V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

SHOWMASTERS, INC. *et al.*,	)	
	)	
Plaintiffs,	)	Civil Action No. 2020 18145
	)	
v.	)	
	)	
HON. RALPH S. NORTHAM *et al.*,	)	
	)	
Defendants.	)	

INTRODUCTION

The COVID-19 pandemic raises extraordinarily difficult questions for elected officials and other policymakers. The virus is deadly and spreads with devastating ease. Well-intentioned people can unknowingly infect others. There is currently no vaccine or cure. Millions have been infected in the United States alone, and hundreds of thousands have already died.

As Justice Antonin Scalia observed more than two decades ago, "[w]e 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." *Schenck v. Pro-Choice Network*, 519 U.S. 357, 393 (1997) (Scalia, J., dissenting). Virginia is no different. As Governor, Dr. Ralph S. Northam was elected by the people to be the Commonwealth's chief executive. And, under the Virginia Services and Disaster Law of 2000 (Emergency Law), he serves as Director of Emergency Management, vested with "emergency powers." Va. Code Ann. §§ 44-146.14(2), 44-146.17.

Pursuant to that authority—and assisted by a team of experts, including the Health Commissioner—the Governor has taken evidence-based measures to slow COVID-19's spread, save lives, and protect public health. The Governor is keenly aware of the toll these measures have taken on all Virginians. But the Governor's chosen measures have also been working, by one estimate halving the transmission rate from what it would have been without them.

Petitioner asks this Court to second-guess the Governor's choices and decide—without a staff of experts or even the normal course of litigation—when, how, and under what conditions Virginia should permit certain activities to occur. The law does not require such extraordinary (and potentially deadly) judicial guesswork. To the contrary, as the United States Supreme Court emphasized, "[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); see *Ragsdale v. City of Danville*, 116 Va. 484, 485 (1914) (citing *Jacobson* as "[a]n instructive discussion" of state's "police power" to protect public health). Because Virginia law authorizes the Governor and the State Health Commissioner to do exactly what they did here—make difficult decisions about how to guide the Commonwealth through an unprecedented public health crisis—plaintiffs' motion for injunctive relief and the petition for mandamus should be denied.

STATEMENT OF THE CASE

1. Since March of this year, public health authorities have been working to slow the spread of COVID-19, a novel coronavirus that causes a pneumonia-like illness and proves fatal to some percentage of those who contract it. See generally *Lighthouse Fellowship Church v. Northam*, No. 2:20CV204, 2020 WL 2110416, at *1–3 (E.D. Va. May 1, 2020). To date, more than 55 million people have been infected with COVID-19 worldwide, and 1.3 million have died.[1] Virginia's death toll stands at 3,835 as of November 17, 2020—a number that continues to climb.[2] More than 200,000 COVID-19 cases have been reported in the Commonwealth,

[1] Johns Hopkins Univ., Center for Systems Science & Engineering, *Coronavirus Resource Center*, https://coronavirus.jhu.edu/map.html (last visited Nov. 18, 2020).

[2] Virginia Department of Health, Coronavirus in Virginia, https://www.vdh.virginia.gov/coronavirus/ (last visited Nov. 17, 2020).

including more than 27,000 in Fairfax alone.[3]

2. One thing that makes COVID-19 so deadly is the ease with which it spreads. The virus is transferred by in-person interactions, either between people in close contact or through respiratory droplets when an infected person coughs, sneezes, or talks.[4] Infected persons may not show symptoms for days (if at all) and may unknowingly spread the virus to others during their asymptomatic period, which makes controlling the virus' spread even more difficult.[5]

3. In March 2020—as the virus was just emerging—the Governor imposed significant but temporary restrictions on Virginians' daily lives that were necessary to protect public health. Those restrictions included:

- "Cessation of all in-person instruction at K-12 schools . . . for the remainder of the 2019-2020 school year";
- Limiting "restaurants" and other "dining establishments" to "delivery and take-out services";
- Closing "all public access to recreational and entertainment businesses" such as fitness centers, massage parlors, and concert venues;
- Directing certain "brick and mortar retail business[es]" to "limit all in-person shopping to no more than 10 patrons per establishment"; and
- Issuing a "temporary stay at home order" according to which "[a]ll individuals in Virginia" were directed to "remain at their place of residence" subject to certain exceptions and otherwise "maintain social distancing of at least six feet from any other person, with the exception of family or household members or caretakers."

See Executive Order Number Fifty-Three (EO 53) ¶¶ 2–4, 6; Executive Order Number Fifty-

[3] *Id.*

[4] Centers for Disease Control & Prevention, Coronavirus Disease 2019 (COVID-19), *Frequently Asked Questions*, https://www.cdc.gov/coronavirus/2019-ncov/faq.html (last visited Nov. 17, 2020).

[5] *Id.*

Five (EO 55) at 1.[6]

The early measures also included a temporary restriction on gatherings of more than 10 people. Under Executive Orders 53 and 55 (both issued in late March), "[a]ll public and private in-person gatherings of more than ten individuals" were "prohibited," including "parties, celebrations, religious, or other social events," whether "indoor or outdoor." EO 55 ¶ 2; Amended Executive Order Number Fifty-Three (Amended EO 53) ¶ 1 (continuing temporary gatherings restriction "as further clarified in Executive Order 55").[7] Violations of the temporary gathering restriction were punishable as a Class 1 misdemeanor as provided in Virginia Code § 44-146.17. See EO 55 at 2.[8]

4. In the months since Executive Orders 53 and 55 were issued, Governor Northam has developed a phased plan to safely reopen businesses and restart activities in Virginia. From the beginning, the phases have been designed to incrementally ease restrictions while remaining vigilant about the ongoing threat posed by COVID-19.[9]

a. Phase One began on May 15, 2020, and was set out in Executive Order Number

[6] EO 53 is available at: https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf. EO 55 is available at: https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf.

[7] Amended EO 53 is available at: https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-AMENDED---Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf.

[8] These restrictions—including the temporary gatherings restriction—were consistent with measures adopted around the same time in many, if not most, other States. See generally Nat'l Governors Ass'n, *Coronavirus State Actions*, https://www.nga.org/coronavirus-state-actions-all/ (Sept. 2, 2020).

[9] See Forward Virginia Guidelines, https://www.virginia.gov/coronavirus/forwardvirginia/ (last visited Nov. 18, 2020).

Sixty-One and Order of Public Health Emergency Three (EO 61).[10] EO 61 reiterated that the restrictions imposed in prior orders were designed "to slow the spread of [COVID-19]" and "were necessary to save lives." EO 61 at 1. These measures "lowered transmission rates" and "also prevented [Virginia's] healthcare systems from being overwhelmed—affording . . . healthcare systems and healthcare providers time to acquire the tools and resources necessary to respond to the virus." *Id.* EO 61 further explained that, because the "efforts and sacrifices" undertaken "seem to have slowed the spread of the virus," it was appropriate to "ease some of the restrictions." *Id.* at 2. At the same time, EO 61 emphasized that "[t]he path forward will not be business as usual," that the virus "is still present," and that Virginians must "remain vigilant, cautious, and measured" in the next phase of the response. *Id.*

Specifically, EO 61 abrogated the stay-at-home order and permitted restaurants and other food service establishments to begin serving on outdoor patios, provided that occupancy did not exceed "50% of the lowest occupancy load on the certificate of occupancy" and social-distancing and hygiene requirements were followed. EO 61 at 2–3. Subject to compliance with similar (but tailored) social-distancing and hygiene requirements, EO 61 also permitted farmers markets to open; fitness centers to open for outdoor activities; personal care businesses and indoor shooting ranges to open to 50% of occupancy capacity; non-essential retail businesses to expand opening to 50% capacity; and campgrounds to open for short-term stays. *Id.* at 3–6. In addition, EO 61 modified the temporary gatherings restriction to permit residents to attend religious services, provided that such services were "limited to no more than 50% of the lowest occupancy load on the certificate of occupancy of the room or facility in which [the services] are conducted" and

[10] EO 61 is available at: https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-61-and-Order-of-Public-Health-Emergency-Three---Phase-One-Easing-Of-Certain-Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf.

social distancing and hygiene requirements were followed. *Id.* at 7–8.

b. Most of the Commonwealth entered Phase Two on June 5, 2020. See Amended Executive Order Number Sixty-Five and Amended Order of Public Health Emergency Six (EO 65).[11] Under Phase Two, restaurants were permitted to operate "take-out, and indoor and outdoor dining and beverage services," so long as they complied with relevant guidelines, including limiting occupancy to 50% of the lowest occupancy load, restricting parties to 50 patrons or less, seating parties at least six feet apart, requiring employees to wear face coverings, and regularly and thoroughly disinfecting surfaces. *Id.* at 2–3. Fitness centers were permitted to open to 30% of occupancy capacity, and the in-person gatherings restriction was eased to permit gatherings of up to 50 people. EO 65 at 4, 11.

c. Phase Three began on July 1, 2020. See Executive Order Number Sixty-Seven and Order of Public Health Emergency Seven (EO 67).[12] Under Phase Three, indoor entertainment venues were permitted to open, indoor and outdoor recreational sports activities were allowed, and the temporary gatherings restriction was eased to permits in-person gatherings of up to 250 individuals. EO 67 at 7–10 (describing required parameters).[13]

5. This Fall has brought a dangerous surge in COVID-19 cases in the Commonwealth and throughout the Nation. In the last 14 days, all 50 States plus Washington,

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[11] EO 65 is available at: https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-65-and-Order-Of-Public-Health-Emergency-Six---AMENDED---Phase-Two-Easing-of-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-(COVID-19).pdf.

[12] EO 67 is available at: https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-67-and-Order-of-Public-Health-Emergency-Seven---Phase-Three-Easing-of-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-(COVID-19).pdf.

[13] Due to rising case counts, restrictions were tightened in some regions over the summer, see Amended Executive Order Sixty-Eight and Order of Public Health Emergency Eight, and later eased, see Third Amended Executive Order Number Sixty-Seven and Order of Public Health Emergency Seven.

D.C., have seen a rise in COVID-19 cases, and infections have spiked by 100 percent or more in at least 10 States.[14] As of November 12, 2020, one in every 378 Americans tested positive for COVID-19.[15] The number of patients hospitalized with COVID-19 has also grown dramatically, setting new records six of seven days since last week.[16] As a result of this recent increase, 22% of all American hospitals report that they expect to face a staffing shortage.[17]

The Commonwealth has not been immune. Virginia public health authorities are currently reporting an average of approximately 1,500 new COVID-19 cases per day—higher than the previous statewide peak of approximately 1,200 in May.[18] Hospitalizations have increased by more than 35% in the last four weeks. *Id.* This trend shows no sign of slowing down and may very well intensify: Across the Commonwealth, 25 out of 35 local health districts are in growth trajectories, including eight districts where rates are surging.[19] The growing number of cases and hospitalizations means that health care systems in some regions could face a strain as

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[14] Peter Alexander and Corky Siemaszko, *Covid-19 Cases Are on the Rise in All 50 States, NBC News Data Shows*, NBC News (Nov. 17, 2020, 6:47 PM), https://www.nbcnews.com/news/us-news/covid-19-cases-are-rise-all-50-states-nbc-news-n1248006.

[15] The COVID Tracking Project, *Weekly Update* (Nov. 12, 2020), https://covidtracking.com/blog/weekly-update-nov-12.

[16] Adam Martin, *U.S. Covid-19 Hospitalizations Continue to Set Records*, The Wall Street Journal (Nov. 17, 2020), https://www.wsj.com/livecoverage/covid-2020-11-17/card/5t5hVWZofaQBPc7knNYY.

[17] Alexis C. Madrigal, *Hospitals Can't Go on Like This*, The Atlantic (Nov. 17, 2020), https://www.theatlantic.com/science/archive/2020/11/third-surge-hospitals-staffing-shortage/617128/.

[18] Sixth Amended Executive Order Number Sixty-Seven and Order of Public Health Emergency Seven (Compl. Ex. A) is available at: https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-67-SIXTH-AMENDED-and-Order-of-Public-Health-Emergency-Seven---Phase-Three-Further-Adjusting-of-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-(COVID-19).pdf.

[19] See UVA COVID-19 Model Weekly Update (Nov. 13, 2020), https://www.vdh.virginia.gov/content/uploads/sites/182/2020/11/UVA-COVID-19-Model-Weekly-Report-2020-11-13.pdf.

early as next month.[20] In Fairfax, worsening public health metrics have led public schools to delay additional in-person learning scheduled to begin this week.[21]

6. In response to the dangerous rise in cases throughout the Commonwealth—and in recognition of the potential for hospitals to be overwhelmed if trends continue—the Governor and the State Health Commissioner imposed certain targeted restrictions on various businesses and activities while otherwise keeping the Commonwealth in Phase Three of the Reopening Plan. Under the current restrictions, restaurants and other establishments are prohibited from selling alcohol after 10 p.m. and from offering in-person dining between midnight and 5 a.m. See Sixth Amended Executive Order Number Sixty-Seven and Order of Public Health Emergency Seven at 1 (Nov. 13, 2020) (Compl. Ex. A) (Sixth Amended EO 67). Fitness centers are permitted to remain open at 75% of the lowest occupancy load and must limit in-person classes to no more than 25 persons. *Id.* at 4. Sporting events are limited to no more than 25 spectators, or 250 for marathons or other races. *Id.* at 7, 8, 10. In-person gatherings are now limited to 25 persons (down from 250), although larger religious services remain permitted. *Id.* at 11. And, as most relevant here, "Entertainment and Amusement Businesses"—which are defined to include "[p]eforming arts venues, concert venues, sports venues," "entertainment centers," "and other indoor places of public amusement"—are subject to a capacity limitation of "the lesser of 30% of the lowest occupancy load on the certificate of occupancy . . . or 250 persons." *Id.* at 9.

7. Plaintiffs are a gun-show promoter, a firearms dealer, and prospective gun-show

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[20] See University of Virginia, Biocomplexity Inst., *Estimation of COVID-19 Impact in Virginia* (Nov. 11, 2020), https://www.vdh.virginia.gov/content/uploads/sites/182/2020/11/COVID-19_VA_Spread_11-November-2020.pdf.

[21] Drew Wilder, *Fairfax County Schools Delay In-Person Learning for Some as Covid Cases Surge*, NBC Washington (Nov. 16, 2020, 11:37 PM), https://www.nbcwashington.com/news/coronavirus/fairfax-county-schools-delay-in-person-learning-for-some-as-covid-cases-surge/2477163/.

attendee who intend to hold, sell at, or attend The Nation's Gun Show, which is scheduled to take place at the Dulles Expo Center in Chantilly beginning on Friday, November 20, 2020. Plaintiffs concede that they do not know how many people are likely to attend the gun show this year, but anticipate that participation could "easily surpass" prior years (Compl. at 9), when 23,000 people attended (Elliott Aff. at 3). Plaintiffs contend that they cannot proceed with the show under the currently applicable guidelines and will cancel if they remain subject the 250-person occupancy restriction. Accordingly, plaintiffs request either a temporary injunction and/or writ of mandamus excusing them from the restrictions applicable to all other similar events on the ground that the order is arbitrary, *ultra vires*, and violates numerous provisions of the Virginia Constitution.

LEGAL STANDARD

Although "[n]o Virginia Supreme Court case has definitively set out standards to be applied in granting or denying a [temporary] injunction," Virginia courts "follow[ ] [the] standards delineated in the four-part test used by the federal courts." *School Bd. of City of Richmond v. Wilder*, 73 Va. Cir. 251, at *2 (Richmond Cir. Ct. Apr. 6, 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).

"A writ of mandamus is an extraordinary remedial process, which is not awarded as a matter of right but in the exercise of a sound judicial discretion." *Gannon v. State Corp. Comm'n*, 243 Va. 480, 482 (1992) (internal citation omitted). "Due to the drastic character of the

writ, the law has placed safeguards around it." *Id.* "Consideration should be had for the urgency which prompts an exercise of the discretion, the interests of the public and third persons, the results which would follow upon a refusal of the writ, as well as the promotion of substantial justice." *Id*. "In doubtful cases, the writ will be denied" and will be granted only "where the right involved and the duty sought to be enforced are clear and certain." *Id.*

ARGUMENT

There is no escaping the breathtaking sweep of plaintiffs' claims. According to plaintiffs:

- the Governor has *no authority* to close businesses or limit the number of people who may be present at certain facilities during a declared emergency, even when necessary to protect public health;
- *nearly all* of the measures the Governor has taken to fight the spread of COVID-19 are *ultra vires* and unenforceable; and
- *no such measures may be taken in the future*, no matter how fast the virus spreads, how high the death toll rises, or how effective those measures have proven to be.

Accepting plaintiffs' arguments would cripple the Commonwealth's ability to address the ongoing emergency caused by COVID-19. And that, in turn, would put the health of Virginians at enormous risk, threaten the viability of the state healthcare system, and frustrate efforts to safely resume all economic activity.

Fortunately, plaintiffs' arguments are wrong on the merits. Moreover, given the public-health consequences of invalidating restrictions imposed to fight a still-ongoing global pandemic, the equities also weigh heavily against granting plaintiffs the extraordinary remedies of a temporary injunction or mandamus.

I. Plaintiffs cannot show a substantial likelihood of success on the merits

A. The Dulles Expo Center is not a "Brick and Mortar Retail Business"

Throughout their complaint (*e.g.*, at 13, 17), plaintiffs mistakenly suggest that the challenged executive order directly regulates The Nation's Gun Show. It does not. Rather, the show is affected by the executive order because of *the location* it has selected—the Dulles Expo Center (Center).[22]

The Center is an exhibition venue frequently rented to promoters who gather vendors to sell products and services to the public. See https://www.dullesexpo.com/. In addition to the Nation's Gun Show, the Dulles Expo Center will host or has hosted a variety of events through the Fall and Winter of 2020 and 2021, including the 27th Annual Northern Virginia Christmas Market, the International Gem and Jewelry Show, the Super Pet Expo, the Capital Art and Crafts Festival, and the DC Big Flea and Antiques Market. *Id.* (Schedule of Events).

When events like those listed above are not in session, however, the Dulles Expo Center sells nothing. For that reason, *the Center* cannot possibly be a "Brick and Mortar Retail Business."[23] Rather, the Center is properly characterized as an entertainment *venue*—one that, like a concert or sports venue, brings large numbers of people together at regular intervals for public events and, in so doing, creates a greater risk of COVID-19 transmission than other venues, such as outdoor concert halls or facilities used for routine activities like grocery shopping. Accordingly, there is nothing "arbitrar[y] or capricious[]" about classifying the Dulles Expo Center as an "Entertainment or Amusement Business[]" and subjecting it to the same

[22] Because the challenged restrictions regulate the Dulles Expo Center—not plaintiffs—it is not clear that plaintiffs (as opposed to the Center) have standing to challenge them.

[23] Nor does "rent[ing] tables to many Federal Firearms Licensees and other vendors" at periodically held events (Elliott Aff. at 2) make The Nation's Gun Show a brick and mortar retail business either.

standards as movie theaters, convention centers, arenas, and the like.

B. The executive order is authorized by law[24]

Plaintiffs' bottom-line claim is that the Governor and Health Commissioner have no authority to issue executive orders like the one challenged here. Compl. at 16. According to plaintiffs, neither the Governor's constitutional authority, the authority granted to the Governor under the Emergency Law, nor the authority afforded both the Governor and the Health Commissioner under Title 32.1 of the Code of Virginia empower either official to order the closure of "lawful businesses" (something that, to be clear, has not been done under the existing order) much less businesses that so much as touch on gun sales and ownership. See *Id.* at 17.

Those are staggering assertions. Under plaintiffs' view, Virginia's executive branch is largely powerless to respond to an ongoing, once-in-a-century global pandemic—a result that would eviscerate the Commonwealth's efforts to slow the disease's spread and inflict an unknown (and unknowable) toll on Virginians. Fortunately, plaintiffs are also wrong—as multiple courts in the Commonwealth have held over the last few months.[25]

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[24] To the extent plaintiffs' claims rest on the allegations that the Governor has exceeded his *statutory* authority, their claims fail at the threshold because the Emergency Law affords no private right of action. See *Stoney v. Anonymous*, No. 200901, 2020 WL 5094625 at *3–4 (Va. Aug. 26, 2020).

[25] Courts have repeatedly rejected requests for injunctive relief against the Governor's COVID-19 orders, including from others making similar arguments to plaintiffs. See *Hall v. Northam*, No. CL 2000632-00 (Culpeper Cir. Ct. Apr. 30, 2020), *pet. refused*, No. 200582 (Va. May 19, 2020); *Dillon v. Northam*, No. CL20-3812, 2020 WL 4381655 (Norfolk Cir. Ct. July 30, 2020); *Tigges v. Northam*, No. 3:20-CV-410, 2020 WL 4197610 (E.D. Va. July 21, 2020); *Schilling v. Northam*, No. CL20-799 (Albemarle Cir. Ct. July 20, 2020); *Strother v. Northam*, No. CL20-260 (Fauquier Cir. Ct. June 29, 2020); *SEG Properties, LLC v. Northam*, No. CL20-2818 (Loudoun Cir. Ct. June 10, 2020); *Diaz-Bonilla v. Northam*, No. 1:20-cv-00377 (E.D. Va. June 5, 2020); *Bareford v. Northam*, No. 4:20-cv-50 (E.D. Va. May 8, 2020); *Lighthouse Fellowship Church v. Northam*, No. 2:20CV204, 2020 WL 2110416 (E.D. Va. May 1, 2020); *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, 2020 WL 1955281 (E.D. Va. Apr. 8, 2020). The sole exception—*Lynchburg Range & Training, LLC et al.*

1. The Emergency Law

a. The Emergency Law specifically grants the Governor broad authority to act during emergencies. "Because of the ever present possibility of the occurrence of disasters of unprecedented size and destructiveness," the General Assembly found it "necessary" to "confer upon the Governor . . . emergency powers." Va. Code Ann. § 44-146.14(a). Among those powers is the authority to "declare a state of emergency" and "to issue *such orders* as may, in his judgment, be necessary to accomplish *the purposes of* this chapter." § 44-146.17(1), (7) (emphasis added). The "purpose of" the Emergency Law is to "protect the public peace, health, and safety, and . . . preserve 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. For that reason, the challenged executive order—and the 250-person occupancy restriction specifically—falls comfortably within the scope of the Governor's authority under the Emergency Law.

b. Plaintiffs' contrary arguments are without merit. Plaintiffs insist that the Emergency Law does no more than authorize the Governor to "order[] evacuations of areas stricken or threatened by natural disasters, and issu[e] orders to control and allocate essential goods such as food and fuel" and that "there is no provision . . . that could possibly be construed as empowering the Governor to close entire categories of businesses throughout the Commonwealth." Compl. at 19. But plaintiffs do not actually cite—much less engage with—the statutory provisions they purport to analyze, and the language of those provisions simply confirms why plaintiffs are wrong.

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v. Northam et al., CL 200003-33 (Lynchburg Cir. Ct. Apr. 27, 2020) (*Lynchburg* Order)—involved materially different facts and is discussed in detail later in this brief.

i. The Emergency Law's language repeatedly makes clear that its descriptions of the Governor's authority are *inclusive* not *exclusive*. For example, paragraph one of Code § 44-146.17(1) provides:

> [The Governor is authorized] [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*** 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.

Va. Code Ann. § 44-146.17(1) (emphasis added).

Through the use of the words "including, but not limited to," the statutory text makes clear that the Governor is authorized to issue orders that go *beyond* providing supplies to affected areas. The "order" challenged here—which includes temporary occupancy limitations on certain businesses—was imposed after the Governor declared a state of emergency,[26] and was specifically premised on the authority conferred in Code § 44-146.17, see Sixth Amended EO 67 at 1. And there can be no dispute that the measures were, in the Governor's judgment, necessary to protect public health—because the orders say so expressly. See *id.* ("Although Virginians have done much to mitigate the spread of the virus, it is clear that additional measures are necessary. Accordingly, I order following additional restrictions.").

ii. Nor is the Governor's authority limited to the context of evacuations from areas affected by disasters. Although plaintiffs cite no specific provision of the Emergency Law, their argument appears to rest on Code § 44-146.17(1)'s third paragraph, which states:

> [The Governor] ***may*** direct and compel evacuation of all or part of the populace from any stricken or threatened area if this action is deemed necessary for the preservation of life, implement emergency mitigation, preparedness, response or

[26] See Amended Executive Order Number 51, available at: https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-51-AMENDED-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-(COVID-19).pdf.

> recovery actions; prescribe routes, modes of transportation and destination in connection with evacuation; and control ingress and egress at an emergency area, including the movement of persons within the area and the occupancy of premises therein.

Va. Code Ann. § 44-146.17(1) (emphasis added).

Here, plaintiffs advocate reading a specific grant of authority ("may") as a constraint on authority that was previously given ("may only"). But, even standing alone, that is not what "may" means, and nothing about paragraph three modifies or limits the powers granted to the Governor in Code § 44-146.17(1)'s *first* paragraph—which, as just described, vests the Governor with broad authority to issue orders that are, in his judgment, necessary to protect public health and safety. Indeed, if plaintiffs were correct, by conferring upon the Governor *additional* authority to order evacuations and take related actions, the General Assembly implicitly (and profoundly) limited the Governor's authority to issue *other* "orders as may, in his judgment, be necessary to accomplish the purposes of [the Emergency Law]." Va. Code Ann. § 44-146.17(1). That interpretation finds no support in the text of the Emergency Law or its purpose of ensuring the Commonwealth's capacity to protect "public peace, health, and safety." § 44-146.14(a).[27]

iii. Although this Court need look no further than the statutory text to determine that plaintiffs' position runs headlong into the General Assembly's intent in enacting the Emergency Law, recent events confirm the point. During its most recent session, the General Assembly *rejected* a bill that would have limited the Governor's authority in precisely the manner plaintiffs

[27] Indeed, the Loudoun County Circuit Court rejected such arguments from one of the same plaintiffs here—John Crump—explaining that "[i]t is clear from the plain language of the [Virginia Emergency Law] that, in times of emergency, the Governor's powers are exceptionally broad under Title 44." *SEG Props., LLC*, No. CL20-2818, at 5. Likewise, courts throughout the Commonwealth have rejected restrictive readings of the Emergency Law, instead concluding that the Emergency Law "provides broad discretion and relies on a Governor's judgment to determine how to handle the emergency." *Hall*, Case No. CL2000632-00, at 2; see also *Schilling*, CL20-799, at 5 (describing "the Governor's emergency powers" as "very broad").

advocate.

The bill in question—Senate Bill 5077—was referred to the appropriate committee and "passed by indefinitely" ten days later.[28] That bill would have stricken from the first paragraph of Code § 44.1-146.17 the very words just discussed: "in his judgement" and "including but not limited to." That same bill also would have amended the statute along the same lines plaintiffs suggest, by providing that "[a]n executive order issued under this statute *shall not* force the closing of any business, or any category of business or industry, either temporarily or permanently, *unless* . . . an order of quarantine or an order of isolation concerning a communicable disease of public health threat has been issued by the State Health Commissioner for an affected area of the Commonwealth pursuant to Article 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 of Title 32.1." See *id.* (emphasis added). In other words, confronted with the opportunity to restrain the Governor's authority under the Emergency Law in the very ways plaintiffs urge—and against the backdrop of multiple court opinions interpreting the statute to afford the Governor broad authority to enact exactly the sorts of measures plaintiffs challenge, see n.25, *supra*—the General Assembly declined to do so without so much as a committee vote.[29]

2. Authority outside the Emergency Law

The Emergency Law specifically provides that nothing in it "is to be construed to . . . [l]imit, modify, or abridge the authority . . . vested in [the Governor] under *other* laws of this

[28] See SB 5077, Emergency Laws; Limits powers and duties of the Governor, Virginia's Legislative Information System, available at https://lis.virginia.gov/cgi-bin/legp604.exe?202+sum+SB5077&202+sum+SB5077.

[29] Citing Code § 44-146.17(1), para. 5, plaintiffs also assert the Governor is erroneously relying on his authority under the Emergency Law to issue orders relating to quarantine or isolation. See Compl. at 25. That provision has no application here. And to the extent plaintiffs contend that the Governor's specific authority to issue orders related to quarantine or isolation implies that paragraph 1 should be read narrowly (contra the plain text), that argument fails for the reasons explained in the text.

Commonwealth *independent of, or in conjunction with*, any provisions of this chapter." Va. Code Ann. § 44-146.15(1) (emphasis added). Here, other provisions provide independent sources for the executive branch's authority to take action to protect the public health.

a. The Commissioner's authority under Title 32.1

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 that policy, the legislature has granted the executive branch broad 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.

The Sixth Amended EO 67—which was issued jointly with the Commissioner, specifically cites "the authority vested in the State Health Commissioner pursuant to [Code] §§ 32.1-13, 32.1-20, and 35.1-10," and is the *only* source of the restrictions currently in operation—is consistent with and supported by the authority provided under Title 32.1.

Plaintiffs' contrary contentions are without merit.[30]

Indeed, plaintiffs are seeking to have it both ways when it comes to Title 32.1. On the one hand, plaintiff insist that the particular attention afforded to public health threats in Title 32 means that the General Assembly cannot have meant what it said about the Governor's authority in the Emergency Law. Compl. at 25–27. On the other hand—despite specifically acknowledging that the Health Commissioner is the "responsible expert" designated by the General Assembly to act in this arena (Compl. at 26)—plaintiffs also attempt to dismiss or diminish the scope of the Commissioner's authority under Title 32.1. Both efforts fail.

i. Reduced to its essence, plaintiffs' first argument is that—during a time of declared emergency—this Court should ignore what the General Assembly said in a law that is specifically about emergencies (the Emergency Law) because of what it said in a different set of laws about public health (Title 32.1). That is plainly wrong.

ii. Plaintiffs fare no better in their efforts to challenge the scope of the Commissioner's authority under Title 32.1.[31]

First, plaintiffs argue that the Commissioner's orders—included Sixth Amended EO 67—are invalid because they were not issued pursuant to the Virginia Administrative Procedures Act (VAPA), Va. Code. Ann. § 2.2-4011). But the provision plaintiffs cite applies to "regulations" that can be issued by any agency when "necessitated by an emergency situation,"

[30] In rejecting similar arguments brought by one of the same plaintiffs here, the Loudoun County Circuit Court explained, "that the language of [Title 32.1] tasks the Commissioner with issuing regulations and orders to meet emergencies and suppress diseases" and "[s]imilar to the Governor's emergency powers, this language is extremely broad and . . . does not prohibit the Commissioner from issuing orders relating to businesses." *SEG Props*., No. CL20-2818, at 5.

[31] Plaintiffs' assertion that the Commissioner cannot issue unconstitutional orders, see Compl. at 29, is true but irrelevant because the orders are not unconstitutional. See Part I(C), *infra*.

Va. Code Ann. § 2.2-4011—not executive orders issued in response to a public-health emergency under Title 32.1.

The fact that the General Assembly could not have intended VAPA to apply in this situation is apparent by the cumbersome process required to enact even emergency regulations. Under Code § 2.2-4011, for example, before an agency may adopt any emergency regulations, it must "submit[] a request stating in writing the nature of the emergency" and must "consult[] with the Attorney General." That process is wholly inconsistent with the need for quick action in response to a public-health emergency. Moreover, Code § 2.2-4011 provides that "approval" for emergency regulations is "at the sole discretion of the Governor." Given plaintiffs' contention that the General Assembly could not have authorized Governor to usurp the Commissioner's authority to act in response to a public-health emergency (Compl. at 26), their VAPA argument is puzzling at best.

Second, plaintiffs argue that the Commissioner's authority to act on the Board's behalf is *implicitly* limited by a requirement that the Board must approve the Commissioner orders when it next meets or such orders automatically expire. Plaintiffs cite no authority for that proposition, and it is flatly inconsistent with the statute on which the Commissioner's power rests. That statute allows the Commissioner to act "when the Board is not in session." Va. Code. Ann. § 32.1-20. The Board was not in session when the Commissioner made his declaration of Public Health Threat and it was not in session when Sixth Amended EO 67 was issued. That is the end of the matter. There is no self-detonating clause in any of the Commissioner's orders and no reason to believe the General Assembly would have constrained the Commissioner's authority during a public-health crisis by implying one.[32]

[32] Because (as plaintiffs acknowledge) the Commissioner has not issued an order of quarantine or isolation, Virginia Code § 32.1-48.05 is inapposite. And to the extent plaintiffs

b. The Governor's authority under the Virginia Constitution

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, as previously noted, protecting the public health and safety in the face of a global pandemic is a quintessential executive function. Plaintiffs' broadsided assault on the Governor's constitutional authority is entirely without basis and does nothing to advance their argument.

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insist that the *Governor* cannot derive any authority from Title 32.1 because the Emergency Law "limits his authority to act in relation to title 32" to orders of quarantine and isolation (Compl. at 31), plaintiffs again misread the statute. When read in conjunction with the preceding paragraph, the provision in question—paragraph 5 of Code § 44-146.17(1)—simply provides that the Governor's power to issue executive orders *includes* those declaring an emergency and that, when such an order is issued, the order *may* (again, not must) "address exceptional circumstances that exist relating to an order of quarantine or an order of isolation." See Va. Code Ann. § 44-146.17(1).

C. The challenged actions are constitutional

Beyond contending that Sixth Amended EO 67 is *ultra vires*, plaintiffs also insist that it is unconstitutional. According to plaintiffs, the executive order violates Sections 7, 12, and 13 of Article I of the Virginia Constitution and likewise violates the Emergency Law *because* it infringes their right to keep and bear arms. Those claims are unpersuasive.

1. The Governor's policy decisions during a time of emergency are entitled to deference

Plaintiffs' constitutional challenges fail at the outset because they neither acknowledge nor engage with the relevant framework. The Supreme Court of Virginia has recognized that "[p]rompt action [is] required" in certain situations to protect "safety and welfare." *Boyd v. Commonwealth*, 216 Va. 16, 19 (1975) (per curiam). "Dealing with . . . an emergency situation requires an immediacy of action that is not possible for judges," *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971), and "[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); see *Ragsdale v. City of Danville*, 116 Va. 484, 485 (1914) (citing *Jacobson* as "[a]n instructive discussion" of state's "police power" to protect public health). 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.

It is hard to imagine a more appropriate circumstance for such deference than the current emergency. Authorities estimate that 1.5 to 2.2 million Americans could have died if governments did nothing to stop the virus, and a battery of evidence supports the conclusion that

minimizing close personal contact is necessary to curb its spread.[33] The Governor's step-by-step approach—including relaxing restrictions when the virus ebbed and reinstating them when it surged—refutes any suggestion that he acted arbitrarily or without due consideration of the difficult issues involved. Accordingly, the Governor's chosen strategy for slowing the spread of COVID-19 and saving lives warrants deference.

2. Petitioners' constitutional challenges fail on their own terms

Even without appropriate deference to the Governor's judgment, plaintiffs' challenges easily fail.

Anti-Suppression Provision

Plaintiffs contend that Sixth Amended EO 67 violates Article I, Section 7, which provides that "all power of suspending laws, or the execution of laws, by any authority, without the consent of the people is injurious to their rights, and ought not to be exercised." Va. Const. Art. I, § 7. That is incorrect.

1. The Virginia Supreme Court has already rejected a similar constitutional challenge to a previous Governor's exercise of emergency powers during an ongoing crisis. In *Boyd v. Commonwealth*, 216 Va. 16 (1975), the Governor relied on a predecessor statute to lower the statewide speed limit to 55 miles per hour. Like plaintiffs, the appellant in that case argued that the Governor's action violated various provisions of the Virginia Constitution, including those respecting the powers of the coordinate branches. See Appellant Br. at 5, 9–10, *Boyd v. Commonwealth*, 216 Va. 16 (1975), No. 740853. The Supreme Court of Virginia disagreed and unanimously upheld the Governor's actions and a resulting criminal conviction.

[33] See Sheri Fink, *White House Takes New Line After Dire Report on Death Toll*, N.Y. Times (Mar. 16, 2020), https://www.nytimes.com/2020/03/16/us/coronavirus-fatality-rate-white-house.html.

Boyd, 216 Va. at 21. If a Governor may temporarily modify a generally applicable rule of law (the speed limit) in response to a fuel shortage, he surely may order the temporary measures at issue here in response to a global pandemic that has killed more than a million people, and infected over 200,000 in Virginia alone.

2. *Boyd* also underscores why petitioners' heavy reliance on *Howell v. McAuliffe*, 292 Va. 320 (2016), falls flat. In *Howell*, the Supreme Court of Virginia held that a Governor had violated Article I, § 7 by "abrogat[ing]" and "rewrit[ing]" "a general rule of law" specifically set out in the state constitution and replaced it with a different one. 292 Va. at 349 (citing Va. Const. art. II, § 1). The Court concluded that nothing in the state constitution 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). 292 Va. at 342.

This case differs from *Howell* in nearly every pertinent respect. Here, unlike in *Howell* (and unlike in *Boyd*), Governor Northam has not suspended, abrogated, or rewritten any "general rule of law." *Howell*, 292 Va. at 349; see *Boyd*, 216 Va. at 17 n.2 (noting that statutorily prescribed speed limit was 70 miles per hour). Here, unlike in *Howell* (and like in *Boyd*), the Governor's actions do not conflict with any limitation on his authority and were taken pursuant to authority expressly granted to him by the General Assembly and the state constitution. See Part I(B)(1)–(2), *supra*. And here, unlike in *Howell*, there is no "unbroken historical record" casting doubt on the Governor's particular exercise of authority. 292 Va. at 341. Nor could there be. Whereas *Howell* concerned a routine matter that is specifically addressed in the state constitution and arises in every administration (restoration of rights for those convicted of crimes), *id.*, the actions challenged here involve a response to a once-in-a-century crisis.

Speech and Assembly

Plaintiffs also contend that, by subjecting *the Dulles Expo Center* to a 250 patron/participant limit, Sixth Amended EO 67 violates *their* right to speak and assemble. That argument fails on multiple levels.

1. For one thing, the challenged restriction does not regulate speech at all. Rather, it merely caps (at 250) the number of people who may congregate in a particular *venue* at any one time.

2. But even if some incidental impact on speech can be assumed, the challenged order easily survives constitutional scrutiny as a permissible time, place, and manner restriction. As plaintiffs acknowledge, "Article I, § 12 of the Constitution of Virginia is coextensive with the free speech provisions of the federal First Amendment," *Elliott v. Commonwealth*, 267 Va. 464, 473–74 (2004), and First Amendment jurisprudence has long held that the right may be subject to reasonable time, place, and manner restrictions, see *Cox v. New Hampshire*, 312 U.S. 569, 574–78 (1941); see also *York v. City of Danville*, 207 Va. 665, 669 (1967) ("While the rights of freedom of speech and assembly [under Article I, § 12] are fundamental, they are not absolute and must be exercised . . . in consonance with peace, good order and the rights of others."). That is precisely what is at issue here.

a. *First*, contrary to plaintiffs' heated assertions, the occupancy restriction applicable to the Dulles Expo Center is content neutral. "The principal inquiry in determining content neutrality . . . in time, place, or manner cases . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Here, it has not. The purpose of the challenged occupancy restriction has nothing anything to do with the content of any speech it may

incidentally curtail. And it applies to the Nation's Gun Show in precisely same way it would apply to *any other event* at the Dulles Expo Center or similar venue—be it the Pet Expo, the International Gems and Jewelry Show, and the DC Big Flea an Antiques market. Indeed, contrary to plaintiffs' bald speculation that the restriction was somehow designed to "further[] the political agenda of Governor Northam" (Compl. at 38), the restriction would also apply exactly the same way to an event held by gun-violence-prevention advocates in a similar venue.

b. *Second*, the restriction satisfies the applicable standard of scrutiny. When reviewing content-neutral time, place, and manner restrictions, courts "engage[ ] in a two-part analysis": "determin[ing] whether the regulation materially advances an important or substantial interest"; and, if so, "ask[ing] whether the regulation is narrowly tailored to serve that interest." *American Entertainers, L.L.C. v. City of Rocky Mount, N.C.*, 888 F.3d 707, 716 (4th Cir. 2018) (internal quotation marks, alterations, and citation omitted). Here, the answer to both questions is "yes."

i. The importance of the interest in preserving lives and health during a global pandemic requires little discussion. "The Government [ ] has a significant interest in protecting the health, safety, and welfare of its citizens," *Rubin v. Coors Brewing Co*., 514 U.S. 476, 485 (1995), and a "state's wish to prevent the spread of communicable diseases . . . constitutes a compelling interest." *Workman v. Mingo Cty. Bd. of Educ*., 419 Fed. Appx. 348, 353 (4th Cir. 2011). The challenged occupancy restriction materially advances that interest by implementing social-distancing measures designed to mitigate the spread of a novel and deadly virus that has killed thousands of Virginians and threatens hospital capacity across the Commonwealth.

ii. The restriction is also narrowly tailored. For these purposes, "[a] regulation is narrowly tailored . . . if it 'promotes a substantial government interest that would be achieved

less effectively absent the regulation' and does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Ross v. Early*, 746 F.3d 546, 552–53 (4th Cir. 2014) (quoting *Ward*, 491 U.S. at 799). The restriction directly promotes the interest in preserving life and health by implementing targeted social-distancing measures that reflect the recommendations of the Commonwealth's public health experts. It does not burden "substantially more speech than is necessary," *Id.* at 552, both because it is intended to be limited in time and adjusts to accommodates venues of larger and smaller size by permitting hundreds of people to congregate in venues like the Dulles Expo Center, while limiting smaller venues, like fitness classes, to no more than 25. See Amended EO 67 at 4, 9.

The occupancy restriction also leaves "open ample alternative channels for communication of [] information." *Ward*, 491 U.S. at 791. Although plaintiffs contend that "the Order prevents [them] from carrying out the educational mission associated with the Nation's Gun Show," plaintiffs may continue to engage any dialogue they wish so long as the number of people in the venue remains below 250. Moreover, Amended EO 67 does not in any way limit the number of people who may approach gun dealers at their stores or trainers at indoor and outdoor shooting ranges. See Amended EO 67 at 3–4, 6. This is, of course, to say nothing of the fact the order leaves completely untouched *all* forms of communication that do not involve in-person contact, including social media cites, chat rooms, online lectures, and the like. Accordingly, notwithstanding plaintiffs' overheated rhetoric, the occupancy restriction comes nowhere close to violating Article I, Section 12.

Right to Keep and Bear Arms

Plaintiffs suggest that, by applying an occupancy restriction to the Dulles Convention Center, Sixth Amended EO 67 infringes their rights under Article I, Section 13 of the Virginia

Constitution. Even accepting plaintiffs' contention that the right to keep and bear arms protects the right to *sell* guns and related products, that claim is without merit.

1. The breadth of plaintiffs' right-to-bear-arms challenge is remarkable. As plaintiffs would have it, a public-health mandate issued in the midst of a global pandemic is constitutionally infirm because it may prompt *private citizens* to cancel a gun show that is no longer profitable. If the constitutional right to bear arms sweeps so broadly, one wonders how the government could ever regulate any business that touches the purchase and sale of firearms. How, for example, could the government impose a tax on gun sales, require disabled access to shooting ranges, or subject a small gun retailer to fire code provisions that limit occupancy when any of those laws could make affect a business's viability? On plaintiffs' view, it is difficult to see how any of these generally applicable laws would survive constitutional scrutiny.

Given these far-reaching consequences, it is unsurprising that plaintiffs offer no real support for their theory. Attempting to preempt the obvious rejoinder that sellers can sell and buyers can buy guns elsewhere if the gun show is canceled, plaintiffs rely on the United States Supreme Court's statement in *Heller* that a ban on handgun possession cannot be justified by the fact that long guns are permissible. Compl. at 35 (citing *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008)). But an all-out ban on handgun possession *in the home* is a far cry from limiting the number of people at a gun show when any eligible buyer can purchase a gun at "the Walmart location adjacent to [the Dulles Expo Center]" (Compl. at 8) or any one of the many other gun retailers that remain open (and subject to no occupancy restrictions) under the Governor's order.[34]

Indeed, *Heller* does not go nearly as far as plaintiffs suggest. Unlike plaintiffs, who

[34] See *Walmart Backtracks, Putting Guns Back In Stores*, Wash. Post. (Oct. 30, 2020), https://www.washingtonpost.com/business/2020/10/30/walmart-guns-stores/.

appear to regard *any* government intrusion on the ability to make gun sales or purchases as constitutionally impermissible, the U.S. Supreme Court has expressly held that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." 554 U.S. at 626. Moreover, the Court explained, there are several categories of laws regulating firearms that are "presumptively lawful," including "laws imposing conditions . . . on the commercial sale of arms." *Id.* at 626–27 & n.26. By plaintiffs' own admission, The Nation's Gun Show is an event at which "Federal Firearms Licensees and other vendors" sell their products and "attendees purchase firearms, ammunition, firearms accessories, and other accessories, combined worth millions of dollars," Elliott Aff. at 1–2—in other words, it is event hosting the "commercial sale of arms." *Heller*, 554 U.S. at 626–27. Because the challenged executive order simply imposes conditions on those sales—providing that they cannot occur unless, for public safety reasons, no more than 250 people are present in a particular type of venue at a given time—*Heller* does not support plaintiffs' claim. Instead, it establishes that the occupancy restriction is "presumptively lawful." See *id.* at 626 n.26.

Even if the restriction challenged here did not fall within the category of "presumptively lawful" regulations, it would easily survive scrutiny because it does not implicate the "central component" of the constitutional right: the ability to use firearms for "[i]ndividual self-defense." *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 134 (2011). As already described, restricting the number of people who can gather at a gun show when gun stores, other firearms retailers, and indoor and outdoor shooting ranges remain open and subject to no restrictions simply does not compromise anyone's ability to obtain and use guns for self-defense. Accordingly, the challenged restriction would—*at absolute most*—trigger intermediate scrutiny and would comfortably survive that test. The 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*, 419 Fed. Appx. at 353. And the facts recited above—along with established evidence that social distancing curbs the spread of COVID-19—establish a more than "reasonable fit," *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010), between the Governor's objectives and his chosen means. Nothing more is required.[35]

2. Plaintiffs' contention that the occupancy restriction is inconsistent with the Emergency Law's protection for the right to bear arms fails for the same reason. As plaintiffs' point out, Virginia Code § 44-146-15(3) states that the Emergency Law:

> shall not be construed to . . . [e]mpower the Governor . . . to in any way limit or prohibit the rights of the people to keep and bear arms as guaranteed by Article I, Section 13 of the Constitution of Virginia or the Second Amendment of the Constitution of the United States, including the otherwise lawful possession, carrying, transportation, sale, or transfer of firearms except to the extent necessary to ensure public safety in any place or facility designated or used by the Governor, any political subdivision of the Commonwealth, or any other governmental entity as an emergency shelter or for the purpose of sheltering persons.

Plaintiffs do not appear to contend that this statutory provision protects *more than* Article I, Section 13. See Compl. at 19–20. That view accords with the statutory text, which does not reference "the rights of the people to keep and bear arms" in a general sense—but rather the "rights . . . *guaranteed by* Article I, Section 13 of the Constitution of Virginia or the Second Amendment." Va. Code Ann. § 44-146.15(3) (emphasis added). Accordingly, to the extent they predicate their challenge to the Governor's use of the Emergency Law on the specific features of a gun show, their claim rises and falls on Article I, Section 13. And because their Article I, Section 13 challenges falls short, so too

[35] Plaintiffs candidly concede that the federal guidance to which they devote an entire section of their complaint is purely advisory. Compl. at 43. It also lends nothing to the constitutional analysis.

does their gun-show-specific challenge to the Governor's emergency powers.[36]

II. The balance of equities and public interest factors weigh heavily against plaintiffs

Assuming, *arguendo*, the plaintiffs could establish show *some* degree of irreparable harm,[37] the balance of the non-merits factors weighs heavily against injunctive relief. See *Winter*, 555 U.S. at 24 ("[C]ourts 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)). Although it is plaintiffs' burden on both factors, see *id.* at 20 (emphasizing that "[a] plaintiff seeking a preliminary injunction must establish" each of the four factors), they fall woefully short meeting the bar for demonstrating an entitlement to the extraordinary remedy they seek.

1. Plaintiffs' filings betray a callous disregard for the public-health consequences of enjoining the Governor's order. Plaintiffs urge this Court to weigh the "concrete harms" they will suffer if they are unable to host, participate in, and attend a gun show more heavily than the

[36] Although plaintiffs rely on *Lynchburg Range & Training, LLC et al. v. Northam et al.*, CL 200003-33, 2020 WL 2073703 (Lynchburg Cir. Ct. Apr. 27, 2020), that case is inapposite. There, the court considered a challenge to a different COVID-19 related executive order and its holding as to that provision has no bearing on the legality of the occupancy restriction at issue here, particularly because the restriction is (at most) a "presumptively lawful" condition on commercial sales. *Heller*, 554 U.S. at 626 & n. 26. And to the extent the court's decision could be read as suggesting that strict scrutiny is the appropriate *constitutional* standard of review, the court acknowledged any such statement was dicta. 2020 WL 2073703, at *4 (declining to determine "a level of scrutiny" given the relevant statutory text). At any rate, such a view would mark a radical and unwarranted departure from the prevailing view. See, *e.g.*, *New York State Rifle & Pistol Ass'n*, 883 F.3d at 61–62 ("assum[ing], arguendo, that" heightened scrutiny applies, "we find that intermediate scrutiny is appropriate").

[37] That is a dubious proposition. Many of the purported harms plaintiffs claim are economic, see Compl. at 45–46, which are precisely the sorts of impacts that generally do not establish irreparable harm. Cf. *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 61–62 (2008). Moreover, plaintiffs cannot rely on harms to non-parties, which they attempt to do repeatedly. See Compl. at 47 (referring to partner vendors and first-time gun purchasers).

"impossible-to-estimate risk of transmission of the flu-like" illness known as COVID-19. Compl. at 48. Moreover, plaintiffs claim that the "serious health consequences" of COVID-19 are "unknown," *id.*, and that "whatever the risk of transmission may be, it is . . . borne primarily by persons who choose to accept that risk." *Id.* at 49.

2. These statements are brazenly misinformed. As described above, the ongoing pandemic has infected more than 200,000 Virginians since March and has killed nearly 4,000—more than four times the number of automobile fatalities that occurred in all of 2019.[38] Two days ago, a hospital in Norfolk reported that it had treated seven children with a serious health condition linked to COVID-19.[39] Due to a recent surge in cases, more than one in five hospitals in the country is reporting a shortage of staff. See *supra* n.17. It goes without saying that such hospital shortages affect patients suffering from all types of medical conditions and put an enormous strain on public health systems.

In the midst of this crisis, plaintiffs ask this Court to second-guess the decisions of policy makers and public-health experts and to allow tens of thousands of people to converge on an area smaller than a city block, where they will congregate indoors for an extended period of time. Contrary to plaintiffs' assertions (Compl. at 49), the risk of that activity will not be borne "primarily" by those who choose to attend. Rather, those who contract COVID-19 at the event will bring it home to their communities where they will unknowingly spread it in the days before they become symptomatic (if ever), passing it to elderly people, those with pre-existing

[38] Drive Smart Virginia, Annual Report, available at https://www.drivesmartva.org/about-dsv/annual-report/#:~:text=Data%20from%20the%20Virginia%20Department,the%20Commonwealth%20from%20traffic%20crashes.

[39] *Virginia Hospital Has Seven Kids With Rare COVID Condition*, NBC12 (Nov. 16, 2020), https://www.nbc12.com/2020/11/16/virginia-hospital-has-had-kids-with-rare-covid-condition/.

conditions, pregnant women and others who are at greater risk for severe health problems or death. The public interest in preventing this kind of spread is not speculative or hypothetical, nor is it outweighed by any harms plaintiffs face from the inability to participate in a gun show.[40]

III. Plaintiffs are not entitled to a writ of mandamus

Plaintiffs are not entitled to a writ of mandamus because there is "no clear and certain" duty to be enforced. *Gannon v. State Corp. Comm'n*, 243 Va. 480, 482 (1992). Moreover, "the interests of the public and third persons" and "the promotion of substantial justice" preclude granting the writ for the reasons just explained. *Id.*

CONCLUSION

Plaintiffs' motion for a temporary injunction and petition for writ of mandamus should be denied.

Dated: November 18, 2020

Respectfully submitted,

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[40] Indeed, given the potentially catastrophic consequences of The Nation's Gun Show becoming a super-spreader event, the bond that would be required to protect the Commonwealth in the event of a wrongly imposed injunction would be difficult to fathom, much less calculate. See Va. Code Ann. § 8.01-631(A) (except in specifically enumerated cases "*no temporary injunction shall take effect* until the movant gives bond with security in an amount that the trial court considers proper to pay the costs and damages sustained by any party found to have been incorrectly enjoined") (emphasis added).

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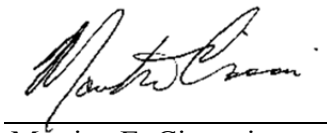

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