V I R G I N I A :

IN THE CIRCUIT COURT FOR THE COUNTY OF CULPEPER

MERRILL C. "SANDY" HALL et al.,	)	
	)	
Petitioners,	)	Civil Action No. CL20000632-00
	)	
v.	)	
	)	
HON. RALPH S. NORTHAM et al.,	)	
	)	
Respondents.	)	

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR TEMPORARY INJUNCTION

Mark R. Herring
Attorney General

Victoria N. Pearson (VSB No. 48648)
Samuel T. Towell (VSB No. 71512)
Deputy Attorneys General

Erin Rose McNeil (VSB No. 78816)
Assistant Attorney General

Toby J. Heytens (VSB No. 90788)*
Solicitor General

Michelle S. Kallen (VSB No. 93286)
Martine E. Cicconi (VSB No. 94542)
Deputy Solicitors General

Jessica Merry Samuels (VSB No. 89537)*
Assistant Solicitor General

Zachary R. Glubiak (VSB No. 93984)
John Marshall Fellow

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240 – Telephone
(804) 371-0200 – Facsimile
solicitorgeneral@oag.state.va.us

***Counsel of Record for Respondents**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitional Provisions

Statutes

Other Authorities

INTRODUCTION

The COVID-19 pandemic has already inflicted massive harms and raised extraordinarily difficult questions for elected officials and other policymakers. The virus is deadly and spreads with devastating ease. Well-intentioned people can infect others without even realizing they have been infected themselves. There is no proven treatment or vaccine. Millions have been infected worldwide, and hundreds of thousands have already died.

As Justice Antonin Scalia noted 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 in the Virginia Emergency Services and Disaster Law of 2000 (Emergency Law), Va. Code Ann. § 44-146.13 *et seq*., the General Assembly specifically designated the Governor as the Director of Emergency Management and vested him with "emergency powers." §§ 44-146.14(2), 44-146.17.

Pursuant to that authority—and assisted by a team of public-health experts—Governor Northam has taken evidence-based measures to slow COVID-19's spread and protect lives and public health. The Governor is keenly aware of the toll these measures have taken on all Virginians and that—regretfully but inevitably—some have borne a disproportionate share of the economic pain. But those measures have also been working—by one estimate cutting in half the virus's transmission rate from what it would have been without them.

Like the decision to impose them in the first place, when and how the current measures can safely be relaxed present complicated questions of fact, prediction, and judgment. Reopening too slowly risks compounding the economic hardships already felt across the Commonwealth and making recovery all-the-more difficult. But reopening too quickly risks triggering a second

wave of cases, requiring the imposition of renewed restrictions, and erasing the hard-won gains made possible by the sacrifices of Virginians over the past several weeks.

Petitioners ask this Court to second-guess the Governor's choices and decide—without a staff of experts or even in the normal course of litigation—when and how Virginia should loosen its social distancing measures, which businesses should reopen, and under what conditions. The law does not require such extraordinary (and potentially deadly) judicial guesswork. To the contrary, as the United States Supreme Court emphasized more than a century ago, "[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). Because Virginia law authorizes the Governor to do exactly what he did here—make difficult decisions about how to guide the Commonwealth through an unprecedented public health crisis—and because petitioners also fail to 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 that a novel coronavirus was likely to blame for a mysterious, pneumonia-like illness. Oliver Aff. ¶ 3 (Exhibit F). Just months later, COVID-19 has become a global pandemic, killing more than 200,000 people and infecting over 3,000,000 worldwide. ¶ 8. Virginia's death toll stands at 492—a number that continues to climb. ¶ 13. More than 14,000 COVID-19 cases have been reported in Virginia, including *four thousand* new cases last week alone. ¶ 12. Culpeper County has already seen 126 cases. *Id.* Despite robust data collection and reporting by public health authorities, these figures "likely undercount[] the actual number of positive cases" due to limitations in testing capacity. *Id.*

The toll extends beyond those infected. As those with COVID-19 require treatment and

hospitalization, the burden on the healthcare system grows. 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. Such shortages would place healthcare workers at even higher risk and prevent those needing treatment for unrelated reasons from accessing care.

2. One thing that makes COVID-19 so deadly is the ease with which it spreads. Experts agree 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. Oliver Aff. ¶ 5; Forlano Aff. ¶ 4 (Exhibit G).[1] Evidence also suggests the virus can survive "for hours if not days" on surfaces such as plastic and metal. Oliver Aff. ¶ 20.[2] And infected persons may not show symptoms—and thus may not realize they have contracted the virus—for days, if at all. *Id.*

Because they "often involve or allow the sharing of spaces and items," recreation and entertainment businesses are "strong candidates for COVID-19 transmission." Oliver Aff. ¶ 20; accord Forlano Aff. ¶¶ 7–8. A New Jersey man became infected through a "casual handshake" at a bowling alley,[3] and a movie theater and a gun raffle were identified as exposure sites in Michigan and Indiana.[4] Recognizing this danger, public-facing businesses across the country—

[1] A recent study linked a COVID-19 outbreak to an air conditioner in a restaurant. Jianyun Lu et al., *COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China, 2020*, Centers for Disease Control and Prevention, Emerging Infectious Diseases, Vol. 26, No. 7 (Jul. 2020).

[2] See also Neeltje van Doremalen et al., *Aerosol and Surface Stability of HCoV-19 (SARS-CoV-2) Compared to SARS-CoV-1*, New Eng. J. Med. (Apr. 16, 2020), https://www.nejm.org/doi/full/10.1056/NEJMc2004973.

[3] 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/.

[4] 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.

including museums, sports venues, concert halls, and theme parks—began closing temporarily.[5] Gyms and fitness centers were no exception: Because social distancing and disinfecting would be too difficult in such facilities, numerous gyms elected to close.[6]

Exercise facilities have proven to be particularly effective sources of transmission. "Gyms are like a petri dish. . . . People are close to one another, they're sweating, they're coughing and sneezing, they're touching multiple surfaces, they're sharing equipment, they're indoors. Literally all of the heightened risk factors for COVID transmission are all entwined together in a gym."[7] A recent study revealed that one in eight people use the same cloth to wipe their face and gym equipment, and 81% admitted they never or hardly ever clean gym equipment before use.[8] And even with proper cleaning, "airborne sweat particles that contain germs and viruses" are at a higher risk of "being absorbed" as people breathe deeply while exercising.[9] See Oliver Aff. ¶ 20 (referencing "shared equipment, and respiratory exertion"); Forlano Aff. ¶ 7–8.

3. Lacking a cure, public officials have focused on slowing COVID-19's spread. According to federal guidelines, "[e]veryone should . . . [a]void close contact" by "[s]tay[ing]

---

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

[6] See, *e.g.*, Gold's Gym Closing Its Corporate-Owned Gyms Through March 31 In Response To Coronavirus (Mar. 16, 2020), https://www.goldsgym.com/blog/covid19-update/; Equinox, COVID-19 Updates, https://www.equinox.com/covid19update?icmp=banner-covid (as of March 16, 2020, "[a]ll Equinox club locations and showrooms are temporarily closed").

[7] Lachlan Markay, *Trump Calls For Reopening America's Gyms Day After Call With SoulCycle's Owner*, The Daily Beast (Apr. 17, 2020), https://tinyurl.com/y8rytrt4 (quoting director of O'Neill Institute for National and Global Health Law at Georgetown University); accord AdventHealth, *Coronavirus Pandemic: Why the Gym Isn't Safe Right Now* (Apr. 1, 2020), https://tinyurl.com/ycf6jpgx; Healthline, *How to Exercise at Home If You're Avoiding the Gym During the COVID-19 Outbreak*, https://tinyurl.com/yat525ll ("Simply wiping sweat off with a towel isn't enough to stop the coronavirus and other bugs from spreading.").

[8] Hayley Soen, *Gyms Are a Hotbed for Coronavirus, So I Guess I Won't Be Going Anymore*, The Tab (Mar. 2020), https://tinyurl.com/y7ncbr2b.

[9] Urian B., *Stop Going To The Gym! Expert Warns About the Risk of Coronavirus Infection from the Gym*, TechTimes (Mar. 11, 2020), https://tinyurl.com/y8mv5wrw.

home as much as possible" and "[p]ut[ting] distance between yourself and other people."[10] State officials have implemented that guidance by closing schools, requiring many businesses to close to the public, prohibiting gatherings of more than ten, and issuing stay-at-home orders.[11]

4. Acting with the input and advice of some of the Nation's leading epidemiologists, doctors, and economists, Virginia has taken a variety of steps to limit COVID-19's spread. On February 7, the State Health Commissioner identified COVID-19 as a public health threat. Order of Public Health Emergency Two (2020) (Northam & Oliver Order) (Exhibit B). 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. See Amended Executive Order 53 (EO 53) (Exhibit A) (describing earlier measures). The virus, however, continued to spread.

On March 23, the Governor issued Executive Order 53. Emphasizing that "person-to-person contact increases the risk of transmission and community spread" (Pet. Ex. B, p. 1), that Order took a variety of steps 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 retailers selling private fitness equipment—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"—specifically defined to

[10] 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. 28, 2020).

[11] See Council of State Gov'ts, COVID-19 Resources for State Leaders, https://web.csg.org/covid19/executive-orders/ (last visited Apr. 28, 2020).

include "[f]itness centers" and "gymnasiums"—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 surfaces, and other appropriate workplace guidance from state and federal authorities while in operation." ¶ 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. EO 55's restrictions will remain in place until June 10. EO 55, p. 3.

EO 53's restrictions on businesses—including fitness centers—were originally scheduled to expire on April 24. Pet. Ex. B ¶ 4. "Data collected by the Virginia Department of Health, however, show[ed] that the virus [was] continu[ing] to spread across the state[,] adversely affecting thousands of Virginians." EO 53, p. 1. Concluding that it was "necessary to extend certain measures previously undertaken to ensure the safety and wellbeing of Virginians," *id.*, on April 15, the Governor amended EO 53 to provide that its restrictions on businesses would be continued for an additional two weeks—through 11:59 p.m. on May 7. See EO 53 ¶ 4.

5. The current measures have proven effective. Virginians have "reduced their activities since the Governor declared a state of emergency," corresponding with a "reduction[] in the growth rate of COVID-19 cases." Peake Aff. ¶ 7 (Exhibit H). The evidence shows "that this reduction in activity in Virginia has reduced transmission rates by roughly 50%—from 2.2 transmissions per infection before March 15, 2020, to 1.1 after March 15, 2020." *Id.*

But the current progress is fragile. One model "predicts that lifting social distancing restrictions too soon can lead to a rapid increase of COVID-19 cases, resulting in a surge of hospitalizations that has the potential to overwhelm Virginia's healthcare system." Peake Aff. ¶ 8; accord Lewis Aff. ¶¶ 8, 10 (Exhibit I).[12] The problem is not limited to timing. If restrictions are not lifted with sufficient caution, "the sudden relaxation of restrictions will supply new targets" for the virus.[13] Virginia's public health officials have therefore warned that, "[e]ven when the stay-at-home order [in EO 55] is lifted, social distancing will remain important to the public health response to COVID-19." Peake Aff. ¶ 10.

To ensure safe easing of restrictions, the Governor has announced a multi-step process.[14] That blueprint "includes a phased approach that is grounded" in federal guidelines. Blueprint, *supra* note 14. Under the Governor's plan, the first phase will begin after the Commonwealth sees, among other things, downward trends in the percentage of positive tests and the number hospitalizations and ICU admissions over 14 days. See *id.*; Peake Aff. ¶ 9. The first phase of reopening will retain many of the measures that have proven effective so far—"Virginians will continue teleworking, social distancing, and wearing face coverings"—but will loosen

[12] See generally Univ. of Va., Biocomplexity Inst., *Estimation of COVID-19 Impact in Virginia* (April 13, 2020), https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Combined-PPT-April-13.pdf.

[13] William Wan et al., *States Rushing to Reopen Are Likely Making a Deadly Error, Coronavirus Models and Experts Warn*, Wash. Post (Apr. 22, 2020), https://www.washingtonpost.com/health/2020/04/22/reopening-america-states-coronavirus/; see generally Sergio Correia et al., *Pandemics Depress the Economy, Public Health Interventions Do Not: Evidence From the 1918 Flu* (Draft, Apr. 10, 2020), https://ssrn.com/abstract=3561560 ("cities that intervened [in 1918 flu pandemic] earlier and more aggressively do not perform worse and, if anything, grow faster after the pandemic is over").

[14] *Governor Northam Unveils Blueprint for Easing Public Health Restriction* (Blueprint), Office of the Governor of Virginia (Apr. 24, 2020), https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-856337-en.html.

restrictions on businesses.[15] In advising the Governor on this process, public health officials will be assisted by the Governor's Business Task Force, which is charged with "providing valuable input for how [to] reopen safely and responsibly, and strengthen consumer confidence."[16]

6. Petitioners filed this suit on April 21—almost a month after the Governor issued EO 53 and almost a week after those provisions were extended. Petitioners seek a declaration exempting all "fitness centers, gymnasiums, indoor sports facilities, and indoor exercise facilities" from both the closures in EO 53 and the stay-at-home provisions in EO 55. Pet. for Decl. J. & Inj. Relief 21–22 (Pet.). Petitioners also request "[t]he immediate entry of a temporary injunction" preventing the Governor and law enforcement "from enforcing, in any manner . . . the prohibition on operation of and access of private membership Health Clubs." *Id.* at 22.

LEGAL STANDARD

"No temporary injunction shall be awarded unless the court shall be satisfied of the 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).

[15] Governor of Virginia Facebook Page, *Forward Virginia: A Blueprint for Easing Public Health Restrictions in the Commonwealth* (Apr. 25, 2020), https://tinyurl.com/y9uz8zll.

[16] *Id.*

ARGUMENT

Petitioners 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).

I. Petitioners have not demonstrated likelihood of success on the merits

Petitioners offer a slew of arguments why this Court should exempt them from the temporary closure restrictions that apply to all "recreational and entertainment businesses." EO 53 ¶ 4. Each fails.[17]

A. The plain language of EO 53 includes petitioners' facilities

Petitioners acknowledge that their businesses are "fitness center[s]" as that term is used in EO 53. See Pets.' Mem. in Supp. of Pet. For an Emergency, Temp. Inj. 5, 7 (Mem.). But petitioners nonetheless insist that the "*operat[ions]* of their particular business[es]" are not covered by "the plain and simple terms of Executive Order 53(4)" because—as "private-membership clubs"—they do not offer "public access." *Id.* at 11 (emphasis added).

That argument is too clever by half. The obvious role of the words "all public access" in the paragraph 4's introductory sentence is to differentiate between a business's owners and employees (who may continue to access the relevant facilities) and members of the public (who may not). Accord EO 53 ¶ 2 (requiring "[c]essation of all in-person instruction at K-12 schools" but not excluding teachers or administrators from the building). This view is confirmed by the same paragraph's fifth bullet point, which specifically references "public *and private* social

[17] Indeed, other Virginia courts have rejected requests for injunctive relief as to the Governor's Executive Orders regarding COVID-19. See *Lighthouse Fellowship Church v. Northam*, ECF No. 10, No. 2:20-cv-204 (E.D. Va. Apr. 24, 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*, ECF No. 5, No. 1:20-cv-363 (E.D. Va. Apr. 1, 2020). Although a Lynchburg circuit court recently entered a temporary injunction against one aspect of EO 53, that ruling was based on a specific statutory provision that, by its terms, has no applicability to petitioners' facilities. See *Lynchburg Range & Training, LLC v. Northam*, No. CL20000333 (Lynchburg Cir. Ct. Apr. 27, 2020) (relying on Va. Code Ann. § 44-146.15(3)).

clubs." EO 53 ¶ 4 (emphasis added). If "private-membership clubs" do not entail "public access," paragraph 4's specific inclusion of "private social clubs" would make little sense.[18]

Petitioners' plain-language argument also sweeps far more broadly than they admit and would lead to implausible consequences. Although petitioners attempt to limit their claim to "their particular business[es]" (Mem. 11), it is common knowledge that nearly *all* fitness centers operate on a membership model. Petitioners also cite no evidence for their assertion that "[v]irtually *all* other businesses in the classification of" paragraph 4 of EO 53 "only operate with public access," *id.* at 13 (emphasis added), and common experience confirms that many "[t]heaters, performing arts centers, concert venues, [and] museums"—to say nothing of "recreation centers [and] indoor sports facilities," EO 53 ¶ 4—operate on at least a partial membership model. See, *e.g.*, About Membership, Va. Museum of Fine Arts, https://www.vmfa.museum/membership/. Last but not least, petitioners' argument suggests that current members may continue to access their facilities but *prospective* members or *guests* of current members may not—a result that would make little sense and bear no relationship to the Governor's obvious purpose in extending EO 53 for another two weeks.[19]

Contrary to petitioner's suggestion, Mem. 12, no rule of strict construction for criminal statutes can overcome "the saving grace of common sense." *Baker v. Commonwealth*, 284 Va.

---

[18] Respondents do not take petitioners to argue that their gyms are exempt from federal anti-discrimination laws as "private club[s] or other establishment[s] not in fact *open to the public*." 42 U.S.C. § 2000a(e) (emphasis added). Nor could they, for a members-only policy has long been deemed insufficient to establish that a business is not "open to the public." See *Wright v. Salisbury Club, Ltd.*, 632 F.2d 309, 312 (4th Cir. 1980) (holding that "formal membership requirements" did not make country club "truly private" under anti-discrimination law).

[19] Petitioners' reliance (Mem. 12) on *Flinchum v. Commonwealth*, 24 Va. App. 734 (1997), underscores just how far afield they must go to find support for their position. Although that opinion contains three uses of the specific words "public access," the decision had no occasion to define that term because the case involved a very different question—whether "the parking lot of a sporting goods store" was a "'highway' as defined by Code § 46.2-100." *Id.* at 735.

572, 580 (2012) (quotation marks and citation omitted). Here, common sense dictates that a prohibition on "all public access" to "fitness centers," EO 53 ¶ 4, encompasses patrons, regardless of the labels particular businesses give them. And common sense shows *why* fitness centers must be included in temporary closure orders, as they have been in the overwhelming number of sister state closures: there is hardly an enterprise more suited to viral transmission than one in which people exercise in close proximity, sharing facilities and equipment.[20]

B. The Governor's actions are authorized by law and constitutional

Immediately after seeking to engineer a narrow exemption for their own operations, petitioners launch a broadside against nearly the entirety of the Governor's social distancing measures. Petitioners insist that Virginia law "contains *no authorization*—by plain text or implication—to categorically shutter broad sectors of private businesses across the state, or to restrict the movements of citizens." Mem. 20. They describe the Governor's actions as "an unprecedented, ultra vires assertion of unlimited power that exceeds the Governor's authority and effects the suspension of other constitutional and statutory rights and mandates." Mem. 14–28. And they maintain that if current law authorizes the Governor to do what he has done here, the law itself must be struck down as "an unconstitutional delegation of power." Mem. 29–31.

Those are staggering assertions. Under petitioners' view, Virginia's chief executive and Director of Emergency Management 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, petitioners are plainly wrong.

[20] See State Orders Closing Gyms and Fitness Centers (Exhibit J); see also *Nat'l Governors Assoc., Coronavirus: What You Need To Know*, https://www.nga.org/coronavirus/#states.

1. Virginia law authorizes the Governor to close gyms during a pandemic

Petitioners insist that the Governor had no authority to temporarily close fitness centers, and that the challenged order thus represents "an ultra vires act that must be invalidated by the Court." Mem. 15. Not so. In the Emergency Law, the General Assembly has expressly conferred upon the Governor the authority to take necessary and measured steps during emergencies, and other provisions of the Code and Constitution of Virginia buttress that grant of authority.

a. The Emergency Law

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 specifically 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 "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.[21]

The Governor's order to temporarily limit the operations of certain businesses came after he declared a state of emergency, Executive Order 51 (2020) (Northam), and specifically cited

[21] 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/.

Code § 44-146.17, see EO 53, p. 1. As petitioners recognize, the Governor's declaration of an emergency "authoriz[ed] him to prepare and coordinate the response to the potential spread of COVID-19, a communicable disease of public health threat." Pet. ¶ 18. The measures included in EO 53—including the provision challenged here—were specifically designed "to mitigate the impacts of [COVID-19] on our Commonwealth." Pet. Ex. B, p. 1; accord EO 53, p. 1. The Order was therefore well within the Governor's powers under the Emergency Law. See Op. Va. Att'y Gen. No. 06-044, at 5 (Jun. 8, 2006), https://www.oag.state.va.us/files/Opinions/2006/06-044_Howell_Norment.pdf (describing the Emergency Law as "[a] broad statutory delegation of power to the Governor to act . . . in the event of an emergency").

Petitioners assert that various parts of Code § 44-146.17(1) show that the Governor lacks power to temporarily close certain businesses. But petitioners' numerous arguments suffer from a common flaw: Reading in words that are not in the statute and reading out words that are there.

i. Petitioners' first such mistake comes when addressing the penalty provision contained in the fourth paragraph of Code § 44-146.17(1). That paragraph reads, in its entirety:

> Executive orders, ***to include*** those declaring a state of emergency and directing evacuation, shall have the force and effect of law and the violation thereof shall be punishable as a Class 1 misdemeanor in every case where the executive order declares that its violation shall have such force and effect.

§ 44-146.17(1) (emphasis added). Petitioners view this language as "provid[ing] *a limitation* on which executive orders may have the force of law and carry criminal penalties," restricting the category to *only* those "that both declare an emergency *and* direct evacuation." Mem. 24 (first emphasis added); see also *id.* 22 n.4 (suggesting an evacuation order is required for the Governor to act under the Emergency Law). That is not what "to include" means. Instead, petitioners are urging the Court to rewrite the statute to say something else, either by eliminating the words "to include those" or replacing "to include" with "limited to." But "[t]he words of the statute mean

what they say and [courts] may not read into a statute a meaning contrary to its clear language." *Marcus, Santoro & Kozak, P.C. v. Hung-Lin Wu*, 274 Va. 743, 757 (2007).

ii. Petitioners repeat the same mistake when discussing Code § 44-146.17(1)'s fifth paragraph. That provision states:

> Such executive orders declaring a state of emergency ***may*** address exceptional circumstances that exist relating to an order of quarantine or an order of isolation concerning a communicable disease of public health threat that is issued by the State Health Commissioner for an affected area of the Commonwealth pursuant to Article 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 of Title 32.1.

§ 44-146.17(1) (emphasis added). According to petitioners, that means that when (as here) a particular emergency takes the form of "a communicable disease of public health threat," the Governor may *only* impose "restrictions of movement and liberties" by following "the procedures and standards set forth in Title 32.1, Chapter 2." Mem. 25–26.

That argument is doubly flawed. For one thing, petitioners again appear to be suggesting that the Court should read a word of inclusion ("may") as one of restriction ("may only"). In addition, petitioners attempt—in a parenthetical clause that cites no authority whatsoever, see Mem. 25—to redefine words that are specifically defined in the code of Virginia ("quarantine" and "isolation") as meaning something different and broader and then to leverage those redefinitions as the premise for an argument that the Governor's actions here are invalid because they were not issued pursuant to the procedures prescribed in Title 32.1. See Pet. 19 (describing respondents' actions as "declaring a *de facto* quarantine or isolation of the Petitioner").

That is not how statutory construction works. As the Code of Virginia specifically recognizes, "quarantine" and "isolation" are medical terms with a specific meaning: the physical separation of *people* who have contracted or been exposed to an infectious disease, not the temporary closure of *businesses* or particular entities. See Va. Code Ann. § 32.1-48.06

("'Isolation' means the physical separation, including confinement or restriction of movement, *of an individual or individuals* who are infected with or are reasonably suspected to be infected with a communicable disease of public health threat . . . ." (emphasis added)); *id.* (similarly defining "Quarantine" as involving "the physical separation . . . of an *individual or individuals*") (emphases added); accord Centers for Disease Control and Prevention, Quarantine and Isolation, https://www.cdc.gov/quarantine/index.html (Apr. 28, 2020). The point is not simply that an order temporarily closing certain businesses "does not expressly 'declare' a quarantine." Mem. 27. It is also that, here too, the relevant language *expands* rather that *limits* gubernatorial authority by underscoring that orders issued under the Emergency Law may work with and supplement other orders issued by the State Health Commissioner under Title 32.1.

iii. The Governor does not contend that the Emergency Law grants him "unlimited grant of authority to use executive orders for any kind of restriction." Mem. 23. But the Emergency Law does permit the Governor to do what he has done here: direct the temporary closure of certain businesses to limit the spread of a deadly and contagious pandemic and coordinate the careful and deliberate re-opening of those businesses.

b. Authority outside the Emergency Law

Other statutory and constitutional provisions provide independent sources for the Governor's authority to take emergency action to protect the public health. See Va. Code Ann. § 44-146.15(1) (emphasizing that nothing in the Emergency Law "is to be construed to . . . [l]imit, modify, or abridge the authority . . . vested in [the Governor] under other laws of this Commonwealth independent of, or in conjunction with, any provisions of this chapter").

i. 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 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.

ii. 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.

2. The Governor's temporary closure order is constitutional

Adopting a shotgun approach, petitioners also assert (but rarely elaborate) that the Governor's targeted and temporary actions have violated or suspended a plethora of constitutional provisions, including Article V, § 12 (Mem. 15–17), Article I, § 7 (Mem. 29–30), Article I, § 11 (Mem. 30), and Article IV § 14 (*id.*). To the extent petitioners' various freestanding constitutional arguments are properly raised, each fails for the same fundamental reason: the Governor has lawfully exercised his statutory and constitutional authority to take necessary actions to preserve life and public safety during emergencies.

a. Petitioners' constitutional challenges fail at the outset because they neither acknowledge nor engage with the relevant framework. Because "[d]ealing with . . . an emergency situation requires an immediacy of action that is not possible for judges," courts have long emphasized that the politically accountable executive branch 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). 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." *Id.* That framework reflects the recognition 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).

It is hard to imagine a more appropriate circumstance for such deference than the current

emergency. Petitioners concede that the Governor has been "guided by good intentions," and acknowledge that addressing "the COVID-19 pandemic" involves balancing "competing public policy priorities" and raise difficult factual questions and sometimes "limited information." Mem. 4. Such concessions are wise. Authorities estimate that 1.5 to 2.2 million Americans could die if governments did nothing to stop the virus,[22] and a battery of evidence supports the conclusion that minimizing close, person-to-person contact and sharing of equipment 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. Accordingly, 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 D) (upholding COVID-related gathering restriction on this basis); *Lawrence v. Colorado*, No. 1:20-cv-00862 at 16 (D. Colo. Apr. 19, 2020) (Exhibit E) ("There is certainly room for honest debate about many of these issues; in a situation as novel, wide-ranging, and rapidly evolving as this, there are bound to be conflicting opinions . . . . It is not the Court's role, however, to resolve these debates. . . . [T]he Supreme Court has made clear that, outside of cases that are 'beyond all question,' courts must defer to [public] officials' judgment." (quoting *Jacobson*, 197 U.S. at 31)).

b. Petitioners' constitutional challenges also fail even on their own terms. Indeed, the Supreme Court of Virginia has already rejected similar constitutional challenges to a previous Governor's exercise of emergency powers during an ongoing crisis. In *Boyd v. Commonwealth*, 216 Va. 16 (1975) (per curiam), the Governor relied on a predecessor statute to lower the statewide speed limit to 55 miles per hour. Like petitioners, the appellant in that case

[22] 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.

questioned the constitutionality of the emergency law itself and argued that the Governor's action violated both Article IV, § 11 and separation-of-powers principles in the Virginia Constitution. Compare Appellant Br. at 5, 9–10, *Boyd v. Commonwealth*, 216 Va. 16 (1975), No. 740853, with Mem. 16, 19, 30, 37. The Supreme Court disagreed and unanimously upheld the Governor's actions and a resulting criminal conviction. *Boyd*, 216 Va. at 21.[23] If a Governor may temporarily modify a generally applicable rule of law (the speed limit) in response to a fuel shortage, he surely may require a temporary closure of certain businesses in response to a global pandemic that has infected 3 million people and killed over 200,000.

Petitioners insist "there is no precedent of a prior Governor exercising emergency powers" in the specific way the Governor has done so here. Mem. 17. But lack of precedent about the scope of a Governor's authority to respond to a once-in-a-century event says more about the frequency of such events than it does the Governor's authority. See *id.* (acknowledging that Virginia's first Disaster Laws were enacted in 1973).[24] And the fact that executives in other States have enacted similar measures (likely also without precedent) belies any suggestion that the Governor's actions are arbitrary, irrational, or disproportionate to the threat at issue.

c. *Boyd* also underscores why petitioners' heavy reliance on *Howell v. McAuliffe*, 292 Va. 320 (2016), falls flat. Article I, Section 7 of the Virginia Constitution states "[t]hat all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised." In

[23] Because no evacuation was ordered in *Boyd*, that decision further undermines petitioners' argument that the Governor's emergency authority "is further limited . . . only to instances where a State of Emergency has been declared AND an evacuation has been ordered." Pet. 15.

[24] Business closures to stem the spread of a pandemic are not new. During the 1855 yellow fever epidemic, "all business in Norfolk had been suspended and the city was one great hospital." George Holbert Tucker, *Norfolk Highlights 1584–1881*, Ch. 36, https://tinyurl.com/y887bqt4; see also Influenza Encyc., *The American Influenza Epidemic of 1918–1919, Richmond Virginia*, https://tinyurl.com/y93876yr (describing closure orders in response to Spanish flu).

Howell, the Supreme Court of Virginia held that a Governor had violated that provision 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. *Howell*, 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). *Howell*, 292 Va. at 342.

This case differs from *Howell* in nearly every pertinent respect. Here, unlike in *Howell* (and unlike in *Boyd*), the Governor 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), *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 temporary response to a once-in-a-century crisis.

3. The Emergency Law itself is constitutional

Petitioners' last fallback position is that if the Emergency Law allows the Governor to do what he has done here, that law is itself unconstitutional because it constitutes "an improper delegation of power." Mem. 31. Here too, petitioners' claims land short.

The Emergency Law amply satisfies petitioners' own standard by "establish[ing] specific policies and fix[ing] definite standards to guide the official, agency, or board in the exercise of

the [granted] power." Mem. 31 (citing *Ames v. Town of Painter*, 239 Va. 343, 349 (1990)). Like the zoning ordinance upheld in *Ames*, the Emergency Law "avoids" any non-delegation "difficulty because it contains standards for the guidance of the [Government] in the exercise of" his delegated powers. *Ames*, 239 Va. at 349. The Emergency Law includes a detailed statement of purpose to guide the Governor's discretion. Va. Code Ann. § 44.146.14. It provides lengthy definitions of critical terms and thus creates specific triggers for its applicability. § 44-146.16. It specifically identifies things the Governor may not do, § 44-146.15, requires notifying the General Assembly of certain types of actions, § 44.146.17:1, and contains an automatic sunset provision for all "rule[s], regulation[s], or order[s] issued under" it, § 44-146.17(1); accord EO 53 ¶ 4 (specifically limiting timeframe of closures).

The presumption that "[a]ll actions of the General Assembly are presumed to be constitutional" is "one of the strongest known to the law." *Hess v. Synder Hunt Corp.*, 240 Va. 49, 52 (1990); *Harrison v. Day*, 200 Va. 764, 770 (1959). To deny interim relief on petitioners' non-delegation claim, the Court need conclude only that petitioners' two pages of briefing fails to satisfy their "heavy burden of proof" on that point. *Id*.

II. Petitioners have not demonstrated irreparable harm

Petitioners 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. Petitioners' allegations rely on monetary losses they will incur because of the Governor's temporary closure order. See Mem. 33–34. Those losses are real and deeply regrettable. But they are precisely the sorts of *economic* impacts that are generally insufficient to establish irreparable harm, and petitioners have made no attempt to prove their conclusory claim that these damages are "incapable of meaningful measure." Mem. 33. To the contrary, petitioners have *already* quantified the harm resulting from their forced closure. See Mem. 9 (noting that petitioners "have suffered combined

losses of approximately $36,000,000, and mounting," including "approximately $750,000 of rent obligations"). Although such losses are undeniably large, they represent exactly the kind of injury that monetary damages are designed to remedy and the kind of calculations courts make 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) (to show "irreparable injury" based on "monetary damages," plaintiff must show such damages "are difficult to ascertain or are inadequate").[25]

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

Any harm petitioners 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, petitioners contrast the "immeasurable and impossible to quantify" economic losses they will suffer without a temporary injunction, with what they attempt to dismiss as the "theoretical" and "vague potential for the additional transmission of disease if Petitioners re-open." Mem. 6, 33, 35. Petitioners are glaringly wrong on the science. But even if they were right, the balance of equities and public interest factors are not the right forum for such debates.

1. In just a few months, the virus that causes COVID-19 has already infected more

[25] Petitioners briefly suggest that respondents' "sovereign offices" undermine "any adequate remedy at law." Mem. 6. Petitioners cite no authority for the proposition that potential defenses to a damages claim means that the irreparable injury requirement is automatically satisfied.

than *three million* people, Oliver Aff. ¶ 8, and may be *twenty times* more deadly than the flu.[26] As previously explained, gyms 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. From shared equipment, to profuse sweating, to damp locker rooms, fitness centers raise particular risk in terms of facilitating transmission of the disease. See pp. 3–4, *supra*. For that reason, the Governor could reasonably conclude that "restricting public access to a range of recreational businesses, including gyms" is a key component of "the Commonwealth's efforts to encourage social distancing and slow the spread of COVID-19." Forlano Aff. ¶ 7.

2. Petitioners deem it "self-evident that most of the members who will attend Petitioners' facilities during this time period are healthier and more active than the most vulnerable categories of people pre-disposed to severe effects from COVID-19," Mem. 35, and suggest that the Court should allow them to reopen on that basis. That reasoning is inaccurate, dangerous, and normatively troubling.

First, those currently suffering and dying from COVID-19 include populations initially considered less at risk. People who are physically fit may still experience "negative health outcomes—including death." Oliver Aff. ¶ 6. A 38-year-old trainer described his experience in harrowing terms: "I run a fitness center, I train soccer teams, I'm a physical therapist . . . . I never smoked . . . . Suddenly I'm catapulted onto a hospital bed, unable to breathe."[27] Young people

[26] 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.").

[27] Sylvia Poggioli et al., *Italian Fitness Coach With COVID-19: 'Feels Like Your Head Is Being Held Underwater,'* NPR (Mar. 26, 2020), https://tinyurl.com/rnne2cp; see also Chris Mooney et al., *Hundreds of Young Americans Have Now Been Killed by the Coronavirus, Data Shows*, Wash. Post (Apr. 8, 2020), https://tinyurl.com/y6wwfvlk ("A very fit 30-year-old

are seriously impacted by the disease as well. Oliver Aff. ¶ 6.[28]

Second, regardless of whether petitioners' patrons (as a group) may be less at-risk than the general population, those patrons can—like anyone else—carry and spread the disease to others. Oliver Aff. ¶ 6. Indeed, infected persons may not become symptomatic for days after being exposed, and up to a quarter of people may be entirely asymptomatic. Oliver Aff. ¶ 5; Forlano Aff. ¶ 4.

Finally, as steward for all of the Commonwealth's people, the Governor is not—at absolute minimum—*required* to adopt the Darwinian approach to public health and safety urged by petitioners. As tragic experience has already shown, the virus spreads rapidly throughout communities, and when healthcare systems become overrun, patients, healthcare workers, and the broader public all suffer. Oliver Aff. ¶ 7.[29]

3. The Court should also consider the scope of petitioners' arguments in evaluating the balance-of-equities and public safety factors. Despite petitioners' creative attempts to read themselves out of the Governor's orders, their primary arguments and logic sweep vastly farther. The necessary implication of those arguments is that huge swaths of the Governor's current

---

triathlete is just as vulnerable as a chess-playing 45-year-old who gets no exercise."); Kirstin O'Connor, *'We Have COVID-19. I Know It:' Crossfit Gym Owners Recover After Contracting Coronavirus—Family of 3 Suffered From Different Symptoms*, Click Orlando (Apr. 23, 2020), https://tinyurl.com/ydcdeysc (CrossFit owners and toddler contracted coronavirus).

[28] See also Centers for Disease Control and Prevention, *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19) – United States, February 12–March 16, 2020*, https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm (from Feb. 12 to Mar. 16, nearly 40 percent of American COVID-19 patients hospitalized were ages 20-54); Nina Bai, *Coronavirus Is Sickening Young Adults and Spreading Through Them, Experts Say*, UCSF (Mar. 24, 2020) https://www.ucsf.edu/news/2020/03/416961/coronavirus-sickening-young-adults-and-spreading-through-them-experts-say.

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

emergency measures (if not *all of them*) are unlawful, and that this Court must resolve the questions confronting public health officials across the country: which businesses get to open, when, and under what conditions. See Mem. 4 (suggesting that "it falls upon the courts . . . to provide . . . lawful and practical solutions" and "take notice of the social climate outside the courthouse"). But "[t]here are no easy answers" to these questions, "especially with a continued lack of testing, contact tracing and detailed guidance from federal health agencies." Wan, *supra* note 13. And the best available evidence indicates that "lifting social distancing restrictions too soon can lead to a rapid increase of COVID-19 cases, resulting in a surge of hospitalizations that has the potential to overwhelm Virginia's healthcare system." Peake Aff. ¶ 8. Given that Virginia has not yet met either of the federal criteria for beginning "phased opening," ¶ 9, this Court should decline petitioners' request to begin that opening itself.

* * *

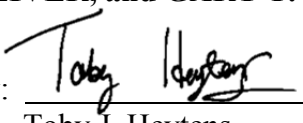
Petitioners obviously "disagree[e] with the [Governor's] assessment" about the need to temporarily close certain businesses to the public. *Freemason Street Area Ass'n v. City of Norfolk*, 100 Va. Cir. 172, at *12 (Norfolk Cir. Ct. 2018). But neither petitioners nor the courts have been charged with assessing the risks and attempting to implement the policies that best balance the costs and benefits of these difficult decisions. Those decisions lie, first and foremost, with the Governor. For that reason, 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.

Respectfully submitted,

HON. RALPH S. NORTHAM, DR. M. NORMAN OLIVER, and GARY T. SETTLE

By: 

Toby J. Heytens
Counsel for Respondents

Mark R. Herring
Attorney General

Victoria N. Pearson (VSB No. 48648)
Samuel T. Towell (VSB No. 71512)
Deputy Attorneys General

Erin Rose McNeil (VSB No. 78816)
Assistant Attorney General

Toby J. Heytens (VSB No. 90788)*
Solicitor General

Michelle S. Kallen (VSB No. 93286)
Martine E. Cicconi (VSB No. 94542)
Deputy Solicitors General

Jessica Merry Samuels (VSB No. 89537)*
Assistant Solicitor General

Zachary R. Glubiak (VSB No. 93984)
John Marshall Fellow

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240 – Telephone
(804) 371-0200 – Facsimile
solicitorgeneral@oag.state.va.us

***Counsel of Record for Respondents**

Dated: April 29, 2020

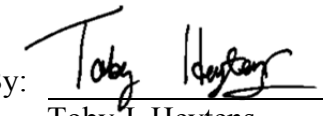
CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2020, a true and accurate copy of the foregoing Memorandum in Opposition was transmitted by both first-class mail and email to:

William M. Stanley, Esq.
C. Gregory Phillips, Esq.
James T. Taylor, Esq.
The Stanley Law Group
13508 Booker T. Washington Hwy.
Moneta, Virginia 24121
bstanley@vastanleylawgroup.com

Ryan T. McDougle, Esq.
McDougle Law Firm, P.C.
11159 Air Park Road
Ashland, Virginia 23005
ryan@mcdouglelaw.com

Counsel for Petitioners

By: 
Toby J. Heytens