

In The
Supreme Court of Virginia

RECORD NO.

LINDA PARK, et al.

Petitioners,

v.

**HON. RALPH S. NORTHAM,
GOVERNOR OF VIRGINIA, et al.**

Respondents.

**VERIFIED PETITION FOR WRIT OF MANDAMUS
AND MEMORANDUM OF LAW IN SUPPORT**

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VERIFIED PETITION FOR WRIT OF MANDAMUS AND MEMORANDUM OF LAW IN SUPPORT

Linda Park (“Park”) and Jon B. Tigges (“Tigges”) (collectively, “Petitioners”), by counsel, comes before this Court, pursuant to Article VI, Section 1 of the Constitution of Virginia and Virginia Code §§ 17.1-309 and 8.01-644, and respectfully requests the issuance of a writ of mandamus directed to the respondents, and in support thereof states:

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, Section 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 eighty-eight (88) 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 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 Commissioner constitute a taking without just compensation or due process, in violation of the Virginia Constitution?

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

JURISDICTION AND VENUE

1. This petition seeks the issuance of a writ of mandamus and therefore this Court has original jurisdiction and is the appropriate venue. VA. CONST. art. VI, § 1; Va. Code § 17.1-309. *See also Howell v. McAuliffe*, 788 S.E.2d 706 (2016) (Supreme Court exercising original jurisdiction over citizens' petition for writ of mandamus).

PARTIES

2. Park is a resident of Spotsylvania, Virginia and is the owner and president of Fujiya House, Inc. ("Fujiya House"), a duly incorporated Virginia entity. Fujiya House operates a hibachi-style restaurant located in Fredericksburg, Virginia.

3. Tigges is a resident of Loudoun County and is the owner and president of Zion Springs LLC ("Zion Springs")—a limited liability company duly organized under the laws of Virginia with its principal place of business in Hamilton, Virginia. Zion Springs is a venue located in Loudoun County

hosting weddings and corporate retreats along with offering 'Bed & Breakfast' services.

4. Respondent Honorable Ralph S. Northam is the duly elected Governor of the Commonwealth of Virginia and is a party to this action in his official capacity as such.

5. Respondent Dr. M. Norman Oliver (the "Commissioner" or "Commissioner Oliver") is the duly appointed State Health Commissioner for the Commonwealth of Virginia and is a party to this action in his official capacity as such.

STATEMENT OF FACTS

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

7. On March 12, 202, the Governor issued Executive Order 51 ("EO 51") declaring a state of emergency in Virginia "to continue to prepare and coordinate our response to the potential spread of COVID-19, a communicable disease of public health threat." That declaration took no steps to impose new law on citizens or businesses in Virginia but rather asserted means of assistance; authorized rules of expedition for the government to enter contracts; and activated existing statutory provisions regarding price gouging.

8. 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 subjects businesses and citizens to criminal penalties for failure to comply.

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

9. On March 23, 2020, the Governor issued Executive Order 53 (“EO 53”). That order closed certain recreational and entertainment business, 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.

10. The Governor and Commissioner have amended these Orders in various ways through subsequent pronouncements. Each of the pronouncements have been made unilaterally by the Governor and Commissioner without any consultation, much less a recorded vote, by the General Assembly.

11. On May 26, 2020 (effective May 29th) – 78 days after initially declaring a public emergency - the Governor and Commissioner issued Executive Order 63 (“EO 63”) and Order of Public Health Emergency Five (“HO 5”) requiring the wearing of face covering while inside buildings with retail orders. Like the previous orders, these orders subjected citizens and businesses to criminal sanctions for failure to comply. There is a limited list of exceptions, but those exceptions do not include: appearing in ceremonies; performing; photography; giving a speech; teaching; concerns of security posed by facial coverings that thwart security measures; or sitting in areas where distancing alleviates risk.

12. Quite simply, 8.6 million Virginians were ordered to wear a face mask anytime they went inside a retail business, regardless of their personal circumstances or the type of environment they were entering. No medical data was cited. The order has no end date.

13. Violations of these orders may be enforced as Class 1 misdemeanors pursuant to Virginia Code §§ 32.1-27 or 44-146.17. The Order has an immediate and chilling effect on service businesses, which rely on person-to-person contact.

Phases for “Re-Opening” Virginia

14. 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.¹ There is ostensibly a Phase Three, but its formal structure and prohibitions have not been released or made public.

15. 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.

16. Pursuant to EO 65 and HO 6, the majority of the state entered Phase Two on June 5, 2020. Pursuant to Third Amended EO 61 and Third Amended HO 3, the Northern Virginia Region, including Loudoun County, remains under “Phase One” indefinitely.

¹ These Phases are outlined in EO 61, which itself has been amended three times. Petitioner requests this Court take judicial notice of all cited orders. See Va. Code § 8.01-386.

Closure of Fujiya House, Fredericksburg

17. Located in the City of Fredericksburg, Fujiya House is in “Phase Two” at present. As such, it is ‘entitled’ to have half-capacity indoor dining. As a restaurant-style that does not have outdoor seating and is based upon hibachi-style dining, Fujiya House has had no practical business since the original shutdown order. Therefore, it is critical for its continued existence to be able to invite patrons to eat within the restaurant at the hibachi tables.

18. However, the governing health department, i.e. the Rappahannock Health Department, has not permitted Fujiya House to serve its customers in the traditional, hibachi-style, instead stating that it can only serve food prepared in a kitchen. The Rappahannock Health Department is a sub-agency of the Virginia Department of Health and is thus under the control of the Commissioner.

19. As such, Fujiya House remains closed indefinitely, despite being a business that is ostensibly allowed to operate under “Phase Two.” As stated *infra*, this closure is based solely on the meaningless distinction that the food is prepared on a hibachi grill and not in a kitchen. There have been no medical findings cited to support this distinction. Neither has there been any assertion by the Commissioner that such hibachi-style is incompatible with social distancing guidelines.

20. Cases like Fujiya House show the *ad hoc*, arbitrary nature of the regulations that the Governor and Commissioner are unlawfully propagating.

Closure of Zion Springs (Loudoun County)

21. Zion Springs is located within the Northern Virginia Region, as defined and used in the various orders.

22. Under Phase One, “[a]ll public and private in-person gatherings of more than ten individuals” remain prohibited. Under Phase Two, this limitation is increased to fifty individuals.

23. As a venue for large gatherings—i.e. weddings and corporate retreats—Zion Springs remains closed indefinitely. Zion Springs clients have likewise lost their ability to practice constitutionally protected speech on the premises. The majority of Zion Springs’ clients were exercising their constitutionally protected right to engage in the act of matrimony in a manner of their choosing. Other clients of Zion Springs have conducted retreats at which political speech was delivered.

24. As the owner, Tigges has been, and continues to be, damaged through lost revenue by this state-mandated closure.

25. With no end dates—and the continued intention of the Governor and Commissioner that they will rule by decree and not by democratic means—Zion Springs and Tigges’ potential clients have no ability to reliably

plan future events. As such, not only is Zion Springs, and by extension Tigges, losing current revenue from the various orders, they are also losing future revenue as the ever-changing regulatory landscape makes future bookings impossible.

26. Further, the restrictions regarding face coverings do not contain reasonable exceptions and, thus, the nature of most events would be badly compromised as there is no exceptions regarding ceremonies, photographs, performers, and areas where there is substantial space for distancing.

27. While the Governor has publicly pointed to potential enforcement discretion for some areas, the orders as Class I misdemeanors carry penalties of up to one (1) year in jail and a \$2,500 fine, for businesses as well as citizens attending each event. As Tigges and Zion Springs' clients lack prescience of how the Governor and Commissioner will apply such 'discretion,' the penalties operate to effectively ban all public gatherings. Tigges has been put out of business.

ARGUMENT AND LAW

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

29. 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.

A. Orders are Facially Unconstitutional

30. “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)).

31. 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.

32. 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.

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

34. 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).

35. 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, and banned 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”).²

² “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.*

36. The latter prohibition renders Third Amended EO 61 and Third Amended HO 3 facially unconstitutional.

Right to Assembly

37. 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 United States. *Elliott v. Commonwealth*, 267 Va. 464, 473-74, 593 S.E.2d 263, 269 (2004).

38. Any limitations on this right³ must be narrowly tailored. *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746 (1989).

39. 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

³ Tigges concedes 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.

Tigges likewise concedes that the Commonwealth has a significant state interest in the health of its citizens. *Id.*

suppressing permissible speech.” *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227, 110 S. Ct. 596, 605 (1990).

40. 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, Home Depot can have 50% of its occupancy capacity indoors at any given time (composed of shoppers who are strangers) while an outdoor wedding is outright banned, regardless of the number of attendees or how fastidiously they attend to social distancing and sanitation guidelines.

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

B. Orders Exceed Authority Granted to Executive

42. 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.

43. 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.

44. 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. Governor Has No Authority to Create Local Criminal Laws

45. 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.

46. 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 make 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).

47. 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 as it is an exercise of a power that the General Assembly could not delegate as it is specifically excluded.

48. 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; Amended HO 4. See Art. 7, §1.

ii. Statutory Definition of “Emergency” Prohibits EOs

49. 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.

50. 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).

51. In plain English, a “public emergency” is a period of time during which the Chief Executive must act because there is not time to “amend the law” through legislative means. *See id.* *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”)

52. 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.

53. 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 . . .”).

54. Instead, the Governor has issued no fewer than **twenty-seven** separate executive orders (and amendments) to address this exigency since declaring an “Emergency.”

55. 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).

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

iii. EOs Exceed Authority Related to ‘Communicable Diseases’

57. 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 EO's, neither the Governor nor Commissioner have actually followed the requirements laid out in their provisions.

58. Title 44, as the original of emergency authority, does speak to the Governor's powers related to communicable diseases, like COVID-19. Specifically, Code Section 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.*"

59. 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.

60. 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).

61. 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 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).

62. 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).

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

64. 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).

65. 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?

66. 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).

67. 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.*

68. When there are no orders of quarantine or isolation, the Governor cannot create his own regulatory structure – untethered to the Code or the VAPA – to restrict the rights of citizens, especially without any evidence they have been infected or even exposed to COVID-19. Any

reliance on a general grant of powers to address emergencies is improper where the legislature has specifically granted powers—with limitations—to the Governor as it relates to such diseases.

C. Orders Are Inconsistent With Procedural Requirements

69. 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.

70. 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.

71. Under Section 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. Section 32.1-13 is the authority that belongs, in the first instance, to the Virginia Board of Health.

72. The Board of Health finally met on June 4, 2020 after **no meetings** in February, March, April or May – the very months when COVID-19 was most relevant.

73. At the June meeting, the process and substance behind the Commissioners’ health orders was not on the agenda and 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.

74. Section 32.1-13 states:

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

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.

75. 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, VAPA applies to both 44-167.17 and section 32.1-13.

76. 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.

77. 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. Without the status of operating as an administrative agency neither the Governor nor Commissioner would have an authority create law, even to fill in the legislative gaps.

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

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

80. The Governor and Commissioner have not invoked nor followed the conditions of § 2.2-4011,⁴ 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 would still have to follow the VAPA.

81. In addition, the Governor and Commissioner have violated Section 2.2-4007.01 on providing notice of intended regulatory action.

82. The Governor and Commissioner have violated Section 2.2-4007.02 on public participation guidelines.

83. The Governor and Commissioner have violated section 2.2-4007.03 on informational proceeding, i.e. by failing to give notice of the proposed orders, prior to their issuance. As stated in that provision, the failure to comply with the requirements of this section cannot be deemed mere harmless error.

84. The Governor and Commissioner have violated Section 2.2-4007.04 to provide an economic impact analysis. Again, with so much time

⁴ Not to mention the fact, as discussed *infra*, that the “emergency” has now existed for four months. Clearly there is enough time for public notice and comment—even if the structure needs to change to adopt to the post-COVID world.

passed, there is no excuse for not having one to understand the regulations and provide a basis for judicial review.

85. The Governor and Commissioner have violated Section 2.2-4007.04:01 concerning notice of certain departments.

86. The Governor and Commissioner have violated Section 2.2-4007.05 with respect to providing notice to the Registrar.

87. The Governor and the Commissioner have failed to follow Section 2.2-4007 to provide a regulatory flexibility analysis for small businesses.

88. The Governor and the Commissioner have failed to follow Section 2.2-4112 to file the regulation with the Registrar of Regulations.

89. Notably, all these decisions 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 on which the Governor and Commissioner have been relying. For the Commissioner there is no evidence he has sought input from the Board of Health, the primary owner of the powers of Section 32.1-13.

90. In the instant case, the Governor and Commissioner have launched a dramatically burdensome and extensive regulatory scheme on

citizens and businesses with only reference to emergency provisions—but with no stated legislative principals that guide the extensive regulatory scheme. The legislature could not have permissibly delegated such a broad and open-ended source of authority and did not do so.

91. The Governor and Commissioner have ignored the relevant Code chapters, apparently determining that the protections to citizens and businesses therein are not useful or desirable. See Va. Code 2.2-4012(D).

92. The massive shutdown of businesses and incursions on civil liberties cannot be justified in the specific provisions of the law.

93. 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 reference to intelligible statements, limitations and principles. The Governor and Commissioner have provided insufficient basis beyond the construct that COVID-19 is a public health threat. The two individuals are assuming unlimited regulatory authority and ability to create law, in direct contrast to the detailed provisions of the relevant chapters.

94. The decisions made by the Governor and the Commissioner are inherently arbitrary and capricious as they make unsupported and often meaningless distinctions between commercial activities, while voiding *en masse* the ability of persons such as the Petitioners to earn a living.

RELIEF REQUESTED

95. Petitioners are without an adequate remedy at law. First, the economic damages to the businesses are ongoing and nearly impossible to measure as the uncertainty is causing future damages as well. Moreover, the Respondents have sovereign immunity for the ministerial actions detailed herein and would be immune from any legal action.

96. Equity weighs in favor of the Petitioners. They are likely to succeed on the merits of their claim as the clear text of the Constitution and relevant code provisions expressly do not allow the regulatory framework issued by the Respondents.

97. Further, the relief sought here is in the public interest, as no man is above the law—and no emergency laws are above the Constitution.

98. The taking of evidence will not be necessary for the disposition of this petition. The orders are an undisputed matter of public record, and their *ultra vires* character, as detailed *supra*, is discernable on their face.

99. Petitioner requests that the Court exercise its authority under Rule 5:7 of the rules of the Supreme Court of Virginia to: (a) to rule on this matter as soon as practical; or (b) enter an immediate order shortening the time period for the filing of responsive pleadings and any potential reply. VA. SUP CT. R. 5:7(c).

WHEREFORE, Petitioners Linda Park and Jon Tigges pray that this Court issue a writ of mandamus, directed to Respondents Dr. Ralph S. Northam and Dr. M. Norman Oliver, holding that the orders referenced above are *ultra vires* and otherwise in violation of the Virginia Constitution, and are and therefore void and of no effect; directing respondent Oliver to inform all of his subordinates within the Commonwealth's Department of Health to cease all actions designed to enforce the Orders; and for such other and further relief as this Court deems necessary and proper.

LINDA PARK
JON TIGGES

BY COUNSEL



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*Active member of DC Bar (#384732)
expected to make appearance *pro hac vice*

AFFIDAVIT OF LINDA PARK

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.



Linda Park

COMMONWEALTH OF VIRGINIA
City of Fairfax, to wit:

Linda Park appeared before me in person on this day, June 9, 2020 and having first been duly sworn, subscribed her name above.



Cristina Lazo
Notary Public

My commission expires: 09/30/2022



AFFIDAVIT OF JON TIGGES

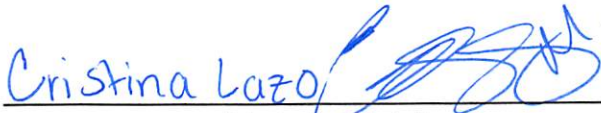
Pursuant to VA Code § 8.01-4.3, I hereby affirm under penalty of perjury that the allegations of the foregoing Petition for Writ of Mandamus are within my personal knowledge and true.



Jon Tigges

COMMONWEALTH OF VIRGINIA
City of Fairfax, to wit:

Jon B. Tigges appeared before me in person on this day, June 9, 2020, and having first been duly sworn, subscribed his name above.



Notary Public

My commission expires: 04/30/2022

