LEADING EDGE POLICY & STRATEGY, LLC

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Submitted Electronically

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Safety and Health Codes Board

RE: Comments On Proposed on VA Department of Labor and Industry, Safety and Health Codes Board Proposed Permanent Standard Based on Emergency Temporary Standard For Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19, 16VAC25-220

To Whom It May Concern:

Thank you for the opportunity to comment on the Virginia Department of Labor and Industry's Safety and Health Codes Board proposed 16 VAC 25-220, Permanent Standard/Regulation, Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19. The proposed rule is based entirely on the Emergency Temporary Standard (ETS) on the same subject. I am a concerned citizen and lawyer with extensive background in regulatory law and policy. I have worked on dozens of statutory programs for many years as Senior Counsel to the Energy and Commerce Committee in the U.S. House of Representatives and worked in the Office of General Counsel for the U.S. Environmental Protection Agency. I have substantial concerns with the ETS and the proposed rule and strongly recommend the Board withdraw the ETS and this proposal.

COMMENTS

I have reviewed both the process and substance of numerous illegal and unwise mandates in Executive Orders from Governor Northam and in Orders of Public Health Emergency from Health Commissioner Norman Oliver in 2020. I have also reviewed the Emergency Temporary Standard (ETS) which was hastily, illegally and unwisely mandated by the Governor under Executive Order 63 and was hastily, illegally and unwisely promulgated by the Virginia Safety and Health Codes Board under the special authority of Va. Code § 40.1-22(6a)

I. The Illegal Mandates Of Governor Northam In EO 63 Regarding an Emergency Temporary Standard Or Rule Undermine the Validity of the ETS

On May 26, 2020, Governor Ralph Northam issued a revised Executive Order 63 that provides in part:

> "E. Department of Labor and Industry
> Except for paragraph B above, this Order does not apply to employees, employers, subcontractors, or other independent contractors in the workplace. **TheCommissioner of the Virginia Department of Labor and Industry shall promulgate emergency regulations and standards to control, prevent, and mitigate the spread of COVID-19 in the workplace**. The regulations and standards adopted in accordance with §§ 40.1-22(6a) or 2.2-4011 of the Code of Virginia **shall apply to every employer, employee, and place of employment within the jurisdiction of the Virginia Occupational Safety and Health program as described in 16 Va. Admin. Code § 25-60-20 and Va. Admin. Code § 25-60-30.** These regulations and standards **must address personal protective equipment, respiratory protective equipment, and sanitation, access to employee exposure and medical records and hazard communication.** Further, these regulations and standards **may not conflict with requirements and guidelines applicable to businesses set out and incorporated into Amended Executive Order 61 and Amended Order of Public Health Emergency Three."**(Emphasis added).

Although EO 63 does not mention the Safety and Health Codes Board, the Governor issued a news release which says in part:

> "The Governor is also directing the Commissioner of the Department of Labor and Industry to develop emergency temporary standards for occupational safety that will protect employees from the spread of COVID-19 in their workplaces. These occupational safety standards will require the approval by vote of the Virginia Safety and Health Codes Board and **must address personal protective equipment, sanitation, record-keeping of incidents, and hazard communication**. Upon approval, the Department of Labor and Industry will be able to enforce the standards through civil penalties and business closures." (empl

The Governor's directives in EO 63 as mandates to the Department of Labor and Industry are illegal, in excess of authority and inconsistent with law. The directive fails all of the tests related to Separation of Powers and also violates the independence of the Board itself, which is a separate statutory creation of the General Assembly with separate duties and powers from those of the Governor.

The Governor's mandate that "The Commissioner of the Virginia Department of Labor and Industry shall promulgate emergency regulations and standards to control, prevent, and mitigate the spread of COVID-19 in the workplace" was issued in excess of the Governor's authority and is, therefore, void. Workplace standards and whether they are emergency standards are set forth in the basic laws

and policies of this Commonwealth or implemented by the Board following regular and reasonable procedures. Workplace standards in this Commonwealth have never been based on unilateral directives from the Governor and no such authority is available to the Governor.

The Governor's mandate that "The regulations and standards adopted in accordance with §§ 40.1-22(6a) or 2.2-4011 of the Code of Virginia shall apply to every employer, employee, and place of employment within the jurisdiction of the Virginia Occupational Safety and Health program" is both in excess of the Governor's authority and unlawfully constrains the lawful discretion of the Virginia Safety and Health Codes Board. The mandate goes beyond policies and standards under the basic laws, and presupposes the regulations at issue meet the statutory standards for an application to every employer, employee, and place of employment. Moreover, the scope of any regulations under the basic laws must be decided by the Board through a process based on statutory policies and standards, rather than by directive from the Governor.

The directive in EO63 that "[t]hese regulations and standards must address personal protective equipment, respiratory protective equipment, and sanitation, access to employee exposure and medical records and hazard communication" is unlawful because the scope of any regulations under the basic laws must be decided by the Board through a process based on statutory policies and standards, rather than by directive from the Governor. The directive in EO63 that "[t]hese regulations and standards may not conflict with the requirements and guidelines applicable to businesses set out and incorporated into Amended Executive Order 61 and Amended Order of Public Health Emergency Three" is unlawful because the scope of any regulations under the basic laws must be decided by the Board through a process based on statutory policies and standards, rather than by directive from the Governor.

The illegal directives from the governor poisoned the process the Board used to adopt the ETS as well as its scope and substance contrary to the requirements of law and in violation of Separation of Powers. The Governor's directive that the Board not issue any regulation which conflicts with Executive Orders or Orders of Public Health Emergency is codified as 16VAC25-220-10(F). Such a provision is unlawful. The Governor has no authority to cabin the lawful exercise of authority or discretion by executive agencies with a separate legal existence or to subvert all otherwise-lawful regulation in the Commonwealth to his whims. Nor can the independent agencies abdicate the responsibility that the legislature has given them to regulate in a manner that meets certain legislative policies and procedures out of a desire not to adopt regulations which conflict with the governor's aims.

It is clear that neither DOLI Staff nor the Board ever questioned the authority of the Governor's E063 mandates. DOLI's website states "In accordance with Executive Order 63, the Department presented to the Safety and Health Codes Board an emergency temporary standard/emergency regulation to address COVID-19, applicable to all employers and employees covered by Virginia Occupational Safety and Health (VOSH) program jurisdiction." In document styled Draft Safety and Health Codes Board Public Hearing and Meeting Minutes, June 24, 2020, the second sentence describes the Governor's directive in EO 63. The draft agenda for the July 24, 2020 describes the directives in EO 63 under Summary of Rulemaking Process.

The final result reflects the Governor's mandates in all ways. The ETS was promulgated under the only two processes-- both emergency process--presented by DOLI staff as options. These process by-passed the provisions of the Virginia Administrative Process Act (VAPA) including ordinary notice and comment proceedings, regulatory impact analyses, regulatory flexibility analyses and other provisions of VAPA. To date there has been no regulatory impact analysis or regulatory flexibility analyses for the public to comment on. It's as if those factors do not matter to the Governor or the Board.

II. The ETS Failed To Meet the Requirements Of Law Which Cannot Support The Scope and Unworkable Provisions of the Rule

The Safety and Health Codes Board (the Board) is authorized by Va. Code §40.1-22(5) to: "adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the federal OSH Act of 1970...as may be **necessary** to carry out its functions established under this title." (emphasis added). Va. Code §40.1-22(5) provides that rules must be to the extent "**feasible"** and be supported by the "**best available evidence"**. To restate this point, any standard must be necessary and supported by best available evidence. It is not evidence that COVID-19 is dangerous. It is evidence that the standard is necessary. The Board shall evaluate the "feasibility of the standards" and experience gained under this and other health and safety laws.

The unwise procedural path that the Board chose to go through carries a higher burden before promulgating any regulation or component of a regulation. Under Va. Code §40.1-22(6a), the Board must determine that the components of the ETS must be "**necessary to protect"** employees from **"grave danger."** The provision is an unusual and extraordinary provision that avoids ordinary rulemaking. Judicial review of such action demands **"substantial evidence"** supporting the Board's choices. The Board did not meet these standards for the rule. The key point is it is that the standards to not apply to the rule on an assumption the scope and structure of the rule does not have alternatives.

Nothing required nor allows the Board to consider an up or down assessment without evaluating whether the full scope and each and every mandate of the rule is necessary to protect employees from a grave danger, is feasible, and supported by substantial evidence. The key is to consider alternatives. For example, the ETS itself has categories of risk

The Governor's mandates poisoned the process and the Government's mandates are not substantial evidence or proof of necessity or anything else relevant to the decision of the Board. This is so, even the Governor appoints most members of the Board. The Board has legal obligations and acquiescing to illegal mandates is not consistent with those legal obligations. The text of the final ETS does not itself contain findings that the all the major components of the final ETS are necessary to meet a "grave danger."The issue is not whether *any* ETS is necessary to meet the "grave danger" standard but whether all of the substantial elements of this ETS as applied across the scope of every employer in Virginia is necessary under the procedures of Va. Code §40.1-22(6a).

III. Multiple Components and the Regulatory Sweep of the ETS Fails To Meet the Statutory Standards

A. The Board Did Not Consider Whether The Full Sweep And Each Component Meets The Statutory Standards

The record shows a vote related to the adoption of **AN** emergency standard. The minutes show that Mr. Withrow stated that the "staff of the Department of Labor and Industry recommends that the Board find that SARS-CoV-2 and COVID-19 related hazards and job task employee exposures constitute a grave danger to employees in Virginia that necessitate the adoption of **AN** emergency temporary standard to protect Virginia employees from the spread of the SARS-CoV-2 virus which causes COVID-19 under Va. Code §40.1-22(6a). (emphasis added). The aforementioned statement by Mr. Withrow was noted as following a discussion of the briefing package up to p. 136. (Note, the draft summary of the draft ETS starts on p. 153). The Board had a discussion related to the recommendation and whether there was a grave danger and if there is a need for An emergency temporary standard. The motion was made, properly seconded, and carried.

Since a regulation with a scope that applied to all employers and contained all of the instructions of the EO 63 was the only thing provided to the Board, there is no indication that the Board considered alternatives and the components of the overall ETS to see if all components and their full scope were "necessary" to address a "grave danger"and"feasible" and supported by "substantial evidence in the record as a whole." Proceeding through this unusual approach that did not provide a comment period that satisfied VAPA, that had no regulatory impact analysis, and provided for no regulatory flexibility analysis, and the Board's decision to follow the express directions of the Governor to the exclusion of considering any other option, left the Board's administrative record unlawfully cabined and renders its decision unsupported by substantial evidence and unlawful. There is also no indication that the Board provided a response to significant comments from the 10-day comment period, nor any indication that the Board was presented a significant discussion of comments.

B. The Board Has Not Shown That The Sweep, Components or Approach of the Standards Are Necessary To Protect Against A Grave Danger Considering that the Federal Occupational Health And Safety Administration Has Guidelines and Certain Rules And Recommended Against the Basic Action The Board Has Taken

The Federal Occupational Safety and Health Administration ("OSHA") took the position that it will not be promulgating an emergency standard pursuant to its authority under the OSH Act of 1970, instead opting to rely upon many voluntary guidelines for various business sectors. There is no evidence the Board meaningfully considered OSHA's regulatory framework, even though the Virginia Code provides that OSHA standards are presumptively lawful when adopted by the Board under its powers. The Safety and Health Codes Board has failed to meet the standard of finding that the full scope of the ETS are "necessary" to address a "grave danger" to use the extraordinary process of Va. Code §40.1-22(6)(a) and do not have "substantial evidence" in the record for this finding. There are many reasons the ETS fails on this front. First, it is important to consider the scope of the rule. The rule covers virtually every private and public employer in Virginia. Second, the rule is unworkable. Under the ETS, a single cough means an employee cannot work for 10 days. The ETS requires unrealistic reporting and planning burdens for every employer regardless of whether that employment situation is substantially above the background risk facing Virginians in multiple settings. That is not a burden that is proportional or reasonable for the risk and does not warrant the exceptional use of 40.22 (6a). By their own statements and structure of the rule, the Board has stated 4 levels of risk from low to very high. Yet the rule poses substantial requirements on all levels. Additionally, the Board cannot justify how it can simultaneously designate parties to be a "low" risk while still regulating those same parties on the basis that they face "grave danger." The Board has provided no comparative assessment or statement to support its finding of"grave danger." More importantly the Board has not shown that the burdens in the ETS are necessary to address a grave danger.

The US Department of Labor and US Court of Appeals for the District of Columbia Circuit have already provided direction on this issue. On April 28, 2020, AFL-CIO President, Richard Trumka, petitioned US Secretary of Labor Eugene Scalia to adopt a Department of Occupational Safety and Health Administration (OSHA) emergency temporary standard for COVID-19. On April 30, 2020, US Secretary of Labor Eugene Scalia rejected the AFL-CIO petition from April 28, 2020, and stated:

> "Coronavirus is a hazard in the workplace. But it is not unique to the workplace or (except for certain industries, like health care) caused by work tasks themselves. This by no means lessens the need for employers to address the virus. But it means that the virus cannot be viewed in the same way as other workplace hazards."

The letter also states

> "your letter disparages OSHA's guidelines as 'only voluntary', suggesting that there are no compliance obligations on employers. That is false... Indeed, the contents of the rule detailed in your letter add nothing to what is already known and recognized (and in many instances

> required by the general duty clause itself). Compared to that proposed rule, OSHA's industry specific guidance is far more informative for workers and companies about the steps to be taken in *their* particular workplaces" That is one of the reasons OSHA has considered tailored guidance to be more valuable than the rule you describe."

On June 11, 2020, the US Court of Appeals for the District of Columbia Circuit denied the AFL-CIO's May 18 petition.

The Board has not shown evidence that the myriad requirements it imposed are "necessary" with substantial evidence to address a "grave danger" and "feasible." First, for the requirements to be "necessary" and "feasible" they would need to be operationally workable and "necessary" in the sense that the timing concerns warranted the extraordinary step of not following the ordinary requirements of VAPA. VAPA would require economic impact analyses, regulatory flexibility analyses and a more meaningful comment period than provided by the Board.

The general duty requirements of Va. Code § 40.1-51.1 (a) of the Code of Virginia apply to all employers covered by the Virginia State Plan for Occupational Safety and Health. Under this provision "....it shall be the duty of every employer to furnish to each of his employees safe employment and a place of employment that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.." Accordingly, the baseline for understanding what is "necessary" to address a "grave danger" should be viewed against the baseline that employers already have legal obligations relating to COVID-19.

The rules are not "feasible" because the Board has not provided adequate time or taken sufficient steps to roll-out and educate the employers within the scope of the rule about the rule and compliance with the rule. The rule is massively complicated. There is no evidence that the Board has taken steps to make all Virginia employers aware of the rule and set-up appropriate steps for such a massive program.

C. The Immediately Effective Date Was Not Feasible And Neither the Board Nor DOLI Has Properly Provided A Roll-out for Regulations Of Such Immense Sweep

The immediate effective date of the ETS upon publication in the City of Richmond is irrational and not feasible. The training requirements effective dates are equally irrational as there was no time provided for businesses to evaluate their obligations and options to control the virus before beginning training. The Board has unreasonably exposed businesses to threats of compliance enforcement action for steps they cannot take in the time frame set out in the rule. Such actions are not consistent with the Constitution of Virginia because the Board is depriving businesses and citizens of liberty without the fundamental due process rights of sufficient notice and time for compliance. The scheme *per se* sets up a regime of arbitrary enforcement since few if any employers were likely in compliance as of its effective date and could not have realistically been in compliance.

D. The "Suspected" COVID Provisions are Unworkable, Vague and Not Supported by Evidence

The operation of the ETS's "suspected" COVID provisions are unworkable. The term "suspected to be infected with SARS-CoV-2 virus""means a person that has signs or symptoms of COVID-19 but has not tested positive for SARS-CoV-2 and no alternative diagnosis has been made."See §16VAC25-220-30. However, the ETS does not define "symptoms." The ETS does have a definition of "symptomatic." "Symptomatic" means the employee is experiencing symptoms similar to those attributed toCOVID-19 including fever or chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, or diarrhea. Symptoms may appear in 2 to 14 days after exposure to the virus. §16VAC25-220-30.

Assuming the term "symptomatic" contains the relevant "symptoms" — a point which is not clear — then the universe of employees with suspected COVID-19 that pose the stated risk includes, among a broader universe, anyone who has a cough *or*headache *or* sore throat *or* congestion *or* runny nose, or fatigue, as just some examples. Pursuant to the ETS, employers are required to develop and implement policies and procedures for employees to report when they are experiencing symptoms consistent with COVID-19,at least when no alternative diagnosis has been made (e.g., tested positive for influenza). Such employees shall be designated by the employer as "suspected to be infected with SARS-CoV-2 virus." See §16VAC25-220-40 A(4)

It is unrealistic to expect employers and contractors, including small and medium sized employers to evaluate alternative diagnosis or expect timely assessments by medical personnel in the time frames for the kinds of low level symptoms described. There is no evidence that this is feasible or that this approach is necessary or even useful to addressing a "grave danger." If anything, the ETS creates a situation in which employees will be skittish to cooperate at all.

Pursuant to the ETS, employers are required to prohibit employees or other persons known or suspected to be infected with the SARS-CoV-2 virus to report to or remain at the work site or engage in work at a customer or client location until cleared for return to work. See §16VAC25-220-40.B and §16VAC25-220-40 A(5). Similar language covers subcontractors. See §16VAC25-220-40 A(7) .No employee or subcontractor can return to the worksite until at least 72 hours since the signs of any symptom have passed and ten days have elapsed, whichever period is longer. See §16VAC25-220-40.B. The return-to-work test-based strategy is also problematic because of the lack of testing availability. The regulation also requires compliance with symptom-based strategy if a known *asymptomatic* employee refuses to be tested. The Rule is asking both employers and employees to affect their business and livelihood based symptoms that cannot be evaluated as being beyond ordinary and common circumstances. This is neither workable, feasible, nor supported by an evidence of operation.

E. The Board Is Effectively Implementing A Quarantine Policy Which Is Beyond The Authority Of the Board And In Conflict with The Requirements Of the Quarantine And Isolation Provisions

F. The Board Lacks Authority Over Sick Leave Policies And Recitation To Such Policies In the ETS Is Illegal

Meanwhile, §16VAC25-220-40 (B)(6) states that "employers shall ensure that sick leave policies are flexible and consistent with public health guidance..." Although the ETS contains language that is vague and threatens potential penalties, the Safety and Health Codes Board does not have authority over sick leave policies. Therefore the Board's statement with regard to such policies is illegal and in excess of authority. The Board should eliminate all human resource policies from the Regulations such sick leave, telework, flexible worksites, flexible work hours, flexible meeting and travel, the delivery of services or the delivery of products. The statement regarding sick leave nonetheless illustrates the problem with the ETS. An employee who coughs or sneezes has to lose work for a significant period of time. That may deny that employee important employment opportunities, the ability to contribute to specific projects, and cause great disruption.

G. The Testing and Reporting Scheme Is Unreasonable and Requires Agreement with Third Parties Who May Or May Not Cooperate

The ETS has a test reporting scheme that penalizes employers who cannot gain agreements with third parties and operate within unrealistic time frames and at risk for mishandling the privacy of medical information. See §16VAC25-220-40 A(8). The system for reporting positive tests includes employees, subcontractors, contract employees, temporary employees, building owners, tenants, residents in a building, and 24 time frames is overly broad, not shown to be necessary, and not feasible for the full scope of employers.

H. The Provisions Asking Building or Facility Owners to Require All Employer Tenants to Satisfy Requirements is Beyond the Boards Authority

The provisions referencing building owners and tenants seem to imply third party obligations and third party cooperation with employers. At best this is unclear but the source of authority for the Board beyond employers themselves is unclear. The lack of authority makes employer obligations unfair because of the necessary reliance on third parties.

I. The ETS Does Not Have A Rational Approach to Economic Feasibility That Meets The Statutory Standards

The ETS definition of economic feasibility at §16VAC25-220-30 is impermissible. The rule defines “economic feasibility” to mean the employer is financially able. The standard does not ask whether the employer could stay in business or avoid releasing employees in order to find the funds to pay for the costs of the rule. The failure to provide an economic impact assessment or regulatory flexibility analysis for comment compounds this problem.

J. The Physical Separation Requirements Are Not Rational

The ETS states under the definition of physical distancing pursuant to §16VAC25-220-30 that "physical separation of an employee from other employees or persons by a permanent, solid floor to ceiling wall constitutes physical distancing from an employee or other person stationed on the other side of the wall." Yet, as pointed out in comments to the Board, physical separation does not have to be achieved by permanent or floor to ceiling walls. Temporary plexiglass and other hard surface barriers are regularly used to retrofit workstations, counters and cubicles as physical separation "shields" or barriers for employees. On information and belief, the Board did not consider that alternative.

K. The HVAC Requirements For Medium Risk Businesses Are Not Reasonable

Requiring retroactive compliance with a 2019 ASHRAE HVAC standard is not reasonable. Any permanent regulation should follow existing process contained in the Uniform Statewide Building Code (USBC) which utilize appropriate industry investigation and recommendations. There is insufficient evidence that this requirement is workable or is necessary to address a grave danger.

L. Prohibiting Consideration of Serologic Tests Is Anti-Science And Illegal

Pursuant §16VAC25-220-40(A)(3), employers are prohibited from even considering serologic test results in deciding when an employee can return to work. A prohibition on using relevant medical information for decisions is an unprecedented political restriction of medical assessments. Not only has the Board seen fit to prohibit serologic testing from being conclusive or determinative of any issue, but the Board has outright prohibited employers from considering scientific evidence in their decisionmaking. Such an across-the-board prohibition is per se unreasonable and unnecessary.

The ETS frequently refers to the standards applicable to the industry which is language that may be appropriate for guidance but is too vague to be meaningful. This is compounded by numerous vague and unworkable definitions. For example, the physical distancing requirement in the ETS is unworkable and ambiguous. Distancing is not available for restaurant wait staff, personal services, physical instructors. The application of this rule is overly broad, unclear and not justified.

M. If the Permanent Standard Is Adopted It Should Sunset When Evidence Of Any Utility Is Reduced By Reduced Transmission of COVID-19

The onerous requirements of the permanent standards are not likely useful and do not address a grave danger when the Governor either removes the Declaration of a State of Emergency or when COVID-19 transmission rates among employers or categories of employers are found to be low. Accordingly, there should be a sunset clause.

N. Much Of the ETS Is Ambiguous and Vague Creating Problems Under Due Process Under the Virginia Constitution and In General

One of the largest sources of vagueness is the Suspected Covid provisions which really have so many convolutions and distinctions that science cannot make and employers cannot reasonably interpret. Workers rights and employers liabilities turn on these vagaries. In addition there are many other vague provisions. The proposed regulations frequently refer to the standards applicable to the "industry" which is language that may be appropriate for guidance but is too vague to be meaningful and should be removed from the ETS and consideration for Regulations. It is unclear about which version of CDC guidance an employer may reference for purposes of compliance with the Regulations found in 16VAC25-220-10(G) since guidance is changing so rapidly. It is also unclear who determines that the "CDC recommendation provides equivalent or greater protection than provided by this standard."

Is the general contractor or owner exposed to potential citation if the subcontractor violates any of the provisions of the ETS or Regulations without providing this information to the employer? This liability should not be shifted to an employer and the relationship is unclear. Similarly, the provisions apply to building owners and tenants and their relationships to employers is unclear and likely outside of the authority of the Board.

The entire structure relating the rules to the Executive Orders and Orders of Public Health emergencies as discussed below create massive uncertainties from overlapping schemes and questions on what supercedes what. This is especially so since the Orders have been changing all the time.

There is language protecting employees who refuse to work because they "feel" unsafe. The criteria for protected work refusals are already in the Administrative Regulatory Manual and this provision is just adding more confusion.

All-in-all, as drafted, enforcing these provisions should be found void for vagueness and lack of due process.

IV. Inclusion of Mandates Enforcing Executive Orders And Orders Of Public Health Emergency Is Illegal And Beyond Delegated Authority

Pursuant to §16VAC25-220-40 (F) of the ETS, the Board has illegally included in the ETS the variable and illegal rules in Orders provided by the Governor and Health Commissioner. Indeed, the structure of the ETS includes any Order they may provide such that the Board has impermissibly delegated its authority under §16VAC25-220-40 (F) to the Governor and Health Commissioner. Under the ETS, there has been no comment process to review the underlying Orders by the Governor or Commissioner. There is no public docket for the Orders, no regulatory impact statements, no regulatory flexibility analysis, and no opportunity for public comment. There was no discussion by the Board of the interaction of the Orders and the emergency rule. Including compliance with such Executive Orders as an enforceable mandate of the ETS constitutes an unlawful expansion of the Board's authority and that

of the Governor and essentially creates an extra statutory enforcement mechanism for the Governor's orders which was never contemplated by the legislature.

A similar problem exists for 16VAC25-220-10 (F) which states this Standard shall not conflict with requirements and guidelines applicable to businesses set out in any applicable Virginia executive order or order of public health emergency. We do not always not the sources of such Orders and whether they may supercede actual regulations. Effectively, this provision delegates authority to the Governor or Health Commissioner and fails to satisfy the statutory standards for rules by the Board. Moreover, the shifting sands create vagueness and uncertainty.

IV. The Mandates In the Existing EO 67 And Related Order Of Public Health Emergency Are Illegal And Thus, The Incorporation Of Such Mandates Are Further Illegal And Fail The Statutory Standards For the Board

Having included the orders of the Governor and Health Commissioner in the ETS, the Board has included illegal and orders which violate the Virginia Constitution. For months on end, the Executive Branch in Virginia has taken numerous actions to subject millions of Virginians and tens of thousands of Virginia businesses to harmful and burdensome regulations, most carrying the threat of criminal sanction, and nearly all without legal precedence, justification, or authority

The mandates of the Governor and Health Commissioner infringe on multiple fundamental rights of the Plaintiffs including their freedom of assembly, freedom of association, free exercise of religion, free speech, privacy, and due process of law. The infringements on these rights are further compounded by numerous instances of unequal treatment. The mandates in the various Orders of the Governor and Health Commissioner are illegal in at least three fundamental ways. A government actor may only permissibly infringe on fundamental rights under the Virginia Constitution if: (A) they have followed procedures required by law, *and* (B) they are operating pursuant to a permissible delegation of legislative authority, *and* (C) they meet the high standards for infringing on multiple rights under the Virginia Constitution.

For virtually every one of the "emergency" mandates, the Executive Orders have not met any of these basic thresholds, let alone all three. However, the situation is even worse here because they Orders have not only violated these elemental principles here-and-there in separate areas of the law, but they have violated all of them simultaneously and cumulatively in each area of law.

A. The Mandates in the Governors Orders Violated Procedures Required By Law And Are Therefore Illegal Under the ETS

VAPA applies to the rules in the Orders because of the specific definitions in VAPA. VAPA provides that a "rule" or "regulation" means any statement of general application, having the force of

law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws. VAPA defines a covered agency as "any authority, instrumentality, officer, board or other unit of the state government empowered by the law to make regulations or decide cases."Absent the status of operating as an administrative agency neither the Governor nor the Health Commissioner would have an authority create regulations, even to fill in ostensible legislative gaps. Both the Governor and Health Commissioner in this context can only described as one of the listed entities empowered by to make regulations as defined by the VAPA definition of a "rule" or "regulation."

The orders, regulations, and rules at issue in this case were published and are not internal guidance or mere clarifications of other law. Through the Orders, the Governor and Health Commissioner purported to create law and to hold citizens and businesses in Virginia subject to them. VAPA is intended to be a default or catch-all source of administrative due process, applicable whenever the basic law fails to provide process. In summary, VAPA governs an agency's actions except where that agency's basic law provides its own due process or where VAPA expressly exempts a particular agency or its actions. *School Bd. v. Nicely*, 12 Va. App. 1051, 1060, 408 S.E.2d 545, 550 (1991). *See also* Va. Code §§ 2.2-4002. Accordingly, VAPA applies to both Va. Code §§ 44-167.17 and 32.1-13.

B. The Governor and Health Commissioner Did Not Operate Under a Permissible Delegation of Rulemaking Authority And, Accordingly, the Mandates In The Orders Violate Separation Of Powers

The Governor and Health Commissioner have create rules of general applicability that threaten criminal sanctions on individuals, businesses, and churches in Virginia. Generally, and in the first instance, the creation of law must go through the General Assembly. Accordingly, the Executive Branch can only create such rules where there is a permissible grant of rulemaking authority from an enactment of law from the General Assembly through the established Constitutional process. The Orders reference the Governor's powers under Article V of the Constitution of Virginia, Virginia Code § 44-146.17, and "any other applicable law." Likewise, the Health Commissioner relies on the powers provided in Va. Code §§ 32.1-13, 20, and 35.1-10.

The Virginia Constitution does not provide the power to create law to the Executive Branch in the first instance, and nothing in Article V provides such authority. Separation of Powers regarding the creation of law is fundamental precept of our Constitutional Republic and is protected in several ways in the Constitution of Virginia. Va. Const. Art. I, §5 states "The legislative, executive, and judicial departments shall be separate and distinct, so that none exercises the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time; provided , however, administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe.". Va. Const. Art. I, § 6. states that:

> That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of **their representatives duly elected**, **or bound by any law to which they have not, in like manner, assented** for the public good. (emphasis added)

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

Va. Const. Art. III, § 1 states:

> The legislative, executive, and judicial departments shall be separate and distinct, so that none exercises the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time; provided , however, administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe.

Va. Const. Art. IV , § 1 states that "**The legislative power of the Commonwealth shall be vested in a General Assembly**, which shall consist of a Senate and House of Delegates. **No law shall be enacted except by bill**. (emphasis added). Quite simply, the Legislative Power resides with the General Assembly with participation by the Governor through a Constitutional process. Separation of Powers belongs to and is for the benefit of the citizens of Virginia. The legislature may not give the Legislative Power to the Executive Branch.

"Deeply embedded in the Virginia legal tradition is 'a cautious and incremental approach to any expansions of the executive power.'" *Howell v. McAuliffe*, 292 Va. 320, 327, 788 S.E.2d 706, 710 (2016) (quoting *Gallagher v. Commonwealth*, 284 Va. 444, 451, 732 S.E.2d 22, 25 (2012)). This tradition reflects our belief that the "concerns motivating the original framers in 1776 still survive in Virginia," including their skeptical view of the "the unfettered exercise of executive power."

No previous Governor or Virginia legislature has ever placed a statewide numerical limitation on assembly or provided a government definition of who may or may not sit or stand together in certain settings, among other basic infringements. Furthermore, there is simply no legal or constitutional basis for running a government by executive order for months on end. No prior Executive Order in Virginia history has authorized the complete shut-down of the Virginia economy, mandated the closing of Virginia's public and private schools, limited lawful assemblies to 10 or 50 people or prescribed who can and cannot sit with one another in different settings.

The Governor and Health Commissioner apparently believe the General Assembly through language in Va. Code §§ 44-146.17 and 32.1-13 has provided for the Commonwealth to be a *de facto*

autocracy whenever a “public health emergency” is unilaterally declared. That is not the law of this Commonwealth, nor could it possibly be construed as such. In Virginia, "delegations of legislative power are valid only if they **establish specific policies and fix definite standards** to guide the official, agency, or board in the exercise of the power. Delegations of legislative power which lack such policies and standards are unconstitutional and void."*Ames v. Town of Painter*, 239 Va. 343, 349 (1990) (emphasis added). See also *Bell v. Dorey Elec*. Co., 248, Va. 378, 380, 448 S.E. 2d 622, 623 (1994).

In *Bell*, the Virginia Supreme Court agreed with the trial court that:

> “[t]he requirement of sufficient legislative standards was not satisfied by the general direction in the statute that the regulations be designed to protect and promote the safety and health of employees. The General Assembly cannot delegate its legislative power accompanied only by such a broad statement of general policy.

*Bell at*448 S.E. 2d 622, 624 (1994)

The *Bell* Court noted that the directives from the legislature must provide sufficient legislative standards to guide the relevant agency and also establish a legally discernable standard by which a court could review subsequent challenges to the Board's rules. The *Bell* Court emphasized that these legislative standards placed in the statute by the General Assembly provide a ceiling on the type of rules which may be adopted. The Governor and Health Commissioners interpretation of Va. Code §§ 44-146.17 and 32.1-13 (as applied through the Orders) would be an unconstitutional delegation of authority and does not meet the tests of *Ames* or *Bell*.

The substance and process (or lack therof) related to the Orders have made the Separation of Powers issue worse in every dimension. The Governor and Health Commissioner have chosen the tool of infringing on fundamental Constitutional rights as key elements of the rules they published through their view of Va. Code §§ 44-146.17 and 32.1-13. They have claimed VAPA does not apply and have, thus, provided no public docket, no forum for public comment, no regulatory impact statements, no regulatory flexibility analysis, no response to comments, no outline of the comments they have received through private processes. The Virginia Board of Public Health did not meet regarding the rules in the Orders.

C. The Requirements To Shut Down Businesses For Failure To Follow Individual Requirements Is Beyond Authority

EO67 provides numerous requirements for a variety of businesses regarding distancing, seating, cleaning, and face masks. In the last paragraph for many of these provisions the Order states “If any such business cannot adhere to these requirements, it must close.” The same language applies to religious services pursuant to B. 1 (F) of the EO67. Pursuant to EO67 A (13), regarding enforcement the Governor and Health Commissioner state in part:

> The Virginia Department of Health shall have authority to enforce section A of this Order. Any willful violation or refusal, failure, or neglect to comply with this Order, issued pursuant to § 32.1-13 of the Code of Virginia, is punishable as a Class 1 misdemeanor pursuant to § 32.1-27 of the Code of Virginia. The State Health Commissioner may also seek injunctive relief in circuit court for violation of this Order, pursuant to § 32.1-27 of the Code of Virginia. In addition, any agency with regulatory authority over a business listed in section A may enforce this Order as to that business to the extent permitted by law.

The Order's provision requiring closure of a business effectively operates as a sanctions for the other requirements in the order. Such a sanction, however, is provided for under Va. Code § 32.1-27 only as part of a carefully-crafted legislative scheme which protects due process rights and provides for judicial review. The creation of a sanction unilaterally by the Governor or Health Commissioner absent such judicial review is in excess of their delegated authority.

D. The Executive Orders and Orders of Public Health Emergency Incorporated By The Board Impermissibly Infringe On Fundamental Rights of Assembly and Association Under the Virginia Constitution

VA. Const., Art. I, § 12 states: "the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble …." By definition, a numerical limitation by the state on the size of assemblies is an infringement on the right to peaceably assemble. A statewide limitation on the size of assemblies in Virginia is unprecedented. Moreover, the infringement on the right of assembly has uneven application under the rules of the orders. For months, there was a 10-person, and then a 50-person, restriction on assembly, including for weddings, celebrations, sporting events, family reunions, and Easter church services. Now the restriction has a higher limit (but includes a restriction on occupancy in certain settings that are lower limits). However, these same restrictions did not and do not now apply to a large meeting of lawyers at a law firm. Countless individuals performing functions together through their employment is not a "gathering" under the Order. Crowds are allowed at a Walmart, Lowes, or other large "essential" stores without those restrictions.

After numerical limits of 10 persons in Phase One and 50 in Phase Two, the numerical limits on assembly are 250 under EO 67. These limitations on assembly included arbitrary government definitions of "family" as part of defining the 10-person limit. EO 68 generally has gone back to a 50-person limit on assembly. The limits on assembly apply in certain circumstances, but not in others, without apparent reasons being given to attempt to justify the distinctions.

EO 67 Third Amended and various standards referred to in that Order incorporate a separate document styled "Safer at Home: Phase Three Guidelines For All Business Sectors" (hereinafter "Guidelines"). Despite its use of the term "guidelines," the document has sections called "best practices" and sections described as "Mandatory Requirements."It states that establishments must either implement these mandatory requirements or close. The requirements vary by setting, but the settings are generally parallel to EO 67. The mandatory requirements in the Guidelines, however, use

materially different terms than those used in EO 67. Where EO 67 has a "family" exception for distancing, the "mandatory requirements" provisions employ the term "members of the same household" and the term "at all times" in various sections. Curiously, the definition of "Family members" in EO 67 would not even include a married couple who are not currently "residing in the same household."

For Farmers markets, "non-essential" brick and mortar retail establishments, indoor and outdoor swimming pools, and horse and other livestock shows, the Guidelines use the narrower terms "household," whereas EO 67 uses the term "family." For purposes of the right of assembly in innumerable situations, and especially given that such rules apply to all Virginians, distinctions like this have major implications, particularly when violating them carries a criminal penalty. This regulatory inconsistency also deprives every Virginian of due process because it makes it impossible for anyone to know with whom they may gather and when without risking committing a criminal offense.

Notably, the Guidelines language for performing arts venues, concert venues, movie theaters, drive in entertainment, sports venues, botanical gardens, zoos, fairs, carnivals, amusement parks, museums, aquariums, historic horse racing facilities, bowling alleys, skating rinks, arcades, amusement parks, trampoline parks, fairs, carnivals, arts and craft facilities, escape rooms, trampoline parks, public and private social clubs, and all other entertainment centers and places of public amusement all use the term "members of the same household" as an exception. However, that term is not used in EO 67 itself. For Horse Racing Racetracks, the Mandatory Guidelines say all must observe distancing, but exceptions--whether household or family-- are not included.

A government scheme that prohibits every instance of physical proximity among individuals within six feet of one another, based on nothing more than the government's arbitrary and unilateral classification of their relationship statuses, is an infringement of fundamental rights under the Virginia Constitution. The right of association is both an integral part of the right of assembly and also a separate fundamental right. Ordinary conversations at a distance much closer than 6 or 10 feet is also important to the right of free speech. It is the kind of speech that can, and in many instances, must occur among two people or a few people to maintain their right to privacy without others intruding or overhearing. At issue is nothing less than the right of a free people to determine, apart from government rules or coercion, with whom they can sit or whom they can stand next to, perhaps to have a private conversation or maybe simply to hold hands – or frankly any other manner of close personal activity.

Virginians have a fundamental right in who they choose to dance with, who to hold close, who to have a normal conversation with, and, generally, who to be next to as long as the other person wants the same. All Virginians "have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."Va. Const., Art. I, § 1. The Constitution of Virginia notes the desire to have a government that is most effectually secured against the dangers of maladministration. Va. Const., Art. I, § 3. Virginians have a fundamental freedom of speech and assembly. Va. Const., Art. I, § 12. We know that "No free

government, nor the blessings of liberty, can be preserved to any people, but ...by frequent recurrence to fundamental principles." Va. Const., Art. Art. I, § 15.

A government definition of who can be close to other people and who cannot, imposed broadly, indefinitely, arbitrarily, and unilaterally upon all Virginians is a profound and impermissible assault on their fundamental rights. EO 67 provides several definitions of who may associate without distancing, which apply in certain settings but not in others. Several elements of EO 67 require maintaining a 6-foot or 10-foot distance in certain settings for certain groups but not others based on a definition in the order of either family or household.

The Virginia Supreme Court has stated that provisions of the Constitution of Virginia that are substantively similar to those in the United States Constitution will be afforded the same meaning. See, e.g.,*Shivaee,*270 Va. at 119, 613 S.E.2d at 574 ("due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution."); *Habel v. Industrial Development Authority,*241 Va. 96, 100, 400 S.E.2d 516, 518 (1991) (federal construction of the Establishment Clause in the First Amendment "helpful and persuasive" in construing the analogous state constitutional provision). While the First Amendment does not, by its terms, protect a "right of association," the United States Supreme Court has recognized such a right in certain circumstances. *Dallas v. Stanglin*, 490 U.S. 19, 23-24 (1989). In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court defined the right at issue to include choices to enter into and maintain certain intimate human relationships and the separate but related right to "expressive association."

E. The Boards Adoption Of The Impermissible Infringements On Constitutional Rights Of Assembly and Association Place Employers In An Unreasonable And Unworkable Situation

By penalizing employers for not following impermissible infringements on Constitutional rights by the Governor, the Health Commissioner, and the Board itself, the ETS forces employers to participate in an illegal scheme. There should be no government definition of who must distance versus not distance based on relationships which neither the government nor businesses can reasonably assess. In various settings the Board would have employers ask customers about their family or household relationships to enforce the distancing requirements. This is not a workable scheme. There is no evidence after many months that this scheme has yielded any benefit other than to threaten all with criminal sanctions. The Board would penalize a wedding venue because a boyfriend and girlfriend not residing in the same house sat together at a religious service or walked at a farmers market together. These requirements have never been feasible and now the Board has adopted them and added to their enforcement structure. The requirements of the Board unreasonably force employers to inquire about matters that cannot be easily proven and places employers in the position of facing liability for discrimination. The requirements if enforced by a local police department would place those police officers at threat for damages under a section 1983 civil rights suit. There is nothing reasonable or workable about these provisions.

V. The Board Continues Its Failure Under VAPA And The Logical Assessment Of Other Statutory Law

A. The Board Must Provide a Regulatory Impact Analysis and Regulatory Flexibility Analysis For Public Comment

To date there has been no regulatory impact analyses or regulatory flexibility analysis. The ETS commendably and specifically states in 16VAC § 25-60-10 (B) that "this standard shall not be extended or amended without public participation in accordance with the Virginia Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) and 16VAC25-60-170." Note the citation is the full scope of VAPA. Public participation under VAPA ordinarily includes comments on a regulatory impact analysis and regulatory flexibility analysis, but none have been provided for this comment period. Beyond the specific provisions in VAPA, the requirement to ensure that rules are necessary and feasible requires the same analysis.

This is all on top of the lack of credible process for the ETS itself. The ETS originated on April 23, 2020 from a petition and model language provided by the Legal Aid Justice Center, Virginia Organizing, and Community Solidarity with the Poultry Workers to Governor Northam, Commissioner Oliver, Attorney General Herring, Commissioner Davenport, and Director Graham. On June 12, 2020, the Administration posted the ETS for ten (10) calendar days or six (6) workdays for public comment and then barred public testimony before the Board during its multiple hearings over four weeks. The Board also violated its own bylaws on several occasions including allowing representatives of the DEQ Director and Virginia Health Commissioner to both vote, not posting agenda properly, not providing public notice properly, and barring public testimony at hearings.

B. The Board and DOLI Should Provide An Analysis Of What Has Happened Related To Operation of the ETS and Employers In Virginia Over the Past Two Months

The unfortunate ETS has been effective since July 27, 2020. It is incumbent on the Board and DOLI to provide information on its operation. This should include a survey of what employers know about the standards, what reporting as occurred, how many employees have been sent home, and some assessment of how the operation of the rules have impacted the transmission of COVID based on actual evidence supporting such assessment. In conversations with multiple employers, there seems to be almost no understanding that the rules exist much less compliance. This is a point that strongly ways against the hasty promulgation of a rule that threatens businesses but for which the Board and DOLI have done little to explain.

RECOMMENDATIONS

For the reasons discussed above the Board should remove the illegal, ill-considered, and unworkable ETS. The Board should not promulgate a permanent standard based on the unworkable and illegal scheme that has been presented by the ETS. The Board should nonetheless provide or obtain a regulatory impact statement and regulatory flexibility analysis concerning the rules including an opportunity for public comment. The Board should obtain an evaluation of the implementation of the ETS prior to its removal. The Governor and Health Commissioner should withdraw the illegal and unworkable mandates in E067 and other Executive Orders and the Board should reject these standards. The Board should provide a response to comments document that covers both the ETS and the permanent rule comments. That document need not address each comment when they are part of a similar group but should provide responses to all significant comments.

Sincerely,

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