

V I R G I N I A :

IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

LYNCHBURG RANGE & TRAINING, LLC et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. CL20000333-00
	)	
v.	)	
	)	
HON. RALPH S. NORTHAM et. al,	)	
	)	
Defendants.	)	

**DEFENDANTS' MEMORANDUM IN OPPOSITION  
TO MOTION FOR TEMPORARY INJUNCTION**

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## INTRODUCTION

Although plaintiffs dismiss it as “flu-like,” Compl. ¶ 78, the evidence shows that COVID-19 is a once-in-a-century pandemic with the potential to kill thousands of Virginians and overwhelm the Commonwealth’s healthcare system. Determined to minimize harm and preserve health and safety, Governor Ralph S. Northam has taken decisive actions to slow the virus’s spread. Restaurants have suspended dine-in service. Large gatherings have been postponed or cancelled. All businesses have been admonished to observe social distancing. Most retail businesses must limit the number of patrons in their stores. And some businesses—including indoor, but not outdoor, shooting ranges—must temporarily close to the public.

In the midst of ongoing efforts to contain a deadly disease, plaintiffs seek emergency equitable relief to carve out an exception for indoor shooting ranges. But Virginia law authorizes the Governor to do exactly what he did here: make difficult decisions about how to respond to a public health crisis. No court in the Nation has ever recognized a freestanding constitutional right to operate or visit an indoor shooting range and, even if such a right existed, it would not reach so far as to preclude a temporary closure of a *subcategory* of shooting ranges during a global pandemic. For that reason—and because plaintiffs also cannot satisfy any of the other requirements for the “extraordinary remedy” they seek, *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008)—the motion for a temporary injunction should be denied.

## STATEMENT

1. In January, Chinese authorities announced a novel coronavirus was likely to blame for a mysterious, pneumonia-like illness. Oliver Aff. ¶ 3 (Exhibit I). Just months later, COVID-19 has become a global pandemic, killing over 180,000 people and infecting more than 2.6 *million* worldwide. ¶ 8. Virginia’s death toll stands at 372—a number projected to grow significantly. ¶ 13. Nearly 11,000 COVID-19 cases have already been confirmed in Virginia,

¶ 12, including 47 confirmed cases in Lynchburg alone.<sup>1</sup> Experts estimate that the true figures may be “11 times more than has been officially reported.”<sup>2</sup> And even perfectly accurate numbers become outdated almost immediately given the pace of spread and the fact that the disease currently has no known treatment or cure. ¶¶ 9–10; Order of Public Health Emergency Two (2020) (Northam & Oliver Order) (Exhibit B).

The disease’s toll extends beyond those infected. As those infected with COVID-19 require treatment and hospitalization, the burden on the healthcare system will grow. Oliver Aff. ¶¶ 19, 21. Depending on the speed of infection, Virginia could face a shortage of hospital beds, intensive-care-unit beds, and ventilators, ¶ 14, placing healthcare workers at even higher risk and preventing those needing treatment for unrelated reasons from accessing care.

2. What makes COVID-19 so deadly is the ease with which it spreads. Although much remains unclear, experts agree the virus is transferred by in-person interactions, either through close person-to-person contact or through respiratory droplets when an infected person coughs, sneezes, or talks. Oliver Aff. ¶ 5; Forlano Aff. ¶ 4 (Exhibit J). Public health officials likewise agree that infected persons may not become symptomatic—and thus may not realize they have contracted the virus—for days after being exposed. *Id.* For that reason, any person-to-person contact represents an undetected opportunity for transmission.

Because they “often involve or allow the sharing of space and items,” recreation and entertainment businesses are “strong candidates for COVID-19 transmission.” Oliver Aff. ¶ 20; see Forlano Aff. ¶¶ 7–8. A New Jersey man became infected through a “casual handshake” at a

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<sup>1</sup> Va. Dep’t of Health, *COVID-19 in Virginia*, <http://www.vdh.virginia.gov/coronavirus/>.

<sup>2</sup> James Glanz et al., *Coronavirus Could Overwhelm U.S. Without Urgent Action, Estimates Say*, N.Y. Times (Mar. 20, 2020), <https://www.nytimes.com/interactive/2020/03/20/us/coronavirus-model-us-outbreak.html>.

bowling alley,<sup>3</sup> and a movie theater and a gun raffle were identified as exposure sites in Michigan and Indiana.<sup>4</sup> Recognizing this danger, public-facing businesses across the country—including museums, sports venues, concert halls, and theme parks—began closing temporarily.<sup>5</sup> Shooting ranges were no exception: As the owner of one range in Virginia Beach explained, it would be prohibitively expensive “to space out patrons so they are more than six feet apart, pause shooting . . . to thoroughly clean the porous, rubber surfaces found all over the range as well as the guns, door knobs and any other surfaces, and bring on extra staff to monitor social distancing and explain the new rules.”<sup>6</sup>

3. Lacking a cure or established treatment plan, officials across the country have focused on slowing COVID-19’s spread. According to federal guidelines, “[e]veryone should . . . avoid close contact” by “stay[ing] home as much as possible” and “put[ting] distance between yourself and other people.”<sup>7</sup> State officials have implemented that guidance by closing schools, requiring many businesses to close to the public, prohibiting gatherings of more than ten, and

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<sup>3</sup> See Chris Wragge, *Coronavirus Update: First Person to Recover in N.J. Wants to Serve as an Example of Hope and Perseverance*, CBS N.Y. (Mar. 19, 2020), <https://newyork.cbslocal.com/2020/03/19/coronavirus-john-mormando-valley-hospital-new-jersey/>.

<sup>4</sup> See FOX 2, *Wayne County Says Dearborn’s AMC Fairlane 21 Was Possible Coronavirus Exposure Site* (Mar. 17, 2020), <https://tinyurl.com/tcvhrwa>; FOX19, *County Health Officials Release List of Possible Virus Exposure Locations* (Mar. 31, 2020), <https://tinyurl.com/yb9nkqme>.

<sup>5</sup> Christina Caron, *Coronavirus Is Spreading. Should You Cancel Your Vacation?*, N.Y. Times (Mar. 17, 2020), <https://tinyurl.com/qoxl2ps>.

<sup>6</sup> Marie Albiges, *Northam Ordered Indoor Shooting Ranges to Close During Coronavirus. A Gun-Rights Group Is Threatening to Sue.*, Va. Pilot (Mar. 31, 2020), <https://www.pilotonline.com/news/health/vp-nw-coronavirus-gun-ranges-20200331-e6nik4jzfb5gz4qokv1254lm-story.html>.

<sup>7</sup> Centers for Disease Control and Prevention, *Coronavirus Disease 2019: How to Protect Yourself & Others*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited Apr. 19, 2020).



issuing stay-at-home orders.<sup>8</sup> Several States’ restrictions have included outright closures of all firearms retailers, two of which have been challenged (and upheld) on constitutional grounds. See Order, *Brandy v. Villanueva*, No. CV 20-02874-AB, at 5–6 (C.D. Cal. Apr. 6, 2020) (*Brandy Order*) (Exhibit D); Order, *McDougall v. County of Ventura*, No. 20-CV-0926-CBM, at 2 (C.D. Cal. Mar. 31, 2020) (*McDougall Order*) (Exhibit E).

4. Virginia’s government has taken steps to limit COVID-19’s spread. As early as February 7, the State Health Commissioner identified COVID-19 as a public health threat. Northam & Oliver Order. On March 13, the Governor ordered all K-12 schools closed for two weeks, and, on March 17, the Governor and State Health Commissioner limited all restaurants, fitness centers, and theaters to 10 patrons at a time.<sup>9</sup> The virus, however, continued to spread.

On March 23, 2020, the Governor issued Executive Order 53 (EO 53). Emphasizing that “person-to-person contact increases the risk of transmission and community spread” (p. 1), that Order sought to minimize such contacts, both by prohibiting “all public and private in person gatherings of 10 or more individuals,” ¶ 1, and imposing additional restrictions on particular entities. K-12 schools were required to cease “in-person instruction,” and restaurants were directed to close “all dining and congregation areas.” ¶¶ 2, 3. Most “brick and mortar retail business[es]”—including firearms retailers—were allowed to stay open so long as they “limit[ed] all in-person shopping to no more than 10 patrons per establishment.” ¶ 6. “[R]ecreational and entertainment businesses”—including “indoor shooting ranges”—were required to temporarily “clos[e] [] all public access.” ¶ 4. “All businesses” were admonished to “adhere to social distancing recommendations, enhanced sanitizing practices on common

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<sup>8</sup> Council of State Gov’ts, COVID-19 Resources for State Leaders, <https://web.csg.org/covid19/executive-orders/> (last visited Apr. 13, 2020).

<sup>9</sup> See Amended Executive Order 53 (Exhibit A) (describing earlier measures).

surfaces, and other appropriate workplace guidance from state and federal authorities.” ¶ 7.

The Governor has also imposed additional restrictions to limit COVID-19’s spread. In Executive Order 55 (EO 55) (Exhibit C), the Governor directed that “[a]ll individuals in Virginia shall remain at their place of residence, except as provided below by this Order and Executive Order 53.” ¶ 1. EO 55 further restricted other activities deemed to foster the kind of close, person-to-person contact that risks COVID-19 transmission, including “all in-person classes and instruction” at colleges and universities and use of public beaches and private campgrounds. ¶¶ 3–5. On April 13, the Governor postponed the Commonwealth’s June primaries by two weeks. Executive Order Fifty-Six (2020) (Northam). The Governor recently announced that the restrictions on businesses in EO 53 will be extended for two more weeks. See EO 53 ¶ 4.

5. In this suit, plaintiffs seek a declaration that EO 53’s temporary “closure of all indoor shooting ranges” is *ultra vires* and unconstitutional, along with a writ of mandamus to enjoin enforcement of that closure. Compl., p. 1. Plaintiffs further seek “immediate entry of a temporary injunction” preventing the Governor and the Superintendent of the Virginia State Police from enforcing the prohibition on public access to indoor shooting ranges. *Id.* In support of their requests, plaintiffs contend that the Governor has no authority to “close entire categories of businesses throughout the entire Commonwealth.” ¶ 34. Plaintiffs further argue that EO 53 violates “their constitutionally protected right to keep and bear arms.” ¶ 82.<sup>10</sup>

### LEGAL STANDARD

“No temporary injunction shall be awarded unless the court shall be satisfied of the

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<sup>10</sup> Plaintiffs filed a previous complaint that also asserted a separate federal claim under the Second Amendment. Case No. CL20000332-00. After defendants removed that suit to federal court, plaintiffs voluntarily dismissed it and re-filed the current action in this Court. Defendants removed that suit as well, but the federal court remanded the re-filed case to this Court, accepting plaintiffs’ submission that they are making no claim that EO 53 violates the Second Amendment.

plaintiff's equity." Va. Code Ann. § 8.01-628. "No Virginia Supreme Court case has definitively set out standards to be applied in granting or denying a [temporary] injunction," and Virginia courts have generally "followed [the] standards delineated in the four-part test used by the federal courts." *School Bd. of Richmond v. Wilder*, 73 Va. Cir. 251, at \*2 (Richmond Cir. Ct. 2007). Under those standards, a temporary "injunction is an extraordinary remedy never awarded as of right," and a party seeking one "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20, 24 (2008).

## ARGUMENT

Plaintiffs cannot satisfy any of the four requirements for obtaining the "extraordinary remedy" they seek. *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008).<sup>11</sup>

### **I. Plaintiffs have not established that they are likely to succeed on the merits**

Plaintiffs offer two primary bases for invalidating the Governor's temporary closure of commercial indoor shooting ranges by way of emergency relief. Both fail.

*First*, plaintiffs broadly insist that the Governor has no authority under the Code of Virginia or the Virginia Constitution to "close entire categories of businesses." Compl. ¶ 34. But plaintiffs' sweeping claim ignores the scope of the Governor's authority under the Commonwealth of Virginia Emergency Services and Disaster Law of 2000 (Emergency Law), Va. Code Ann. § 44-146.13 *et seq.*, and other statutes, and would dangerously narrow the Governor's constitutional authority to protect the Commonwealth by taking decisive action in a

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<sup>11</sup> Indeed, other Virginia courts have repeatedly rejected requests for injunctive relief as to the Governor's Executive Orders regarding COVID-19. See *Webb v. Northam*, No. CL20001624 (Alexandria Cir. Ct. Apr. 15, 2020); *Hughes v. Northam*, No. CL20-415 (Russell Cir. Ct. Apr. 9, 2020); *Tolle v. Northam*, No. 1:20-cv-363 (E.D. Va. Apr. 1, 2020).

crisis. And plaintiffs’ more limited contention—that the Emergency Law precludes the Governor from temporarily closing indoor shooting ranges because they are “firearms-related” (¶ 27)—collapses into (and fails for the same reasons as) their constitutional claims.

*Second*, plaintiffs argue that the Governor’s decision to temporarily close commercial indoor shooting ranges violates their constitutional right to keep and bear arms. But there is no constitutional right to “operate . . . an indoor shooting range,” Compl. ¶ 60, and no court has *ever* recognized a freestanding constitutional right to access one. And even if the constitutional right to keep and bear arms for purposes of self-defense in the home were later found to give rise to a derivative right to train with such weapons, EO 53’s temporary closure of public access to indoor shooting ranges during a global pandemic would comfortably survive judicial scrutiny.

**A. Virginia law authorizes the Governor to temporarily close indoor shooting ranges to the public to slow the spread of a highly contagious virus**

Plaintiffs’ first-level argument is that—even during a global pandemic—the Governor has no authority to “close entire categories of businesses throughout the Commonwealth.” Compl. ¶ 34; accord *id.* ¶¶ 36, 40. That is a staggering assertion—one that, if true, would render the Governor largely powerless to respond to COVID-19, eviscerate the core of the Commonwealth’s efforts to slow the disease’s spread, and inflict an unknown (and unknowable) toll on Virginians. Fortunately, plaintiffs’ assertion is also plainly wrong.

1. The Emergency Law specifically grants the Governor broad authority to take decisive and necessary action during emergencies. “Because of the ever present possibility of the occurrence of disasters of unprecedented size and destructiveness,” the General Assembly specifically found it “necessary” to “confer upon the Governor . . . emergency powers.” § 44-146.14(a). Among those powers is the authority to “declare a state of emergency” and “proclaim and publish such rules and regulations and to issue such orders as may, in his judgment, be

necessary to accomplish the purpose of this chapter.” § 44-146.17(1), (7). The “purpose of” the Emergency Law is defined as “protect[ing] the public peace, health, and safety, and . . . preserv[ing] the lives and property and economic well-being of the people of the Commonwealth,” § 44-146.14(a), especially during a “[d]isaster,” which is specifically defined to include a “communicable disease of public health threat” like COVID-19, § 44-146.16.<sup>12</sup> The Governor’s order to temporarily limit the operations of certain businesses came after he declared a state of emergency, see Executive Order 51 (2020) (Northam), and specifically cited Code § 44-146.17, EO 53, p. 1. The measures included in EO 53—including the closure at issue here—were specifically designed to “mitigate the impacts of [COVID-19] on our Commonwealth.” *Id.* The Order was therefore well within the Governor’s powers under the Emergency Law. See Va. Code Ann. § 44-146.17.<sup>13</sup>

2. Other provisions within the Code and the Virginia Constitution also provide independent sources for the Governor’s authority to take emergency action to protect the public health. Accord Order, *Gun Owners of America, Inc. v. Northam*, No. CL 20-279, at 2 (Richmond Cir. Ct. Jan. 16, 2020) (Exhibit F) (concluding that “the Governor . . . has sufficient authority

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<sup>12</sup> The Emergency Law charges the State Health Commissioner with determining whether a particular “illness of public health significance” constitutes a “[c]ommunicable disease of public health threat,” Va. Code Ann. § 44-146.16, a determination the Commissioner made about COVID-19 on February 7. See *Update on COVID-19* (Feb. 27, 2020), <http://www.vdh.virginia.gov/clinicians/update-on-covid-19/>.

<sup>13</sup> Plaintiffs’ fallback argument is that another provision of the Emergency Law—Code § 44-146.15(3)—“prevent[s] the Governor from using” his emergency authority “to infringe upon the right to keep and bear arms . . . under Article I, § 13.” Compl. ¶ 43. That argument fails for two reasons. *First*, that same provision makes clear that it does not “[l]imit, modify, or abridge the authority of the Governor to exercise any powers vested in him under *other laws* . . . independent of . . . this chapter,” Va. Code Ann. § 44-146.15(1) (emphasis added), and, as explained below, the order is supported by other sources of authority as well. See Part I(A)(2), *infra*. *Second*, as plaintiffs acknowledge (at ¶ 43), their argument about § 44-146-15(3) depends on the assertion that closing indoor shooting ranges violates Article I, § 13, which lacks merit for the reasons explained in Part I(B), *infra*.

outside of the” Emergency Law to issue an Executive Order imposing temporary safety-related restrictions during a declared emergency).

a. In Title 32.1, the General Assembly declared that “the protection, improvement and preservation of the public health and of the environment are essential to the general welfare of the citizens of the Commonwealth.” Va. Code Ann. § 32.1-2. In furtherance of this policy, the legislature has granted the executive branch broad statutory authority to respond to public-health crises like COVID-19. For example, “the State Board of Health and the State Health Commissioner, assisted by the State Department of Health, shall . . . abate hazards and nuisances to the health and to the environment, both emergency and otherwise.” § 32.1-2. The Board, in turn, “may promulgate regulations and orders to meet any emergency or to prevent a potential emergency caused by a disease dangerous to public health,” § 32.1-42, and “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,” § 32.1-13. Moreover, the State Health Commissioner is “vested with all the authority of the Board when it is not in session.” § 32.1-20. Each of these individuals and entities reports to the Governor. See §§ 2.2-201, 2.2-212, 32.1-16 & 17. Accordingly, the measures the Governor has taken—with the advice of the State Health Commissioner, see *Oliver Aff.* ¶¶ 2, 15–16, 18—are consistent with the authority provided in Title 32.1.

b. The Virginia Constitution provides additional authority for the Governor to meet emergencies. The Constitution specifically “vest[s]” “[t]he chief executive power of the Commonwealth in [the] Governor” and also directs that the Governor “take care that the laws be faithfully executed.” Va. Const. art. V, §§ 1, 7. It has been long understood that the Constitution

“create[s] ‘a general reservoir of power’ whereby the chief executive can marshal the resources of the state to protect the people in . . . emergencies,” II A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 588 (1974) (quoting 1945-46 Op. Va. Att’y Gen. 144, 147, 150), and protecting the public health and safety in the face of a global pandemic is a quintessential executive function. See *Schenck v. Pro-Choice Network*, 519 U.S. 357, 393 (1997) (Scalia, J., dissenting) (“We have in our state and federal systems a specific entity charged with responsibility for initiating action to guard the public safety. It is called the Executive Branch.”).

**B. Plaintiffs’ right-to-bear-arms claim is unlikely to succeed**

Plaintiffs also claim that EO 53’s temporary closure of commercial indoor firing ranges violates “their constitutionally protected right to keep and bear arms.” Compl. ¶ 82. That argument ignores the deference courts afford elected officials during times of crisis. It also would fail under the framework that applies to non-emergency measures.

**1. The Governor’s temporary closure order is the sort of good-faith, evidence-based emergency measure that warrants this Court’s deference**

Because “[d]ealing with . . . an emergency situation requires an immediacy of action that is not possible for judges,” courts have long emphasized that the elected branches of government must be able to take decisive actions to address matters of urgent concern. *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971). Just as “[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease,” *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944), the same is true of other constitutionally protected rights—including the right to keep and bear arms. For that reason, in evaluating the lawfulness of measures taken during an emergency, “the scope of [a court’s] review . . . must be limited to a determination of whether the [executive’s] actions were taken in good faith and whether there is some factual basis for [the Governor’s] decision that the restrictions he imposed were necessary

to maintain order.” *Chalk*, 441 F.2d at 1281. That standard reflects the reality that “[i]t is no part of the function of a court” to determine which measures are “likely to be the most effective for the protection of the public against disease,” *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905), and that “governing authorities must be granted the proper deference and wide latitude necessary for dealing with . . . emergenc[ies],” *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996).

The current emergency presents a particularly appropriate moment for such deference. The Governor indisputably acted in good faith in issuing EO 53. Authorities estimate that 1.5 to 2.2 million Americans could die if governments did nothing to stop the virus,<sup>14</sup> and a battery of evidence supports the conclusion that minimizing close, person-to-person contact is necessary to curb its spread. *Oliver Aff.* ¶ 17; *Forlano Aff.* ¶¶ 4–7. The Governor’s step-by-step approach refutes any suggestion that he acted arbitrarily or without due consideration of the difficult issues involved, and his chosen strategy for slowing the spread of COVID-19 and saving lives warrants deference. See *Binford v. Governor Sununu*, No. 217-2020-cv-00152, at 15 (N.H. Merrimack Sup. Ct. Mar. 25, 2020) (Exhibit G) (upholding gathering restriction on this basis).

**2. *Plaintiffs’ right-to-bear-arms challenge would fail even under the standards applicable to non-emergency measures***

For the reasons just explained, this Court’s review of plaintiffs’ constitutional claims should reflect the exigency under which the Governor acted. But those claims would also fail under the usual standards of judicial review that apply to non-emergency action.

a. “[T]he *central component*” of the judicially recognized right to keep and bear arms is the ability to engage in “self-defense,” particularly inside the home. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008); accord *DiGiacinto v. Rector & Visitors of George Mason*

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<sup>14</sup> William Wan et al., *Experts and Trump’s Advisers Doubt White House’s 240,000 Coronavirus Deaths Estimate*, Wash. Post (Apr. 2, 2020), <https://tinyurl.com/vymlmsy>.



*Univ.*, 281 Va. 127, 134 (2011) (referencing “the right to carry and possess handguns in the home for self-defense”).<sup>15</sup> EO 53 does nothing to limit or infringe that right. Those who already lawfully possess firearms may keep them. Those who wish to obtain firearms or ammunition may still purchase them. Compare *Brandy Order* (rejecting constitutional challenge to temporary closure of firearm and ammunition retailers in light of COVID-19); *McDougall Order* (same). And should a “confrontation” arise, EO 53 does nothing to prevent anyone from “us[ing] arms for self-defense.” *Heller*, 554 U.S. at 592, 603.

b. Plaintiffs do not contend otherwise. Instead, they insist that EO 53’s temporary restriction on public access to indoor shooting ranges prevents them from engaging in “activities associated with” armed self-defense in the home, “including the right to access shooting ranges to gain and maintain proficiency in using firearms.” Compl. ¶ 51. That claim fails.

i. Plaintiffs identify no court—anywhere—that has ever recognized a freestanding constitutional right to access indoor shooting ranges. Plaintiffs largely hang their hat on a pair of Seventh Circuit decisions: *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (*Ezell I*), and *Ezell v. City of Chicago*, 846 F.3d. 888 (7th Cir. 2017) (*Ezell II*). See Compl. ¶ 54–55.<sup>16</sup> In those decisions, the Seventh Circuit invalidated a pair of ordinances that permanently and completely (*Ezell I*) and then permanently and almost completely (*Ezell II*) prohibited shooting ranges—indoor or outdoor—anywhere in the city and, in so doing, made it effectively impossible to

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<sup>15</sup> In *DiGiacinto*, the Supreme Court of Virginia concluded that, for the purposes of that case, “the protection of the right to bear arms . . . in Article I, § 13 of the Constitution of Virginia is co-extensive with the rights provided by the Second Amendment of the United States Constitution.” 281 Va. at 134. Although the Court left open the possibility that Article I, § 13 might, in principle, be interpreted differently than the Second Amendment in other situations, plaintiffs have expressly disavowed any such argument here. See Compl. ¶¶ 48–50.

<sup>16</sup> As plaintiffs acknowledge (at ¶ 55), the Second Circuit decision they reference *rejected* a constitutional challenge to a since-repealed ordinance restricting transportation of licensed firearms to shooting ranges in New York City.

lawfully possess a firearm even in the home because a different ordinance limited possession to those with a permit that was itself *predicated on* shooting-range training. See *Ezell I*, 651 F.3d at 691–92; *Ezell II*, 846 F.3d at 894. By tying lawful firearms possession to range-training and then permanently closing all such ranges, those ordinances directly implicated the “central component” of the constitutional right: the ability to use firearms for “[i]ndividual self-defense.” *DiGiacinto*, 281 Va. at 134. EO 53, in contrast, is a temporary measure that does nothing—directly or indirectly—to prevent otherwise lawful possession or use of a firearm.

ii. Even assuming that the constitutional right to keep and bear arms for self-defense necessarily implies some degree of ancillary protection for a citizen’s ability “to learn, practice, and hone their shooting skills,” Compl. ¶ 74—a leap that no Virginia court has ever made—EO 53 would not violate it. By requiring *permanent* closure of “shooting galleries, firearm ranges, or any other place where firearms are discharged,” the ordinances at issue in *Ezell* precluded all opportunities for in-person training with live firearms. *Ezell I*, 651 F.3d at 691 (alterations, quotation marks, and citation omitted). EO 53, in contrast, is a *temporary* measure that leaves available numerous alternative options for firearms education. Even during the period of restriction, plaintiffs’ customers and members may educate themselves through books, internet resources, and videos—including two-way video instruction. They may continue to train with live firearms on private property. They may even continue to train at their preferred venue—a shooting range—so long as that range is an outdoor, rather than indoor, facility. For that reason, EO 53 is simply not the kind of “sharp[] restriction[]” that even plaintiffs’ most favored decisions suggest might, in some circumstances, implicate the constitutional right to keep and bear arms. *New York State Rifle & Pistol Ass’n, Inc. v. City of New York*, 883 F.3d 45, 58 (2d Cir. 2018), cert. granted No. 18-280 (argued Dec. 2, 2019).

iii. For the reasons just stated, defendants do not believe that the restriction plaintiffs challenge is properly subject to any degree of heightened judicial scrutiny. Even were the Court to conclude otherwise, the appropriate standard would be intermediate scrutiny because a temporary closure of indoor shooting ranges “do[es] not implicate the central self-defense concern” that lies behind the constitutional right to keep and bear arms. *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (citation omitted); accord *Brandy Order* at 5 (concluding that—even “[a]ssuming without deciding” that orders closing firearms retailers “burden conduct protected by the Second Amendment”—“intermediate scrutiny” applied because the challenged restrictions were “simply not as sweeping as the complete handgun ban at issue in” *Heller*) (quotation marks, alterations, and citations omitted); *McDougall Order* at 2 (similar).

EO 53’s temporary restriction on public access to indoor shooting ranges easily satisfies intermediate scrutiny. The Commonwealth’s interest in “prevent[ing] the spread of” a highly contagious “communicable disease[.]” is not simply *important* (as required under intermediate scrutiny)—it is “compelling.” *Workman v. Mingo Cty. Bd. of Educ.*, 419 Fed. Appx. 348, 353 (4th Cir. 2011); accord *McDougall Order* at 2; *Brandy Order* at 5. And contrary to plaintiffs’ breezy assertions—none of which are supported by any evidence from healthcare professionals or others with specialized expertise in infectious diseases or COVID-19—the evidence recited above establishes a more than “reasonable fit,” *Chester*, 628 F.3d at 683, between the Governor’s objectives and his chosen means. See pp. 1–3, 11, *supra*. Nothing more is required.<sup>17</sup>

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<sup>17</sup> Plaintiffs spill much ink over an advisory memorandum recently issued by the U.S. Department of Homeland Security. See Compl. ¶¶ 63–69. But, as plaintiffs have since acknowledged, that guidance “is advisory in nature, and does not bind the states.” Mem. in Supp. of Pls.’ Mot. to Remand (ECF No. 3) at 4, *Lynchburg Range & Training, LLC v. Northam*, No. 6:20-cv-00020 (W.D. Va. Apr. 13, 2020). And indeed, the very first page of that guidance notes (in bold) that it “is not, nor should it be considered, a federal directive or standard,” and “[i]ndividual jurisdictions should add or subtract essential workforce categories *based on their*

### C. Plaintiffs' remaining claims lack merit

Plaintiffs also assert that the Governor violated the Suspension Clause and request a writ of mandamus ordering the Governor to “provide notice” that indoor shooting ranges “are no longer shut down” and that no law enforcement official “has the discretion to enforce” the temporary closure of such ranges. Compl. ¶¶ 44–47, 86–88. Those claims fail as well.

1. Article I, § 7 of the Virginia Constitution states “[t]hat all power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.” But here, the Governor has not “suspend[ed]” the operation of any “laws,” and he acted pursuant to authority expressly granted to him by the General Assembly and the state constitution. See Part I(A), *supra*.

Those two features of this case make clear why plaintiffs’ efforts (at ¶¶ 44–47) to analogize it to *Howell v. McAuliffe*, 292 Va. 320 (2016), fall flat. In *Howell*, the Court concluded that the Governor had “abrogated” and “rewritten” “a general rule of law” specifically set out in the state constitution and replaced it with a different one. *Howell*, 292 Va. at 349 (citing Va. Const. art. II, § 1). The Court concluded that nothing in the Constitution of Virginia granted the Governor that power and that the Governor’s action was “irreconcilable” with a specific limitation contained in another provision (Va. Const. art. V, § 12). *Howell*, 292 Va. at 342. Because the narrow portion of EO 53 that plaintiffs challenge has not rewritten any “general rule of law”—and, just as importantly, because the Governor had clear statutory and constitutional authority to issue it—*Howell* is inapposite.

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*own requirements and discretion.*” Director Christopher Krebs, *Advisory Memorandum on Identification of Essential Infrastructure Workers During COVID-19 Response* at 1, Cybersec. & Infrastructure Sec. Agency (Mar. 28, 2020) (CISA Memo), [https://www.cisa.gov/sites/default/files/publications/CISA\\_Guidance\\_on\\_the\\_Essential\\_Critical\\_Infrastructure\\_Workforce\\_Version\\_2.0\\_Updated.pdf](https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf) (emphasis added). That is precisely what the Governor has done here.

2. Plaintiffs’ request for the “drastic” remedy of mandamus fares no better. *Hertz v. Times-World Corp.*, 259 Va. 599, 607 (2000) (citation omitted). Because mandamus represents “an extraordinary remedial process,” a party seeking it must establish that “the right involved and the duty sought to be enforced are clear and certain,” that “there is no other available specific and adequate remedy,” and that the “duty [to be enforced] is purely ministerial and is imposed upon the official by law.” *Id.* at 607–08 (citation omitted).

Plaintiffs come nowhere close to meeting that high burden. As previously explained, plaintiffs cannot establish that *any* of their claims are likely to succeed on the merits. Plaintiffs have also previously described their own claims as raising “complex[] and unsettled issues of state law,” Hr’g Tr. 10:12 (Apr. 13, 2020) (Exhibit H), thus effectively conceding that they cannot make the “clear and certain” showing necessary to obtain mandamus, *Hertz*, 259 Va. at 608 (citation omitted). Nor have plaintiffs identified any “ministerial” duty the Governor has violated, much less any “law” imposing such a duty. *Id.* at 607.

## **II. Plaintiffs have not established irreparable harm**

Plaintiffs also have failed to carry their separate burden of showing that “irreparable injury is *likely* in the absence of an injunction.” *Winter*, 555 U.S. at 22.

1. Plaintiffs’ initial allegations of irreparable harm involve the monetary losses that shooting ranges fear they will incur in light of the Governor’s temporary closure. See Compl. ¶¶ 71–73. But those are precisely the sorts of *economic* impacts that are generally insufficient to establish irreparable harm, and plaintiffs have made no attempt to prove their conclusory claim that “[i]t would be exceedingly difficult to calculate the monetary harm suffered by the ranges and their employees.” ¶ 71. Indeed, courts make precisely those sorts of calculations in a variety of cases every day. Compare *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 61–62 (2008); accord *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Op. Co.*, 22 F.3d

546, 551 (4th Cir. 1994) (stating that, to show “irreparable injury” based on “monetary damages,” the plaintiff must show such damages “are difficult to ascertain or are inadequate”).

Plaintiffs also assert that they can show irreparable harm because, had they brought a damages claim, “the [S]tate could and certainly would assert sovereign immunity.” Compl. ¶ 72. Plaintiffs cite no authority for the assertion that a defendant’s ability to assert *defenses* to a claim for monetary relief entitles a plaintiff to an injunction—an argument that, if true, would deprive sovereign immunity of much of its force. At any rate, plaintiffs could have sought monetary damages by bringing a claim under 42 U.S.C § 1983 for violations of federal law. Although plaintiffs’ re-filed suit no longer alleges violations of the Second Amendment, a plaintiff cannot manufacture its own irreparable injury by choosing to drop otherwise-available claims.

2. Plaintiffs further contend that, without an injunction, their patrons and members will be “unable to fully exercise their firearms rights due to their inability to use these ranges to learn, practice, and hone their shooting skills.” Compl. ¶ 74; see also ¶¶ 75, 77 (alleging that “experienced individuals will lose some proficiency if they are not able to maintain some training, and new purchasers of firearms will not be able to gain experience”). But those patrons and members remain free to “learn, practice, and hone their shooting skills” in any number of ways—including at shooting ranges, so long as they are outdoors—during the current emergency. See p. 13, *supra*. A *temporary* inability to use *a subset* of shooting ranges in the Commonwealth does not constitute the kind of irreparable harm warranting the “extraordinary remedy” of a temporary injunction. *Winter*, 555 U.S. at 22.

### **III. The balance-of-equities and public-interest factors foreclose equitable relief**

Any harm plaintiffs may experience if this Court denies a temporary injunction must be balanced against the catastrophic and permanent harm that others could suffer if the Court grants one. See *Winter*, 555 U.S. at 24 (“courts must balance the competing claims of injury and must

consider the effect on each party of the granting or withholding of the requested relief” and “should pay particular regard for the public consequences in employing the extraordinary remedy of injunction”) (quotation marks and citation omitted). Attempting to apply this framework, plaintiffs compare what they see as the “impossible-to-estimate risk of transmission of [the] flu-like ‘Coronavirus Disease 2019’” with the “definite, concrete, and irreparable harm” that they will allegedly experience in the absence of an injunction. Compl. ¶ 78. But any reasonable balancing weighs strongly against an injunction here.

1. Plaintiffs’ efforts to minimize the impact of what they call the “flu-like” COVID-19 (at ¶ 78) betray a startling indifference to the loss of human life and a deep misunderstanding of the disease. In just a few months, the disease has already infected well over *two million* and killed nearly *two hundred thousand* people worldwide, see Oliver Aff. ¶ 8, and, according to one epidemiologist, it is *twenty times* more deadly than the flu.<sup>18</sup> Unlike the seasonal flu, there is “no proven treatment or cure for COVID-19,” Oliver Aff. ¶ 9, and researchers have discovered that one-in-ten middle-aged patients hospitalized with the virus do not survive.<sup>19</sup> Although plaintiffs point to indications that Washington State (where early and stringent implementation of social distancing has gained praise) may ultimately see lower death rates than initially anticipated, see Compl. ¶ 78, evidence indicates that many COVID-19-related deaths go undetected.<sup>20</sup> And to the extent different models offer different projections regarding the disease’s transmission rate, “all

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<sup>18</sup> Tom Duszynski, *Coronavirus and Flu: Why COVID-19 Poses More of a Threat*, World Econ. Forum (Mar. 9, 2020), <https://tinyurl.com/scdwcxt> (“The death rate of the seasonal flu varies but is about 0.1% compared to about 2% for COVID-19.”).

<sup>19</sup> Joel Achenbach, *Medical Databases Show 1 in 10 Hospitalized Middle-Aged Coronavirus Patients in U.S. Do Not Survive*, Wash. Post (Apr. 11, 2020), <https://tinyurl.com/u37f3x4>.

<sup>20</sup> Emma Brown et al., *Coronavirus Death Toll: Americans Are Almost Certainly Dying of Covid-19 But Being Left Out of the Official Count*, Wash. Post (Apr. 5, 2020), <https://tinyurl.com/w7km7br>; see also Oliver Aff. ¶ 22.

models agree that the institution of social distancing measures greatly decreases the incidence and mortality of COVID-19.” Oliver Aff. ¶ 24; see also Forlano Aff. ¶¶ 4–7.

Here, the almost-inevitable result of granting the requested relief would be increased transmission of a deadly disease. Public-facing businesses like shooting ranges are “strong candidates for COVID-19 transmission” because “they bring people who do not share the same household into proximity with one another and often involve or allow the sharing of spaces and items.” Oliver Aff. ¶ 20. For “[i]ndoor areas,” this risk is compounded “because of the way the virus spreads—through respiratory droplets from an infected person.” *Id.*; see also Forlano Aff. ¶ 7 (“Because COVID-19 is spread through respiratory droplets, indoor areas pose a higher risk for transmission.”). Moreover, “[t]he nature of indoor recreational and entertainment businesses . . . makes it difficult, if not impossible, to effectively comply with social distancing requirements,” Oliver Aff. ¶ 20, in part because of “traffic patterns at entrances, exits, other doorways, cashiers, and other shared spaces such as parking lots, tables, and restrooms,” Forlano Aff. ¶ 8; accord Albiges, *supra* note 6. For that reason, “restricting public access to a range of recreational businesses, including indoor shooting ranges,” is a key component of Virginia’s “efforts to encourage social distancing and slow the spread of COVID-19.” Forlano Aff. ¶ 7.<sup>21</sup> The Commonwealth’s social distancing measures have proven effective to this point, by one estimate halving transmission rates. Oliver Aff. ¶ 24. But the situation remains tenuous, and this Court should reject plaintiffs’ invitation to second-guess public health experts at such a crucial juncture.

2. Plaintiffs insist that any “risk would be borne primarily by persons who choose to

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<sup>21</sup> Although plaintiffs tout the ventilation system at one plaintiff’s range, Compl. ¶ 18, they offer no evidence that such systems have proven effective in mitigating the spread of COVID-19—nor do they suggest that the other ranges they seek to re-open have such systems.



accept that risk—customers of ranges and employees of ranges.” Compl. ¶ 79. But we know that is wrong. As tragic experience elsewhere has already shown, the virus spreads rapidly throughout communities, and when healthcare systems become overrun, patients and healthcare workers suffer. Oliver Aff. ¶ 7.<sup>22</sup> Because “the granting . . . of the requested relief” could seriously undermine efforts to protect public health, as well as inflict massive and permanent irreparable harm on numerous third parties, the balance of equities and public interest factors tip decisively against granting the “extraordinary remedy” plaintiffs seek. *Winter*, 555 U.S. at 24.<sup>23</sup>

\* \* \*

Plaintiffs obviously “disagree[e] with the [Governor’s] assessment” about the need to temporarily close certain businesses to the public. *Freemason Street Area Ass’n v. City of Norfolk*, 100 Va. Cir. 172, at \*12 (Norfolk Cir. Ct. 2018). But the Court should “seriously heed the [Governor’s] conclusion that public safety” requires such a step and be especially “reluctant” to discount the careful assessments upon which it was made. *Id.*

## CONCLUSION

The motion for a temporary injunction should be denied.

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<sup>22</sup> See also Lenny Bernstein et al., *Covid-19 Hits Doctors, Nurses and EMTs, Threatening Health System*, Wash. Post (Mar. 17, 2020) (explaining that “the virus is picking off doctors, nurses and others needed in the rapidly expanding crisis”), <https://tinyurl.com/wd78bf8>.

<sup>23</sup> Plaintiffs’ public-interest argument again relies on advisory guidance from a federal agency. See Compl. ¶ 85. Even putting aside plaintiffs’ efforts to walk back their reliance on that document, see *supra* note 17, EO 53 is fully consistent with it. The memorandum describes as “essential” “workers supporting the operation of . . . shooting ranges” and encourages “[p]romoting the ability of *such workers* to continue to work.” CISA Memo, *supra* note 17, pp. 3, 6 (emphasis added). EO 53 merely closes certain shooting ranges to the public (¶ 4), and does nothing to regulate the employees of those ranges.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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