the laws of the Commonwealth:

> "It is the prerogative and function of the legislative branch of the government, whether state or municipal, to determine and declare what the law shall be, and the legislative branch of the government may not divest itself of this function or delegate it to executive or administrative officers." *Reynolds v. Milk Comm'n of Va.*, 177 S.E. 44 (1934).

In the *Reynolds* case, the Supreme Court of Virginia has stated that the legislative branch may not delegate its duty to determine and to declare the law to the executive branch or to administrative officers.

F. **Amended EO 65 and Amended HO 6 and EO 63 and HO 5 are Void because They Ignore the Public Welfare.**

140. As noted previously, Amended EO 65 and Amended HO 6 and EO 63 and HO 5 are two distinct documents. The executive orders contained within each of the two documents are indistinguishable from the orders of public health contained therein.

141. The Governor abused his discretion when he issued Amended EO 65 and Amended HO 6 and EO 63 and HO 5. Because the orders are in derogation of Virginia's Disaster Law of 2000 ("the Act"), they are void.

142. The Orders fail to preserve the welfare of the people pursuant to Va. Code §44-146.17(1). The term "welfare" is not defined by the Act. The Supreme Court of Virginia has indicated that the terms "public welfare," "public good," and "public interest" are synonymous. They are concerned not only with the safety, health, and morals of the people, but also, with the protection of property. *Bowman v. State Entomologist*, 128 Va. 351, ____, 105 S.E. 141, ____ (1920).

143. The Act was created, in part, to preserve the lives and property and economic well-being of the people of the Commonwealth. Va. Code §44-146.14(a)

144. The Act authorizes the Governor to issue orders necessary to accomplish the purposes of the Act pursuant to Va. Code §44-146.17(1).

145. When issuing orders in response to COVID-19 that have harmed the Plaintiffs, the Governor focused his attention only upon

preserving lives and promoting public safety. He ignored his duty to protect property and to preserve the public welfare. During the Governor's declared state of emergency, the Governor has ordered the closure of businesses of his choosing, and he has severely restricted others. The orders he issued have crippled Virginia's economy.

146. The Governor has ignored his duty to issue orders under the Act which, in addition to preserving lives and promoting public safety, preserve the property and economic well-being of the people of the Commonwealth. The Governor has provided no evidence that the orders he issued, which have devastated Virginia's economy, reduced the spread of the virus.

G. The Penalty Provisions in Amended EO 65 and Amended HO 6 and EO 63 and HO 5 are Void.

147. As previously indicated, Amended EO 65 and Amended HO 6 and EO 63 and HO 5 are two distinct documents. Each of the two documents contains an executive order and an order of public health which are indistinguishable.

148. Both documents contain an identical Directive:

> "Therefore, ***by virtue of the authority vested in me*** by Article V of the Constitution of Virginia, by § 44-146.17 of the Code of Virginia, by any other applicable law, and in furtherance of Amended Executive Order 51 (2020), and by virtue of the authority vested in the State Health Commissioner pursuant to §§ 32.1-13, 32.1-20, and 35.1-10 of the Code of Virginia, the following is ordered:"

The words “by virtue of the authority vested in me by Article V of the Constitution ...” indicate that only the Governor is speaking through each of the two Orders, as the Commissioner remains silent.

149. The language appearing above the signature lines in each document is similar:

> “Given under my hand and under the Seal of the Commonwealth of Virginia and the Seal of the Office of the State Health Commissioner of the Commonwealth of Virginia, this ...”.

150. The two documents declare that a violation of an order contained therein issued pursuant to Va. Code §32.1-13 is a Class 1 misdemeanor. *See* Directive A14 in Amended EO 65 and Amended HO 6 and Directive C in EO 63 and HO 5.

151. Because Amended EO 65 and Amended HO 6 and EO 63 and HO 5 were executed jointly by Governor Northam and by Commissioner Oliver, the two documents are void. The two documents were executed by the Commissioner in derogation of Va. Code §32.1-13 and Va. Code §32.1-20, which when read together, allow the Commissioner, acting for the Department of Health when it is not in session, to make ***separate orders*** and regulations to meet any emergency not provided for by general regulations for the purpose of suppressing conditions dangerous to the public health and communicable, contagious, and infectious diseases.

152. Virginia Code §32.1-13 and Va. Code §32.1-20 do not allow the Commissioner to issue emergency orders jointly with the Governor. Because (1) the Governor does not have the authority to issue an order of

public health emergency pursuant to §32.1-13, and to declare a violation of such order to be a Class 1 misdemeanor pursuant to Va. Code §32.1-27, and because (2) the Commissioner impermissibly executed orders of public health emergency jointly with the Governor, the penalty provisions appearing in Amended EO 65 and Amended HO 6 pertaining to restaurants and the penalty provisions appearing in EO 63 and HO 5, pertaining to the mandatory wearing of face coverings while inside buildings, are void.

H. Directive A2 as set forth in Amended EO 65 and Amended HO 6 is Arbitrary and Capricious and Void for Vagueness

153. Directive A2 in Amended EO 65 and Amended HO 6 provides, in pertinent part, that restaurants must operate with the following restrictions or close:

a. Occupancy may not exceed the 50% of the lowest occupancy load on the certificate of occupancy, if applicable.

b. All parties, whether seated together or across multiple tables, must be limited to 50 patrons or less.

c. Tables at which dining parties are seated must be positioned six feet apart from other tables. If tables are not movable, parties must be seated at least six feet apart.

d. No self-service of food (except beverages), including condiments. Condiments should be removed from tables and dispensed by employees upon the request of a customer. Buffets must be staffed by servers. For self-service beverage areas, use beverage equipment designed to dispense by a contamination-free method.

e. Bar seats and congregating areas of restaurants must be closed to patrons except for through-traffic. Non-bar seating in

a bar area may be used for customer seating as long as a minimum of six feet is provided between parties at tables.

f. Employees working in customer-facing areas must wear face coverings over their nose and mouth at all times.

g. A thorough cleaning and disinfection of frequently-contacted surfaces must be conducted every 60 minutes during operation. Tabletops, chairs, and credit card/bill folders must be cleaned in between patrons.

h. If any such business cannot adhere to these requirements, it must close.

154. Directive A2 of Amended EO 65 and Amended HO 6 contains orders that are arbitrary and capricious and void for vagueness.

155. Directive A2(a) of Amended EO65 and Amended HO 6 limits the occupancy of restaurants. It appears that the purpose of Directive A(2)(a) is to restrict restaurant occupancy to half capacity. The Directive is arbitrary and capricious because it provides no scientific or medical basis for the restriction. According to Directive A2(a), "Occupancy may not exceed the (sic) 50% of the lowest occupancy load on the certificate of occupancy, if applicable." The Plaintiffs acknowledge that the City of Virginia Beach Fire Department has issued an Occupancy Load Permit for Abbey Road, a copy of which is attached hereto as Exhibit B. The document indicates that the occupancy load for Abbey Road, including guest, staff, and entertainment, "***shall not exceed 220*** (emphasis added)." The document provides a maximum occupancy load, but it does not provide a minimum one. "The lowest occupancy load" referenced in

Directive A2(a) which results in the restriction on occupancy does not exist. Therefore, the Plaintiffs argue that Abbey Road should be authorized to operate at full capacity.

156. Directive A2(b) provides,"All parties, whether seated together or across multiple tables, must be limited to 50 patrons or less (sic)." The Plaintiffs are unable to discern the meaning of the words "across multiple tables" as used in the Directive. The Plaintiffs presume that the words are meant to convey the idea that restaurants are prohibited from serving parties greater than 50 at one or more tables. Nevertheless, the Directive allows restaurants to serve more than 50 strangers and/or one or more groups numbering less than 50 at the same table or at multiple tables, even if the total number of customers at one table exceeds 50. It appears that the Directive allows restaurants to divide a party numbering greater than 50 into two or more groups numbering 50 or fewer and to seat them together at one or more tables. Because the Order does not provide a medical or scientific reason for limiting the size of dining parties to 50, it is arbitrary and capricious.

157. Directive A2(c) is arbitrary and capricious and void for vagueness. The order states, "Tables at which dining parties are seated must be positioned six feet apart from other tables. If tables are not movable, parties must be seated at least six feet apart." The Directive is vague, and it is arbitrary and capricious. It is very confusing. Must a table

at which one or more customers are seated be located exactly six feet away from the nearest table to it, or at least six feet away from the nearest table to it? Must a table at which a customer is seated be located exactly six feet away, or at least six feet away, from all of the other tables in the restaurant? Does it matter if the nearest table to a table occupied by one or more customers is unoccupied? If so, why? The Order provides no medical or scientific basis for requiring the spacing of restaurant tables.

The Plaintiffs have additional questions about the Directive's requirement that parties be seated at least six feet apart. When must parties be seated at least six feet apart, and why? Abbey Road has numerous movable and unmovable tables. The majority of the tables are approximately 26" in width, which means that diners who are seated across from each other at the same table are seated approximately two feet apart from each other.

Must parties be seated at least six feet apart if one of the parties is seated at a table that is nonmovable, if both parties are seated at tables that are nonmovable, or if any table located inside or outside of the restaurant is nonmovable, regardless of whether the table is occupied by a party? The Order provides no medical or scientific basis for the six foot separation of parties in a restaurant.

The Plaintiffs note that diners who sit back-to-back at tables that are located six feet apart are located less than six feet away from each other.

If the diners are seated at tables that are movable, it appears the Directive allows the distance between diners in different parties to be less than six feet. If one or more of the tables at which the diners are seated are nonmovable, however, it appears that the Directive may require that the distance between the two diners be increased to at least six feet. The Order provides no medical or scientific reason for increasing the distance between diners at different tables to at least six feet if at least one of the diners is seated at a nonmovable table. The requirement that restaurants space tables and/or parties at least six feet apart, without providing a medical or scientific reason for the spacing, is arbitrary and capricious.

158. Directive A2(e) is arbitrary and capricious and void for vagueness. The order states, "Bar seats and congregating areas of restaurants must be closed to patrons except for through-traffic. Non-bar seating in a bar area may be used for customer seating as long as a minimum of six feet is provided between parties at tables." Directive A2(e) is completely baffling. The Plaintiffs cannot interpret the meaning of the first or the second sentence of the Directive. The two sentences appear to be contradictory. To begin with, the Plaintiffs know not "how to close a bar seat to patrons except for through traffic," which is required by the first sentence of the Directive. Likewise, the Plaintiffs know not "how to close off congregating areas to patrons except for through traffic," as is also required by the first sentence of the Directive. Because the terms "bar

seats" and "non-bar seating" and "customer seating" and "bar area" and "congregating areas" and "through traffic" have not been defined by the order, the Plaintiffs cannot interpret it.

The order fails to state in a clear manner what it prohibits. Does it prohibit customers from sitting upon bar stools, or other pieces of furniture, at a restaurant bar. It appears to allow customers to sit at tables located in or near a restaurant bar, as long as members of different parties are seated no closer than six feet from each other. If the order prohibits seating at the bar, it is arbitrary and capricious because it fails to provide any medical or scientific basis for the restriction.

159. Directive A2(g) is arbitrary and capricious and void for vagueness. The order states, "A thorough cleaning and disinfection of frequently-contacted surfaces must be conducted every 60 minutes during operation. Tabletops, chairs, and credit card/bill folders must be cleaned in between patrons." Because the order does not define the term "frequently-contacted surfaces," it is vague. If a dining table and seat occupied by a customer constitutes a "frequently-contacted surface" pursuant to the Directive, the customer must rise from his/her seat every hour to allow a restaurant worker to clean and to disinfect the table and seat. Customers accustomed to lingering over coffee and dessert may be subject to one or more intrusions for cleaning. For tabletops, chairs, and credit card/bill folders to be cleaned "in between patrons," as specified by the Directive, at

least two customers would have to position themselves in such manner to allow the restaurant worker to clean in between them. The Order does not specify why "frequently-contacted surfaces" must be cleaned and disinfected every hour. Because the order provides no medical or scientific basis for the required frequent cleaning, it is arbitrary and capricious.

I. THE OTHER TEMPORARY INJUNCTION FACTORS WEIGH IN FAVOR OF GRANTING AN INJUNCTION.

160. The Plaintiffs have addressed the likelihood of success on the merits in sections B-H *supra*. In this section, they address the remaining three elements for issuance of a temporary injunction.

A. The Plaintiffs Are Likely to Suffer Irreparable Harm If the Injunction Is Not Granted.

161. Several types of irreparable harm will be suffered in the absence of injunctive relief. It is exceedingly difficult to calculate the monetary harm suffered by the Plaintiffs and their employees to date and the future harm the Plaintiffs and their employees will suffer.

162. Even if a claim for lost revenue to the restaurant and lost income to the employees were made, the state could and certainly would assert sovereign immunity, resulting in there being no adequate remedy at law.

163. Amended EO 65 and Amended HO 6 and EO 63 and HO 5 have no end dates. All restaurants, Virginia residents, and visitors to the Commonwealth are being irreparably harmed by these orders. Should the

ordered limitations on restaurants continue, a large number of restaurants may be so financially crippled that they may be forced to close permanently before the time the Governor and the Commissioner may allow them to operate at full capacity.

B. The Balance of Equities Favor the Plaintiffs.

164. The balance of equities in this case could be analyzed by weighing an impossible-to estimate risk of transmission of flu-like "Coronavirus Disease 2019," abbreviated as "COVID-19," with as-of-yet unclear transmission rates and serious health consequences, against the definite, concrete, and irreparable harm that will be suffered by the Plaintiffs, as discussed *supra*. The risk of COVID-19 to Virginians cannot be fully known, but during recent months, various public health officials have routinely overestimated the infectiousness, morbidity, and mortality from COVID-19, as shown by recent reassessments. *See* A. Heymann, *"Virginia's peak coronavirus prediction moved from May to April,"* WRIC (Apr. 6, 2020) ("The Institute for Health Metric and Evaluation has moved the Virginia"s [sic] peak outbreak of COVID-19 from late May to late April."). *See*, e.g., N. Arama, *"Good News: IHME Revise Their Numbers Down as to Deaths, Hospitalizations, Bed, and Ventilator Need,"* RedState (Apr. 6, 2020). *See* also S. Doughton *"New UW analysis lowers coronavirus death projections and suggests hospitalizations may have already peaked in Washington,"* The Seattle Times (Apr. 6, 2020) ("After a

'massive infusion of new data,' modelers at the University of Washington are painting a much more optimistic picture of the novel coronavirus epidemic in the state, revising sharply downward their estimate of how many people are likely to die and suggesting Washington may have already passed the peak of hospitalizations.").

165. Whatever the risk of transmission may be, it is worth noting that such risk would be borne primarily by persons who choose to accept that risk - i.e. customers and employees of Abbey Road. Indeed, every time a person goes to a food store to make a purchase, or goes to work at that person's place of business which is allowed to be open, one assumes some risk of being exposed to COVID-19, but that is no reason to close food stores or all businesses - and the Governor and the Commissioner Oliver, in their orders, agree. Amended EO 65 and Amended HO 6 allow the majority of Virginia businesses to remain open. Indeed, only a short list of businesses remain closed pursuant to Directive B of the Order, including:

a. Indoor theaters, Indoor performing arts centers, indoor concert venues, and other indoor entertainment centers;

b. Historic horse racing facilities; and

c. Bowling alleys, skating rinks, arcades, amusement parks, trampoline parks, fairs, carnivals, arts and craft facilities, escape rooms, and other places of indoor public amusement.

C. The Injunction Would Be in the Public Interest.

166. Clearly, the public interest favors the protection of constitutional liberties from being abridged. It is always in the public interest for the Governor to follow the law.

167. The Supreme Court of Virginia has recognized that established industries that provide wholesome foods to supply the public demand, such as restaurants, are in the public interest:

> "It is for the public interest that the public demand for all wholesome foods may be supplied in reasonable quantities; and hence it is for the public interest that established industries, materially contributing to such supply, be not extinguished or seriously impaired in their efficiency by the spread of disease of any kind." *Bowman v. Va. State Entomologist*, 128 Va. 351, ____, 105 S.E. 141, 145 (1920).

The Supreme Court of Virginia has stated that **suppliers of wholesome foods**, such as restaurants, **should not be extinguished or impaired in their efficiency by the spread of disease of any kind**.

The issuance of the orders that have harmed the Plaintiffs was in blatant disregard of the public welfare because the orders drastically reduced the supply of wholesome foods available to the public during the pandemic. The issuance of these orders has seriously impaired the efficiency of restaurants, an established industry that is in the public interest to supply nutritious foods to meet the public demand.

J. A WRIT OF MANDAMUS SHOULD ISSUE TO REQUIRE THE DEFENDANTS TO CEASE AND DESIST FROM ENFORCING AMENDED EO 65 AND AMENDED HO 6 AND EO 63 AND HO 5 AGAINST THE PLAINTIFFS.

168. The Plaintiffs petition for and seek issuance of a writ of mandamus, with payment of costs as permitted by Va. Code §8.01-648 directing that, because Amended EO 65 and Amended HO 6 and EO 63 and HO 5 are unconstitutional and otherwise *ultra vires* with respect to their restrictions on the Plaintiffs and the requirements that people must wear masks when inside of buildings. The Plaintiffs request the Court to order the Governor to provide notice to the residents of the Commonwealth of Virginia that Abbey Road is no longer restricted, and that no law enforcement department, division, agency, or officer in the Commonwealth, the Virginia Department of Health, and any other regulatory body in Virginia, has the discretion to enforce the provisions of current Amended EO 65 and Amended HO 6 and EO 63 and HO 5 against the Plaintiffs.

169. The Supreme Court of Virginia has consistently held that "[t]he writ of mandamus ... only issues when there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy." *Hertz v. Times-World Corp.*, 259 Va. 599, 608, 528 S.E.2d 458, 463 (2000) (quoting *Tyler v. Taylor*, 70 Va. (29 Gratt.) 765, 766-67 (1878)); *accord Town of Front Royal v. Front Royal and Warren County Indus. Park Corp.*, 248 Va. 581, 584, 449 S.E.2d 794, 796 (1994), *Hall v. Stuart*, 198 Va. 315, 323-24, 94 S.E.2d 284, 290 (1956). Such a writ is appropriate where, as here, there is no adequate remedy at law. *Cartwright v. Commonwealth*

Transp. Com'R, 613 S.E.2d 449 (2005). Issuance of a writ of mandamus will help remove the chilling effect of Amended EO 65 and Amended HO 6 and EO 63 and HO 5, which infringe on constitutionally protected rights of Virginians.

170. The Supreme Court of Virginia has repeatedly indicated, including as recently as 2016, that mandamus is appropriate to remedy and enjoin enforcement of actions involving what were ultimately held to be unlawful executive acts. *Howell v. McAuliffe*, 788 S.E. 2d. 706, 724 (2016) (issuing writ of mandamus effectively overturning an executive order and stating that, "[a]s a result of our holding that the Executive Orders are unconstitutional, no election official in the Commonwealth has the discretion to enforce them.").

REQUEST FOR RELIEF

171. WHEREFORE, the Plaintiffs respectfully request this Honorable Court for the following relief:

(1) A declaratory judgment finding that Directive A2 as set forth in the current version of Amended Executive Order 65 and Amended Order of Public Health Emergency 6 and Directives A3 and C as set forth in the current version of Executive Order 63 and Order of Public Health Emergency 5 constitute *ultra vires* acts of Governor Ralph S. Northam and Commissioner M. Norman Oliver in violation of the Constitution of Virginia, the Emergency Services and Disaster Law of 2000 (Va. Code §44.1-

146.13, *et seq.*), Va. Code §§32.1-13, 32.1-20, 35.1-10; and the Administrative Process Act (Va. Code §2.2-4000, *et seq.*); and

(2) A declaratory judgment finding that Directive A2 as set forth in the current version of Amended Executive Order 65 and Amended Order of Public Health Emergency 6 is arbitrary and capricious and void for vagueness; and

(3) A declaratory judgment finding that Directive A2(a) of the current version of Amended EO 65 and Amended HO 6 allows the Plaintiffs to operate Abbey Road at 100% capacity; and

(4) Immediate entry of a temporary injunction, on an emergency basis and without bond, enjoining Governor Ralph S. Northam, the Superintendent of the Virginia State Police, and all law enforcement divisions, agencies, and officers within the Commonwealth, and the Virginia Department of Health from enforcing, in any manner (and under threat of criminal penalty) against the Plaintiffs Directive A2 as set forth in the current version of Amended Executive Order 65 and Amended Order of Public Health Emergency 6 and Directives A3 and C as set forth in the current version of Executive Order 63 and Public Health Emergency 5, and permanent injunctive relief that the Court may find appropriate; and

(5) Issuance of a writ of mandamus, with payment of costs as permitted by Va. Code § 8.01-648, directing that, because the current versions of Amended EO 65 and Amended HO 6 and EO 63 and HO 5 are

unconstitutional and otherwise *ultra vires* with their limitations on restaurants and requirements that people wear masks, respectively, that the Governor provide notice to the residents of the Commonwealth of Virginia that restaurants and people are no longer limited by these orders, and that no law enforcement department, division, agency, or officer in the Commonwealth has the discretion to enforce the provisions of the current version of Amended EO 65 and Amended HO 6 governing restaurants and the current version of EO 63 and HO 5 requiring people to wear masks, respectively; and

(6) Further relief pursuant to and in accordance with such declaratory judgment, to include permanent injunctive relief, the Plaintiffs' costs, and such other and further relief as the Court may deem appropriate under the circumstances.

Respectfully Submitted,

WILLIAM G. DILLON, JR./
TAMPICO ENTERPRISES, INC. dba
ABBEY ROAD PUB & RESTAURANT

____
By: Paul J. Duggan, Esq.
Counsel for Plaintiffs

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Certificate of Service

I hereby certify that a true copy of the foregoing was sent by first class mail, postage prepaid, 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 16th day of June, 2020.

____
Paul J. Duggan, Esq.

AFFIDAVIT OF WILLIAM G. DILLON, JR. and TAMPICO ENTERPRISES, INC. dba ABBEY ROAD PUB & RESTAURANT

Pursuant to VA Code § 8.01- 4.3, I hereby affirm under penalty of perjury that the allegations of the foregoing Petition for Writ of Mandamus are within my personal knowledge and true.

____
William G. Dillon, Jr.

Tampico Enterprises, Inc. dba Abbey Road Pub & Restaurant

By:

____
William G. Dillon, Jr.
President and Director

COMMONWEALTH OF VIRGINIA

City of Virginia Beach, to wit:

William G. Dillon, Jr. appeared before me in person on this day, June 16, 2020 and having first been duly sworn, subscribed his name above.

____
Notary Public

My commission expires: