TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA

STEPHEN E. SINCAVAGE, JUDGE
POST OFFICE BOX 470
LEESBURG, VIRGINIA 20178

JEANETTE A. IRBY, JUDGE
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DOUGLAS L. FLEMING, JR., JUDGE
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Loudoun, Fauquier and
Rappahannock Counties

JAMES PAUL FISHER, JUDGE
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JAMES E. PLOWMAN, JR., JUDGE
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W. SHORE ROBERTSON, JUDGE RETIRED
JAMES H. CHAMBLIN, JUDGE RETIRED
THOMAS D. HORNE, JUDGE RETIRED
BURKE F. MCCAHILL, JUDGE RETIRED
JEFFREY W. PARKER, JUDGE RETIRED

June 29, 2020

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In re: Philip C. Strother, *et al.* v. Hon. Ralph S. Northam, *et al.*, Circuit Court of Fauquier County Case No. CL20-260

Dear Counsel:

Thank you for your cooperation and efforts to address this matter remotely. Although it is an unusual process, the Court greatly appreciates your professionalism and understanding.

This case is before the Court on Plaintiff's Motion for Temporary Injunction. The facts at issue are as follows:

Plaintiff, Philip Strother ("Strother"), is the representative of Philip Carter Winery a/k/a Stillhouse Vineyards, LLC ("Winery" collectively "Plaintiffs").

The Plaintiffs have brought the instant action against Governor Ralph Northam ("Governor"), Virginia State Health Commissioner Dr. M. Norman Oliver ("Commissioner"), Virginia Attorney General Mark Herring ("Attorney General"), and Fauquier County Commonwealth's

Attorney Scott Hook ("Hook"), relative to certain executive orders entered in response to the coronavirus ("COVID-19") pandemic. In particular, Plaintiffs challenge Executive Order 63 ("EO 63") that requires face coverings to be worn by individuals in certain settings.

The timeline of the relevant executive orders is as follows:

On March 12, 2020, the Governor issued Executive Order 51 ("EO 51"), declaring a state of emergency in light of the COVID-19 pandemic.

On March 23rd, the Governor issued Executive Order 53 ("EO 53"), calling for temporary restrictions on certain activities in order to limit the spread of COVID-19. On April 15th, The Governor issued Amended EO 53, which included:

> The waiver of § 18.2-422 of the *Code of Virginia* so as to allow the wearing of a medical mask, respirator, or any other protective face covering for the purpose of facilitating the protection of one's personal health in response to the COVID-19 public health emergency declared by the State Health Commissioner on February 7, 2020 and reflected in Executive Order 51 declaring a state of emergency in this Commonwealth. Executive Order 51 is so amended. This waiver is effective as of March 12, 2020 until 11:59 p.m. on Wednesday, June 10, 2020.

Since that date, the Governor and Commissioner have issued Executive Order 61 ("EO 61") providing for "Phase One Reopening" of Virginia. Thereafter, Executive Order 65 ("EO 65"), was issued regarding "Phase Two Reopening." EO 65 was amended June 9, 2020 to include that the waiver of § 18.2-422 "will remain in effect until 11:59pm on September 8, 2020 unless amended or rescinded by further executive order."

In addition to those executive orders, on May 26, 2020, the Governor and Commissioner also issued Executive Order 63 ("EO 63") requiring that patrons over the age of ten in the Commonwealth "shall when entering, exiting, traveling through, and spending time inside the settings listed below cover their mouth and nose with a face covering, as described and recommended by the [Center for Disease Control ("]CDC[")] . . ." The list of establishments includes wineries.

EO 63 also carves out certain exceptions to the face covering requirement. For example, individuals need not wear a face covering while eating or drinking or if they have trouble breathing or have a health condition that prohibits the wearing of a face covering. In such cases, "[a]ny person who declines to wear a face covering because of a medical condition shall not be required to produce or carry medical documentation verifying the stated condition nor shall the person be required to identify the precise underlying medical condition." EO 63.

Enforcement of EO 63 has been delegated to the Virginia Department of Health. Violation of the executive order is punishable as a Class 1 misdemeanor. The State Health Commissioner also has been granted authority to seek injunctive relief for violations of EO 63.

On June 4, 2020, Plaintiffs filed their Complaint in this case. On June 10th, they filed the instant Emergency Motion for Temporary Injunction that is currently before the Court. The Motion alleges that EO 63 in in conflict with VA. CODE ANN. § 18.2-422 (2014) and so they seek relief from enforcement of EO 63. Specifically, they request that the Defendants be prohibited from enforcing criminal penalties on Strother if he elects not to wear a mask in public; that the Defendants be prohibited from enforcing criminal penalties as applied to conduct on Plaintiffs' business premises; and prohibiting the Governor, Commissioner, Attorney General, or their agents from seeking to enforce EO 63 upon the Winery by way of civil or other regulatory enforcement.

On June 17th, Plaintiffs filed their Memorandum of Law. Defendants filed their Memorandum in Opposition on June 19th in anticipation of the hearing conducted June 24th. The Court has carefully considering the written pleadings, authorities citied, evidence admitted, and argument received in making its findings herein.

As a preliminary matter, the Court must consider whether it has jurisdiction over the matter. In order for a court to have jurisdiction, the proceeding must involve an actual adjudication of rights (or a "justiciable controversy"). Daniels v. Mobley, 285 Va. 402, 402 (2013) (citing Charlottesville Area Fitness Club Operators Ass'n v. Albermarle County Board of Super., 285 Va. 87, 98 (2013)). In the context of a declaratory judgment, that means there must be "specific adverse claims, based upon present rather than future or speculative facts." Id. citing City of Fairfax v. Shanklin, 205 Va. 227, 229 (1964)). Thus, actions to interpret statutes and apply speculative facts are not proper for the Court's consideration. Id. (holding the Court lacked jurisdiction to determine whether Texas Hold 'Em poker constituted illegal gambling). With that being said though, the Court *is* within its authority to consider facial challenges to the constitutionality of the statute. Id. at 413.

In the case at bar, the Plaintiffs seek an interpretation of the Executive Orders as they related to the criminal code in order to avoid speculative prosecution under either. However, the Defendants overlook the fact that the Plaintiffs also explicitly challenge the Governor's and Commissioner's authority to issue EO 63. Moreover, the Plaintiffs have argued that theirs in not a situation in which they can take a course of action to avoid criminal prosecution. Instead, according to the Plaintiffs, their compliance with one rule in and of itself constitutes a violation of the other. As a result, the Court finds that the Plaintiffs' are not merely challenging the application of the law, they are challenging the propriety of the Executive Orders themselves. For that reason, there is a justiciable controversy.

Next, the Court must consider the issue of sovereign immunity. "As a general rule, the Commonwealth is immune both from actions at law for damages and from suits in equity to restrain government action or to compel such action . . . . Sovereign immunity may also bar a declaratory judgment from proceeding against the Commonwealth." DiGiacinto v. Rector and Visitors of George Mason Univ., 281 Va. 127, 137 (2011) (quoting Afzall v. Commonwealth, 273 Va. 226, 231 (2007) (edits in original). Those who occupy the high levels of government, such as governors, judges, and legislators are generally offered absolute immunity. Messina v. Burden, 228 Va. 301, 309 (1984). A suit may otherwise proceed if the Commonwealth has

explicitly waived sovereign immunity by statute or action. Baumgardner v. Southern Virginia Mental Health Inst., 247 Va. 486, 490 (1994).

Although the Defendants argue that there has been no waiver of sovereign immunity as it pertains to this claim, the Plaintiff contends that the specific language in the Virginia Administrative Process Act ("VAPA") implicitly waives sovereign immunity. VA. CODE ANN. §2.2-4026 (2016).

Ultimately, the Court finds that the parties have not had sufficient opportunity to fully address this issue, so the Court declines to dismiss the matter on this bases as requested by the Defendants in oral argument. The Court further declines to substantively address this issue at this juncture because, even assuming *arguendo* that sovereign immunity applies, the Plaintiffs are nonetheless not likely to succeed on the merits of their claim.

Turning to the substance of the Motion, it is well settled that "[n]o temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff's equity." VA. CODE ANN. § 8.01-628 (2015). "[T]he granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case." Levisa Coal Co. v. Consolidation Coal Co., 276 Va. 44, 60 (2008). Although the Supreme Court of Virginia has never articulated a temporary injunction standard, the Fourth Circuit and numerous Virginia circuit courts, including this one, have found that the court must consider: (1) the plaintiffs' likelihood of success on the merits; (2) whether irreparable harm will be suffered if the temporary injunction is denied; (3) whether the harm to the plaintiffs outweighs the harm to the defendants; and (4) whether the injunction is in the interest of the public. See Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); Meachin v. Bolin, 84 Va. Cir. 76 (City of Richmond 2013).

In addition to the foregoing, this judicial district also found that it must assess whether the Plaintiffs have an adequate remedy at law. Int'l Limousine Serv. v. Reston Limousine & Travel Serv., 68 Va. Cir. 84 (Loudoun County 2005). In deciding this matter, the Court relies on those standards without adopting another test as argued by the Plaintiffs, citing May v. R.A. Yancey Lumber Corp., 297 Va. 1 (2019) (considering the preservation of the *status quo*).

The Court's first consideration is whether the Plaintiffs have demonstrated a "clear showing" of likely success on the merits. See Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 345 (2009) citing Winter, 129 S. Ct. 365, 374 (2008). When examining a statute, the Court must determine the General Assembly's intent from the words contained therein. Tharrington v. Commonwealth, 58 Va. App. 704, 710 (2011). In doing so, the Court may not "add language to the statute the General Assembly has not seen fit to include." McGinnis v. Commonwealth, 296 Va. 489, 501 (2018) (internal citation omitted). Similarly, the Court may not presume that any part of the statute is without meaning. Postal Telegraph Cable Co. v. Norfolk & W.R. Co., 88 Va. 920, 926 (1892). This is because there is a presumption that "the General Assembly chose, with care, the words it used in enacting the statute, and [Courts] are bound by those words."

Kiser v. A.W. Chesterton Co., 285 Va. 12, n.2 (2013) (citing Halifax Corp. v. First Union Nat'l Bank, 262 Va. 91, 100 (2001)).

VA. CONST. art. V, § 7 directs that the Governor "shall take care that the laws be faithfully executed." The Virginia Code, however, more fully delineates the powers of the Governor and the restrictions on those powers. In particular, VA. CODE ANN. § 44-146.17 (2008) authorizes the Governor to declare a state of emergency and to "take such action from time to time as is necessary for the adequate promotion and coordination of state and local emergency services activities relating to the safety and welfare of the Commonwealth in time of disasters." Id. In doing so, the Governor may "publish such rules and regulations and to issue such orders as may, in his judgment, be necessary to accomplish the purposes of [the Emergency Services and Disaster Law Chapter]..." Id.

The Governor's executive orders may also "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." These emergency powers were conferred to the Governor in part to "protect the public peace, health, and safety, and to preserve the lives and property and economic well-being of the people of the Commonwealth ..." VA. CODE ANN. § 44-146.14(a) (2000).

As the Supreme Court of Virginia has emphasized, "[p]rompt action [is] required" during times of disaster to protect "safety and welfare." Boyd v. Commonwealth, 216 Va. 16, 19 (1975) (per curiam). "The invocation of emergency powers necessarily restricts activities that would normally be constitutionally protected." United States v. Chalk, 441 F.2d 1277, 1280 (4th Cir. 1971). For this reason, the exercise of emergency powers "must appear to have been reasonably necessary for the preservation of order." Id. at 1281. The Court's review of such exercise of executive powers during an emergency are, thus, limited to whether they "were taken in good faith and whether there is some factual basis for [the] decision that the restrictions ... imposed were necessary to maintain order." Id.

The Plaintiffs allege that nothing in the Virginia Constitution or the Code allows for the Governor to enact a "dress code" as he has done in EO 63. In making their argument, the Plaintiffs misquote the Governor's statutory powers to be a finite list authorizing him to "control, restrict, allocate or regulate the use, sale, production and distribution of food, fuel, clothing and other commodities, materials, goods, services and resources under any state or federal emergency services programs." § 44-146.17. That list, however, is prefaced by the language that he may "proclaim and publish such rules and regulations and . . . issue such orders as may, in his judgment, be necessary to accomplice the purposes of this chapter *including, but not limited to* . . ." Id. Thus, Plaintiffs misinterpret the statute to be much less broad than it actually is.

It is clear from the plain language of the statute that, in times of emergency, the Governor's powers are exceptionally broad under Title 44. Contrary to the Plaintiffs' contention, the Governor's powers do not preclude him from issuing orders requiring face coverings and, in fact, VA. CODE ANN. § 183.2-422 (2014) (as addressed *infra*) explicitly anticipates such an event. For this reason, the Court finds that EO 63 was enacted within the Governor's statutory powers.

As EO 63 was issued jointly with the Commissioner, the Court must next examine the Commissioner's powers. Title 32.1 declares 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 (1995). To attain that goal, the Commissioner is tasked with "abat[ing] hazards and nuisances to the health and to the environment, both emergency and otherwise, thereby improving the quality of life in the Commonwealth." Id. In particular, VA. CODE ANN. § 32.1-13 (1979) authorizes the State Board of Health to "make orders and regulations to meet an 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." See also VA. CODE ANN. § 32.1-42 (2004), When the Board is not in session, the Commissioner is vested with its authority. VA. CODE ANN. § 32.1-20 (1979). Although the Plaintiffs seek to disregard certain authorities of the Commissioner under Title 32.1, the Court finds that the Commissioner's powers to suppress disease are extremely broad.

As noted by the Plaintiff, however, the Commissioner's powers are tempered by the Virginia Administrative Process Act ("VAPA") (VA. CODE ANN. § 2-2-4000 *et seq.*), which requires certain notice of administrative regulations and opportunity for comment. Although those steps have not taken place prior to the issuance of EO 63, the VAPA also provides for certain emergency regulations. VA. CODE ANN. § 2.2-4011 (2013).

In particular, the VAPA provides that "[r]egulations that an agency finds are necessitated by an emergency situation may be adopted by an agency upon consultation with the Attorney General, which approval shall be granted only after the agency has submitted a request stating in writing the nature of the emergency, and the necessity for such action shall be at the sole discretion of the Governor." Id. Such emergency regulations may last no more than 18 months. Id. As a result, the Court finds that the Commissioner was within his powers to join in the issuance of EO 63.

Finally, considering the virus' unusually contagious nature, the Court finds that the requirements of EO 63 have been made in good faith and are supported by scientific data. Since February 2020, the Virginia Department of Health has noted over 50,000 cases of COVID-19 in Virginia, resulting in over 1,500 deaths. www.vdh.virginia.gov/coronavirus/. EO 62 noted that "[o]n any given day, 70% of the Commonwealth's positive cases are attributable to the Northern Virginia Region." Even Chief Justice Roberts' concurring opinion in South Bay United Pentecostal Church v. Newsom, that COVID-19 is "a novel severe acute respiratory illness that has killed . . . more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others." No. 19A1044, 2020 WL 2813056 (U.S. S. Ct. May 29, 2020). Because of the new evidence of spread of COVID-19 by asymptomatic individuals, the CDC has recommended wearing cloth face coverings in public settings. www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html. For these reasons, it is clear that the Governor and Commissioner acted in good faith and were supported by scientific data in issuing EO 63.

Finding that the Commissioner and Governor had the authority to issue EO 63, the Court next considers whether EO 63 conflicts with VA. CODE ANN. § 18.2-422 (2014). The criminal code provides:

> It shall be unlawful for any person over 16 years of age to, with the intent to conceal his identity, wear any mask . . . whereby a substantial portion of his face is hidden or covered so as to conceal the identity of the wearer, to be or appear in any public place, or upon any private property in this Commonwealth . . . . However, the provisions of this section shall not apply to persons . . . (iv) wearing a mask . . . for bona fide medical reasons upon . . . (b) the declaration of a disaster or state of emergency by the Governor in response to a public health emergency where the emergency declaration expressly waives this section, defines the mask appropriate for the emergency, and provides for the duration of the waiver. The violation of any provision of this section is a Class 6 felony.

VA. CODE ANN. § 18.2-422 (2014).

As noted above, the Governor addressed § 18.2-422 on April 15, 2020 when he issued Amended EO 53. That Executive Order expressly waived the application of the criminal prohibition, defined the permissible face covering as "a medical mask, respirator, or any other protective face covering for the purpose of facilitating the protection of one's personal health in response to the COVID-19 public health emergency . . .", and provided the duration of the waiver to be from March 12, 2020 to June 10, 2020. Amended EO 65 further extended the waiver until September 8, 2020, unless amended or rescinded by further executive order.

The Court agrees with the Defendants that, even setting aside the issue of waiver, § 18.2-422 would be inapplicable to the Plaintiffs because it carries with it an element of specific intent of wearing a face covering "with the intent to conceal his identity." Id. Wearing a mask in accordance with EO 63 defeats the criminal code's element of specific intent. Even for the sake of argument, if the Court accepts the Plaintiffs' position that specific intent is subjective and nebulous, the Court nonetheless finds that the Executive Orders have clearly waived the enforcement of § 18.2-422. The waiver's duration has explicitly been established through September 8, 2020. The waiver clearly applies to the Commonwealth as a whole, so no specific designation for Fauquier County is necessary or even appropriate.

Finally, Amended EO 53 describes authorized face covering as "a medical mask, respirator, or any other protective face covering for the purpose of facilitating the protection of one's personal health in response to the COVID-19 public health emergency . . ." That definition is not vague

and certainly encompasses the face coverings "recommended by the CDC" as required by EO 63. Thus, the Court finds that is no conflict between the criminal code and the executive order. For that reason, the Plaintiffs cannot demonstrate a clear showing of likely success on the merits.

The next prong for the Court to consider is that of irreparable harm and whether there is an adequate remedy available to the Plaintiffs at law. The United States Supreme Court has held that showing "irreparable harm" must be based on more than "a possibility," because issuing a preliminary injunction is an "extraordinary remedy that may be awarded upon a clear showing that the plaintiff is entitled to such relief." Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 346 (2009). "Unless the plaintiff can demonstrate that the property it seeks to protect has some personal value of sentiment or other intangible quality that cannot be restored to him at law ... or that monetary damages would otherwise not make him whole, the court will deny the injunction because the legal remedy is sufficient." Levisa Coal Co. v. Consolidation Coal Co., 276 Va. 44, 53-54 (2008) (internal citation omitted).

In the case at bar, Plaintiffs focus on their fear of prosecution or enforcement of either EO 63 or § 18.2-422. The Court finds that such harm is purely speculative and is not irreparable. Indeed the Plaintiffs have not alleged that they have been threatened with sanctions, let alone prosecuted. For this reason, the Plaintiffs have failed to establish this prong of the analysis.

The Court's next consideration is the balance of equities. On one hand, the Defendants have an interest in, and are in fact charged with, protecting the Commonwealth against the spread of COVID-19, a highly contagious respiratory illness with no cure. In particular, studies show that wearing a face covering reduces the potential of infection. With the gradual reopening of the Commonwealth, such protective measures are even more warranted than ever.

On the other hand, the Plaintiffs note their interest in engaging in their lawful business activities without fear of facing enforcement from the Department of Health. With that being said, the plain language of EO 63 notes several exceptions to the requirement to wear a face mask, thereby limiting the risk of enforcement measures being taken against an individual or business. Of note, face coverings are not required while eating or drinking, an exception very likely to exist in a winery. Further, individuals with a health condition that would prohibit wearing a face covering are not required to do so. Such individuals may claim that exception without proof of the medical condition or even having to identify the condition.

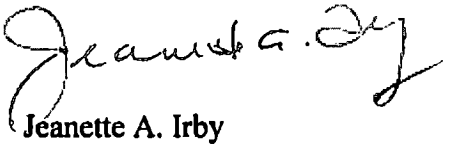
In consideration of these facts, the Court finds that even the full effects of EO 63 still place very little burden on the Plaintiffs in comparison to the Defendants' goal of reducing the spread of COVID-19. For these reasons, the balance of equities tips against the Plaintiffs.

The last consideration for the Court is that of the interest of the public. The Court agrees with the Plaintiffs that the public has an interest in promoting law and order, allowing businesses lawfully operate, and enabling the public to patronize them. To that end, the public also has an interest in the uniform application of the law that runs afoul of Plaintiffs' argument that the injunction sought only applies to these specific parties. Even setting aside that dichotomy, EO 63 has a limited hindrance on Plaintiffs' interest in operating their business. On the other hand, the

requirement of face coverings as defined in EO 63 further the public's interest in maintaining safety and reducing the spread of COVID-19, an interest that the Plaintiffs fail to recognize. For these reasons, the interest of the public weighs in favor of the Defendants. In consideration of all of the aforementioned elements, the Plaintiffs' Motion for Temporary Injunction is denied.

Mr. Towell is asked to please prepare and circulate to counsel an Order reflecting and incorporating the Court's rulings herein, and notice the Order for entry on the Court's docket for July 10, 2020 at 10:00 a.m. if not tendered to the Court before.

Very truly yours,



Jeanette A. Irby
Judge