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ELECTRONICALLY
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Superior Court of California, County of San Francisco
01/05/2021
Clerk of the Court
BY: JUDITH NUNEZ
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

NATIONAL RETAIL FEDERATION; NATIONAL FEDERATION OF INDEPENDENT BUSINESS; RELLES FLORIST; MAYFIELD EQUIPMENT COMPANY; and ABATE-A-WEED, INC.

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH; OCCUPATIONAL SAFETY & HEALTH STANDARDS BOARD; DOUGLAS PARKER, in his official capacity as Chief of the California Department of Industrial Relations; and DOES 1-50, inclusive

Defendants.

Case No. CGC-20-588367

UNLIMITED JURISDICTION

PLAINTIFFS' *EX PARTE* APPLICATION FOR ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF [UNOPPOSED PROPOSED HEARING DATE AND BRIEFING SCHEDULE]

Date: January 7, 2021
Time: 11:00 a.m.
Dept.: 302

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NOTICE

PLEASE TAKE NOTICE THAT on January 7, 2021 at 11:00 a.m., or as soon thereafter as the matter may be heard, in Department 302 of the San Francisco Superior Court located at 400 McAllister St., San Francisco, CA 94102, Plaintiffs National Retail Federation, National Federation of Independent Business, Relles Florist, Mayfield Equipment Company, and Abate-A-Weed (collectively, "Plaintiffs") hereby apply *ex parte* for a hearing date for an order to show cause why a preliminary injunction should not issue pursuant to California Government Code section 11350(a), California Code of Civil Procedure section 526, and California Rule of Court 3.1200. Plaintiffs request that the Court enjoin Defendants California Department of Industrial Relations, Division of Occupational Safety and Health ("DOSH"), Occupational Safety & Health Standards Board, and Douglas Parker (collectively, "Defendants") from enforcing or implementing their COVID-19 Emergency Temporary Standards ("ETS"), specifically at 8 C.C.R. §§ 3205(c)(3)(B)(4.), 3205.1(b), 3205.2(b), 3205.3(g), and 3205(c)(10). Plaintiffs and Defendants have agreed to a hearing date and briefing schedule as follows: January 11, 2021: Deadline for Plaintiffs' to file supplemental briefing and/or additional evidence; January 19, 2021: Deadline for Defendants to file their Opposition and for other interested parties to file any amicus briefing; January 21, 2021: Deadline for Plaintiffs to file their Reply; January 22, 2021: Hearing on order to show cause.

APPLICATION FOR AN ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION

Plaintiffs apply *ex parte* for an order to show cause why a preliminary injunction should not issue to enjoin Defendants from enforcing their COVID-19 ETS reflected at 8 C.C.R. §§ 3205(c)(3)(B)(4.), 3205.1(b), 3205.2(b), 3205.3(g), and 3205(c)(10). California Code of Civil Procedure section 526 authorizes the Court to issue Plaintiffs' proposed injunctive relief. Section 526(a) provides in relevant part:

> An injunction may be granted in the following cases:
> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or

perpetually.

> (2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action.

As discussed in detail below, injunctive relief is proper because in the absence of a preliminary injunction, the ETS will cause Plaintiffs severe and irreparable harm, including by forcing them out of business. Injunctive relief is warranted because (1) the Occupational Safety & Health Standards Board (the "Board") did not meet the Administrative Procedure Act's ("APA") requirements for adopting emergency regulations, which include a requirement for the Board to issue a "finding of emergency [that] shall include . . . a description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, ***by substantial evidence***, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific, and to address only the demonstrated emergency"; (2) DOSH exceeds its authority by enforcing the ETS and regulating activities outside of workplace safety and health, including employee leave and earnings; and (3) the adoption and enforcement of the challenged ETS regulations violate Due Process. Thus, Plaintiffs have a strong likelihood of prevailing on the merits of their challenges to the ETS. The balance of harms favors enjoining Defendants from enforcement of the ETS. Defendants will not be able to show that they will suffer irreparable harm as a result of the injunction because the ETS is unsupported by substantial evidence demonstrating that the specified regulations will prevent the spread of COVID-19 in the workplace given existing state law and public health guidance.

Thus, this Court should issue a preliminary injunction preventing Defendants from enforcing or implementing sections 3205(c)(3)(B)(4.), 3205.1(b), 3205.2(b), 3205.3(g), and 3205(c)(10) of the ETS regulations until this Court decides the merits of this lawsuit.

NO PREVIOUS APPLICATIONS

Plaintiffs have not previously applied for any *ex parte* relief in this action. *See* Cal. R. Ct. 3.1202(b).

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PLAINTIFFS PROVIDED NOTICE TO DEFENDANTS

Plaintiffs gave Defendants notice of this Application. *See* Declaration of Jason S. Mills ("Mills Decl."), ¶ 4; Cal. R. Ct. 3.1202; 3.1203. Plaintiffs expect Defendants to oppose this Application. The name, email address, address, and telephone number of Defendants' counsel is:

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This Application is based upon this ex parte application; the accompanying memorandum of points and authorities; the Declarations of Jason S. Mills, Darrell Feil ("Feil Decl."), Jim Mayfield ("Mayfield Decl."), Jim Relles ("Relles Decl."), Stephanie A. Martz ("Martz Decl."), and Karen Harned ("Harned Decl."); the Proposed Order submitted herewith; the Complaint ("Compl.") filed in this action; and any further evidence and argument the Court considers at the hearing.

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CDC (Sept. 11, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6936a5.htm#F1_down 7

Executive Department State of California, Executive Order N-84-20 ¶¶ 7-8, https://www.gov.ca.gov/wp-content/uploads/2020/12/12.14.20-EO-N-84-20-COVID-19.pdf (Dec. 14, 2020) 8

Other Authorities

A.B. 685, Reg. Sess. 2019-2020 (Cal. 2020) 6

Cal. Const. Art. 1, § 1 14

Colorado State Emergency Operations Center, *Colorado COVID-19 Outbreak Map*, https://covid19.colorado.gov/covid19-outbreak-data 7

Kiva A. Fisher, et. al., *Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults ≥18 Years in 11 Outpatient Health Care Facilities — United States, July 2020* 7

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Spiegel, Matthew & Heather E. Tookes, *Study Shows Which Restrictions Prevent COVID-19 Fatalities—and Which Appear to Make Things Worse*, Yale SOM Insights (Nov. 23, 2020), https://insights.som.yale.edu/insights/study-shows-which-restrictions-prevent-covid-19-fatalities-and-which-appear-to-make-things?fbclid=IwAR0XfTg84RDZD6t3ktXsmdVECCRGpKLDTE7FGVJnLAwKYZXG87mUPhqIE0A 7

Steps to Develop an Occupational Health Standard, Department of Industrial Relations (last updated Nov. 2006), https://www.dir.ca.gov/dosh/steps-to-develop-an-ohs.html 5

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By this Application, Plaintiffs seek an injunction that enjoins the Division of Occupational Safety and Health ("DOSH") from enforcing their COVID-19 Emergency Temporary Standards ("ETS" or "the emergency regulations"), reflected at 8 C.C.R. §§ 3205, 3205.1, 3205.2, and 3205.3. This relief is proper because (1) the Occupational Safety & Health Standards Board (the "Board") did not meet the Administrative Procedure Act's ("APA") requirement for adopting emergency regulations, which requires the Board to issue a "finding of emergency [that] shall include . . . a description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, ***by substantial evidence***, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency"; (2) DOSH exceeds its authority by enforcing the ETS and regulating activities outside of workplace safety and health, including employee leave and earnings; and (3) the adoption and enforcement of the challenged ETS regulations violate Due Process. In the absence of an injunction, the ETS will cause Plaintiffs severe and irreparable harm, including by forcing many of them out of business.

Since March 2020, employers throughout California have established rigorous safety measures, often at great expense, to adapt to a host of ever-evolving Cal/OSHA COVID-19 guidelines and other public health directives, all to keep their employees safe and their businesses running. Indeed, starting in March 2020, Cal/OSHA issued extensive COVID-19 guidelines directing employers to incorporate a multitude of safety protocols into their written Injury and Illness Prevention Plans ("IIPP"), which employers *already* were required to have in place under existing regulations. *See* 8 C.C.R § 3203. Against this backdrop – and *eight* months after the COVID-19 pandemic began in earnest – DOSH proposed and the Standards Board adopted new "emergency" regulations that apply to virtually all California employers and either needlessly duplicate safety protocols that were already in place or create new, poorly crafted requirements. These requirements are so extreme that many California employers now face the actual threat of shutting down because they simply cannot meet these sudden new demands. Without any

meaningful opportunity for input, and as of November 30, 2020, employers must now: (1) exclude from their workplace all employees who spent merely 15 "cumulative" minutes within six feet of someone with COVID-19, regardless of the circumstances; (2) pay these excluded employees full wages for the entire time they are away (10+ days); and (3) when three or more employees test positive for COVID-19 (work-related or not), *require all* employees at the workplace to take weekly COVID-19 tests. The consequences to employers, large and small – who already were following the extensive Cal/OSHA COVID-19 protocols – are staggering. Employers now are forced to move beyond establishing strong safety protocols to figuring how to pay employees who are not working, how to find and pay for countless COVID-19 tests, and how to require potentially hundreds of employees to take these tests. The circumstances are dire for Plaintiffs and many other California employers, and they have no choice but to seek this Court's intervention to stop the enforcement of these extreme regulations – which are entirely untethered to substantive evidence of the realities of the COVID-19 pandemic. Employers did not create the COVID-19 pandemic, there is no evidence that they are exacerbating the pandemic, and it is wrong to shift the costs and logistical burdens of the pandemic onto them through a hastily concocted "emergency" regulation – all under the guise of protecting employees.

The fact is that the Board adopted these "emergency" regulations in violation of the APA's statutory requirements, which require the Board to provide "substantial evidence" that demonstrates the existence of an *actual* emergency. The Board sidestepped this requirement entirely, simply jumping to the conclusion that its proposed extreme "emergency" measures would help alleviate a COVID-19 pandemic that had been spreading for eight months. In doing so, the Board contradicted its own previous findings that "Board staff [wa]s ***not aware of any California studies or data showing that employers are lacking the information necessary to provide employee protections from COVID-19 hazards, nor that the vast majority of employers are not already doing as much as they are able to keep their employees, customers, and businesses functioning safely*** in accordance with federal, state, and local requirements." The Board never addressed these earlier findings and, instead, made bold, unsupported statements that "millions of California workers face potential exposure to COVID-19 on the job" and that

emergency regulations "would significantly reduce the number of COVID-19 related illnesses, disabilities and deaths in California's workforce," all while simultaneously acknowledging a total lack of data as to workplace exposures to the coronavirus.

To be clear, Plaintiffs *do not* ask this Court to decide between workplace safety and business profit. Employers continue to work feverishly to protect their employees from COVID-19 exposure and attempt to follow the expansive and ever-evolving safety protocols issued by Cal/OSHA, the Governor, and various public health agencies. They will continue to do so, as long as there is a valid legal basis for these protocols. Rather, Plaintiffs ask this Court to enjoin enforcement of the purported "emergency" regulations that (1) the Board improperly adopted; (2) exceed DOSH's enforcement authority; and (3) violate Plaintiffs' constitutional rights to Due Process. Employers will continue their diligent efforts to protect employees, pursuant to Cal/OSHA's IIPP standard and the host of COVID-19 guidelines that are already in place, just as they did during the eight long months before the Board arbitrarily found an emergency on November 30, 2020.

Because the balance of harms favors enjoining Defendants and Plaintiffs are likely to prevail, Plaintiffs request that this Court issue a preliminary injunction preventing Defendants from enforcing the ETS in their entirety (8 CCR §§ 3205, 3205.1, 3205.2, and 3205.3) or, in the alternative, specific sections addressing paid leave requirements and COVID-19 testing, §§ (c)(3)(B)(4), 3205.1(b), 3205.2(b), 3205.3(g), and 3205(c)(10).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Employers Establish Rigorous and Effective Measures to Promote Employee and Public Safety.

For the sake of brevity, Plaintiffs will not belabor the well-documented history of the COVID-19 pandemic in California, the State's response to the pandemic through a multitude of executive orders and local ordinances, DOSH's issuance of evolving workforce guidelines, and California employers' extensive efforts to keep their employees safe while continuing to operate their businesses. *See, e.g.*, Compl., ¶¶ 21-46. This history is chronicled in the Complaint, and Plaintiffs focus here on the Board's improper adoption of "emergency" COVID-19 regulations.

B. Cal/OSHA Issues COVID-19 Guidance Under Existing Regulations.

Prior to the Board's adoption of the challenged emergency regulations, DOSH already had legal mechanisms to enforce COVID-19 orders and guidance documents through its authority to require employers to have an effective IIPP under 8 CCR §3203. DOSH's press releases establish that it did, in fact, pursue enforcement of COVID-19 safety protocols under this section. *See, e.g.,* DIR Press Release No. 2020-76, Sept. 4, 2020 ("Cal/OSHA has cited 11 employers for not protecting employees from COVID-19 exposure during inspections of industries where workers have an elevated risk of exposure"). Nonetheless, the Board pushed forward with emergency regulations that largely duplicated the IIPP requirements that were already in place and *after* Board staff had already determined that a COVID-19 emergency regulation was unnecessary and inappropriate. *See* Compl., Ex. C; Gov't Code § 11349.1(a)(6) (stating "nonduplication" as a standard for reviewing regulations).

C. The Board Denies Petition for COVID-19 Temporary Emergency Standards.

Indeed, the Board's decision to push forward with the ETS was a major reversal from its previous findings. On May 20, 2020, the Board received a petition filed by Worksafe and the National Lawyers' Guild, Labor & Employment Committee, requesting that the Board adopt new temporary emergency standards. The petitioners requested that the Board create specific COVID-19 directives for California employers whose employees were not within the scope of the existing Aerosol Transmissible Diseases standards.

On August 10, 2020, Board staff resoundingly rejected Worksafe's premise, concluding that "Board staff does not believe that the Petitioners' emergency request is necessary and recommends that Petition File No. 583 be DENIED." Compl., Ex. C, p. 9. Board staff noted that the "effort to prescribe specific requirements in conjunction with an IIPP-like framework may contradict the legislative intent described in Government Code Section 11340.1(a)," part of the APA, because "[u]nnecessarily creating an offshoot of the IIPP, without substantial evidence of need, can harm the existing protective nature of the regulation and its benefit to California workplaces by diluting its capacity to serve as the primary regulation requiring employers to address newly discovered hazards." *Id.*

Among other findings that contradict the Board's later adoption of the ETS, the Board staff stated that it was "***not aware of any California studies or data showing that employers are lacking the information necessary to provide employee protections from COVID-19 hazards, nor that the vast majority of employers are not already doing as much as they are able to keep their employees, customers, and businesses functioning safely*** in accordance with federal, state, and local requirements." *Id.* at 9 (emphasis added).

D. The Board Adopts "Emergency" Regulations Despite Previously Considering Them Unnecessary.

Just weeks later, the Board reversed course in contradiction of Board staff's analysis of the petition. On September 17, 2020, the Board asserted for the first time that emergency regulations were necessary. However, since receiving Worksafe's petition four months earlier in May, the State of California had taken significant action, including issuing comprehensive COVID-19 standards in the Blueprint for a Safer Economy, unveiled on August 28, 2020, which is regularly updated and remains in effect today.

Nonetheless, despite the constant flow of reopening guidance from the State of California, Cal/OSHA, and local authorities, the Board proceeded with "emergency" rulemaking. Instead of submitting proposed regulations for public comment during the *four months* after it received Worksafe's petition, as required by the APA, the Board waited until September 17, 2020.[1] At that point, the Board directed DOSH to work with Board staff to submit a proposal for an emergency regulation to be considered no later than the Board's meeting on November 19, 2020. Despite the four-month lag between the petition and the order, the Board asserted that adoption of

[1] Under the normal rulemaking process the Board should have conducted, all of the following must occur after the Board decides to grant a petition: the Board submits the package to the Office of Administrative Law ("OAL"); OAL publishes a notice of proposed rulemaking in the California Regulatory Notice Register; the Board posts the notice and other documents and notifies interested parties; the Board holds a public hearing with advance public notice of at least 45 days; Cal/OSHA responds to the public comments and modifies the proposed text accordingly, in collaboration with Board staff; if Cal/OSHA makes substantial changes that are sufficiently related to the public comments, the Board makes the changes available for public comment for at least 15 days; in collaboration with Cal/OSHA, the Board prepares and posts a notice of any additional documents relied on and notifies interested parties at least 15 days before the proposed standard is adopted at a monthly public meeting; the Board submits the adopted standard to OAL; OAL reviews and approves the rulemaking action and transmits the standard to the Secretary of State for filing; and the standard goes into effect on January 1. *See Steps to Develop an Occupational Health Standard*, Department of Industrial Relations (last updated Nov. 2006), https://www.dir.ca.gov/dosh/steps-to-develop-an-ohs.html.

the proposed emergency regulations was necessary without meaningful public comment, pursuant to Government Code section 11346.1(b)(1), because "immediate action must be taken to avoid serious harm to the public peace, health, safety, or general welfare."[2] The Board only allowed the minimum 5-day public comment period for emergency regulations. Gov't Code § 11346.1(a)(2) ("At least five working days before submitting an emergency regulation to the office, the adopting agency shall, except as provided in paragraph (3), send a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency.").

While the Board determined that suddenly there was no time for normal rulemaking or meaningful public comment, the Legislature found sufficient time for the formal legislative process and enacted sweeping legislation that imposes new reporting requirements on employers regarding COVID-19 cases in the workplace and provides DOSH expansive authority to close workplaces based on COVID-19 threats. *See* A.B. 685, Reg. Sess. 2019-2020 (Cal. 2020). The Governor signed AB 685 on September 17, 2020, and it became effective on January 1, 2021.

On November 19, 2020, the Board issued its Finding of Emergency, stating without basis that "[t]he proposed emergency action is necessary to combat the spread of COVID-19 in California workers." Compl., Ex. A, p. 5. However, the Board did not support these claims with ***any citation to supporting evidence***. In fact, the Board noted the "absence of data" and that "the Division cannot presently quantify this cost, because the agency lacks data about the length of outbreaks." *Id.*, pp. 53, 56. The Board's adoption of the ETS addressed none of the concerns that Board staff raised while recommending against adoption of the May petition, including the lack

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[2] Even in its November 19, 2020 Finding of Emergency, the Board noted that "[u]nder existing section 3203, employers in California are already required to have a written and effective Injury and Illness Prevention Plan" that satisfies specific requirements that "already apply to the hazard of COVID-19." Compl., Ex. A, p. 45. The Board noted enforcement of these requirements, including that "the Division has issued COVID-19-related citations to employers based on section 3203." *Id.* The Board also noted that "[m]uch of [Section 3205(c)] makes explicit actions that are already required by existing section 3203." *Id.* Many additional statements demonstrate that large portions of the emergency regulations are overlapping and/or duplicative, in violation of section 11349.1(a)(6). *See, e.g., id.,* p. 50 ("Employers are already required to provide training and instruction regarding COVID-19 hazards and prevention under section 3203(a)(7)[.]"), p. 50 ("all counties already require face coverings and social distancing of at least six feet when it is possible to do so"), p. 51 ("Counties already require the handwashing and cleaning/disinfection protocols required here"), and p. 51 ("Existing section 3203 already requires employers to maintain illness records and records of steps taken to implement COVID-19 hazard correction.").

of supporting data or science.[3]

The Board nonetheless adopted the ETS, and they became effective on November 30, 2020 – the Monday after the Thanksgiving holiday. The ETS added Title 8 of the California Code of Regulations, sections 3205, 3205.1, 3205.2, and 3205.3, which impose largely unprecedented and significant new requirements in relation to COVID-19, including that employers must:

- exclude all employees with potential "COVID-19 exposure," which is presumed simply from being near a COVID-19 case for a collective 15 minutes despite the use of face coverings or even negative testing results, from the workplace for 10-14 days and potentially indefinitely;
- maintain full earnings and benefits, potentially indefinitely, for all employees excluded from the workplace;
- offer COVID-19 testing during working hours and at no cost to all employees who had potential COVID-19 exposure in the workplace; and
- during "outbreaks," provide and pay for COVID-19 testing for all employees at the "exposed workplace" no less than twice a week and potentially more frequently.

Employers immediately scrambled to understand the ETS and attempt to implement the ambiguous new requirements. *See* Martz Decl., ¶¶ 11, 15-20. Adding to the uncertainty, Governor Newsom modified the ETS by executive order on December 14, 2020, changing the

[3] While California does not publish its contact tracing data, the available data on workplace infections contradicts the Board's speculative conclusion about the nexus between COVID-19 and workplaces, especially retail workplaces. *See, e.g.*, Compl., ¶¶ 62-65; Kiva A. Fisher, et al., *Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults ≥18 Years in 11 Outpatient Health Care Facilities — United States, July 2020*, CDC (Sept. 11, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6936a5.htm#F1_down (finding almost no difference in the amount of shopping engaged in by individuals who tested positive for COVID-19 and those who tested negative); Colorado State Emergency Operations Center, *Colorado COVID-19 Outbreak Map*, https://covid19.colorado.gov/covid19-outbreak-data (last visited Dec. 7, 2020) (infections at retail locations made up only 2.8% of total cases logged in the outbreaks, or just 0.3% of the total workforce); Matthew Spiegel & Heather E. Tookes, *Study Shows Which Restrictions Prevent COVID-19 Fatalities—and Which Appear to Make Things Worse*, Yale SOM Insights (Nov. 23, 2020), https://insights.som.yale.edu/insights/study-shows-which-restrictions-prevent-covid-19-fatalities-and-which-appear-to-make-things?fbclid=IwAR0XfTg84RDZD6t3ktXsmdVECCRGpKLDTE7FGVJnLAwKYZXG87mUPhqIE0A ("***closing low-risk retail businesses such as bookstores and clothing stores actually came with higher fatality growth rates***, likely because it pushed stir-crazy citizens toward higher-risk activities, like spending time indoors with friends").

required time to exclude "COVID-19 Exposures" from the workplace to comply with evolving guidance from the California Department of Public Health.[4]

E. The ETS Will Cripple Businesses by Depriving Them of Labor and Requiring Quantities of Tests That Are Likely Impossible to Procure.

The combination of the ETS regulations' mandatory exclusion and testing provisions creates a regulatory environment that cripples or even endangers the very survival of businesses. Without scientific evidence for the necessity or efficacy of doing so, the ETS require employers to exclude from the workplace and provide full pay and benefits for potentially large numbers of employees merely because they were within six feet of a "COVID-19 Case" for 15 minutes collectively over 24 hours – and even if all employees were wearing appropriate face coverings.

For small employers, the effects of the mandatory exclusion requirements can be devastating. Jim Relles, owner of Plaintiff Relles Florist in Sacramento, employs 22 mostly full-time employees, about 17 of whom are in the store on any given day. Relles Decl., ¶ 1. Because the ETS have no small business exception, if the emergency regulations trigger a mandatory exclusion period, Mr. Relles would have no choice but to immediately close his store for 10-14 days. *Id.*, ¶¶ 2-5. During a closure, Relles Florist would lose all revenue from sales, would have to continue paying full salary and benefits to all of the excluded employees, would have to continue paying overhead costs such as rent and utilities, and most of the plants in the store would die and become worthless. *Id.* Mr. Relles faces the real possibility of losing his business because of the financial losses that Relles Florist could incur from the ETS. *Id.*, ¶¶ 6-7.

Darrell Feil owns and runs a small landscaping and gardening supply company that is divided into a retail store, a repair shop, and a weed abatement service. Feil Decl., ¶ 1. The employees are not cross-trained; if the ETS require him to exclude workers for 10-14 days, he would have no choice but to shut down the affected part of his business during the exclusion period. *Id.,* ¶¶ 5-7. If the affected part of his business is the abatement service, the company would be unable to perform the terms of its state abatement contract and the business could lose

[4] Executive Department State of California, Executive Order N-84-20, ¶¶ 7-8, https://www.gov.ca.gov/wp-content/uploads/2020/12/12.14.20-EO-N-84-20-COVID-19.pdf (Dec. 14, 2020).

this contract and the revenue on which it critically depends. *Id.,* ¶¶ 6-7. Mr. Feil fears that those financial losses would be ruinous, and they could force him to close his family business after more than 50 years of operation. *Id.,* ¶¶ 7-8. The ETS regulations legitimately and imminently threaten the survival of Mr. Feil's business. *Id.*

The Board's Finding of Emergency did not consider the availability of testing supplies or the possibility that employers may be unable to comply with these requirements within the prescribed time periods, including in some cases the requirement to test employees twice a week. *See* 8 C.F.R. § 3205.2(b). Indeed, existing limitations to testing supply have already impacted employers like Plaintiff Mayfield Equipment. *See* Compl., ¶ 94; Mayfield Decl., ¶ 5. Although Mayfield Equipment stores are open seven days per week, the limited COVID-19 testing providers are typically only open five days per week. *Id.* Mr. Mayfield's rural employees did not have access to same-day testing, and instead were required to make appointments two or three days after Mr. Mayfield first sent them home from work, and it took another seven to ten days for them to receive results. *Id.* These testing delays, which are not attributable to employers, make compliance with the ETS disproportionately burdensome. *See* Harned Decl., ¶¶ 17-18.

III. THIS COURT SHOULD GRANT PRELIMINARY INJUNCTIVE RELIEF, ENJOINING DOSH FROM ENFORCING THE EMERGENCY REGULATIONS.

In deciding whether to issue a preliminary injunction, the court must consider and balance two interrelated factors: (1) the balance of interim harms and (2) whether there is "some possibility" that Plaintiffs will ultimately prevail on the merits of the claim. *Smith v. Adventist Health Sys./W.,* 182 Cal. App. 4th 729, 749 (2010); *Jamison v. Dep. of Transp.,* 4 Cal. App. 5th 356, 362 (2016). The court's determination is "guided by a mix of the potential-merit and interim harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." *Id.*

A. Plaintiffs are Likely to Succeed on the Merits of Their Claims.

1. The Occupational Safety and Health Standards Board Violated the APA's Emergency Regulation Procedure.

Plaintiffs are authorized under Government Code section 11350(a) to seek invalidation of

an order where, as here, "upon the ground that the facts recited in the finding of emergency . . . do not constitute an emergency within the provisions of Section 11346.1." "If the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations, . . . the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations." Further, Government Code section 11346.1(b)(2) states that "[a] finding of emergency based only upon expediency, convenience, . . . or speculation, shall not be adequate to demonstrate the existence of an emergency."

Here, the circumstances surrounding the ETS did not warrant emergency adoption, and the Board's Finding of Emergency failed to meet the requirements to demonstrate the existence of an emergency so immediate and serious that it made allowing notice and meaningful public comment inconsistent with the public interest. DOSH and Board staff found the existing regulations sufficient to protect the working public from March 2020 through late September 2020. Indeed, in May 2020, the Board flatly rejected Worksafe's petition requesting rulemaking to create temporary emergency standards to address the COVID-19 pandemic. *See supra* Part II.D. There is no reason that the regular rulemaking process, which involves public comment and a robust assessment of financial impact, could not have begun in March 2020.

Further, emergency rulemaking was inappropriate because Defendants set forth no "substantial evidence" that the ETS regulations' specific requirements will prevent or significantly alleviate the spread of the virus. *See* Gov't Code § 11346.1(b)(2); Compl. ¶ 101. No substantial evidence shows that it is necessary to exclude an employee from the workplace for 14 days (now potentially 10 days, following the Executive Order) due simply to a potential COVID-19 workplace exposure. *See* 8 C.C.R. § 3205(c)(10)(B). No substantial evidence shows the necessity of requiring employers to provide (let alone require) COVID-19 testing at their expense during work hours, regardless of testing availability and timing in any geographical area. *See* 8 C.F.R. § 3205.1(b). The State has already made free testing available to Californians, and the Board presented no evidence that shifting testing allocation decisions and costs onto private employers will prevent or significantly alleviate the spread of the virus and advance workplace

safety. In fact, no substantial evidence establishes that employers have the ability to comply with these requirements at all, particularly if the ETS regulations' massive testing mandate outpaces supplies and exacerbates shortages. Indeed, the Board presented no evidence *at all* that the majority of California's workplaces are such a locus of COVID-19 spread to justify imposing the enormous cost of testing on *all* employers. Compl., ¶ 55, Ex. A, p. 5.

Most critically, the Board identified no evidence that most California employers, let alone retailers and small businesses, are the source of widespread infections, such that the ETS regulations are necessary. *See* Compl., Ex. A, pp. 4, 5, 37. To the contrary, the recent studies and data provided with Plaintiffs' Complaint establish the opposite. *See* Compl., ¶¶ 62-65. The Board relied on unsupported claims that the rise in COVID-19 positivity rates is a result of employers "struggling to address the novel hazards presented by COVID-19." *Id*., Ex. B, pp. 2-3.

Because it could not meet its statutory burden of establishing the necessity of emergency rulemaking by substantial evidence, the Board was required to comply with the APA and follow the normal rulemaking process. The Board indisputably did not, and Plaintiffs thus are highly likely to succeed on their claim that the Board violated the APA.

2. The ETS Exceed DOSH's Authority under Cal/OSHA.

Plaintiffs are also likely to succeed on their claim that the Board exceeded its authority by imposing regulations on employers that go outside DOSH's enforcement authority. Generally, "in reviewing the legality of a regulation adopted pursuant to a delegation of legislative power, the judicial function is limited to determining whether the regulation (1) is within the scope of the authority conferred and (2) is reasonably necessary to effectuate the purpose of the statute." *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 11 (1998); *see also Pulaski v. Cal. Occupational Safety & Health Standards Bd.*, 75 Cal. App. 4th 1315, 1331–32 (1999), *as modified on denial of reh'g* (Nov. 24, 1999). "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void." *Pulaski*, 75 Cal. App. at 1332 (quoting *Henning v. Div. of Occupational Safety & Health*, 219 Cal. App. 3d 747, 758 (1990)).

Plaintiffs recognize that DOSH has broad authority to regulate workplace safety. *See* Lab. Code § 6307. But this authority does not extend to regulating wages or sweeping mandates that

employers force their employees to take COVID-19 tests without any evidence that the hazard is work-related.[5]

The ETS require that for "employees excluded from the workplace," employers "continue and maintain an employee's earnings, seniority, and all other employee rights and benefits, including the employee's right to their former job status, as if the employee had not been removed from their job … ." 8 C.C.R. § 3205(c)(10)(C). DOSH has neither the regulatory nor the enforcement authority to require employers to pay employees who are not at the worksite. In California, the DLSE has *express* jurisdiction over the wage-hour standards found in the Industrial Wage Commission Wage orders; the DWC has jurisdiction over disability payments and other benefits provided to employees with job-related injuries and illnesses; and the Employment Development Department administers the Pandemic Unemployment Assistance. DOSH does not regulate employee wages or leave. And its attempt to do so here – ostensibly as "related" to workplace safety – is a gross overreach.

DOSH simply does not have authority to regulate wages of employees who are not even at the workplace. Indeed, no enforcement mechanism exists by which DOSH could enforce these requirements. DOSH issues citations and penalties for purported safety violations – not for lost wages. Because DOSH lacks authority to regulate employee wages and leave in the first place, this Court should enjoin DOSH from seeking to enforce these requirements. *See S. Cal. Gas Co. v. S. Coast Air Quality Mgmt. Dist.*, 200 Cal. App. 4th 241, 268 (2011), *as modified* (Nov. 15, 2011), *as modified on denial of reh'g* (Nov. 22, 2011) ("[D]eference is not accorded to an administrative action which is incorrect in light of unambiguous statutory language or which is clearly erroneous our unauthorized.").

Further, even if DOSH's authority could reach to employee earnings and leave (which it

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[5] Plaintiffs are aware that the Aerosol Transmissible Disease (ATD) standard requires employers to exclude employees from work and maintain the employee's earnings, seniority, rights, and benefits if a *physician recommends* exclusion after an employee was exposed to an airborne infectious disease *at work.* 8 CCR § 5199(h)(8)(B). The lead standard requires medical removal and the provision of medical removal benefits to employees exposed to lead *at work*, but *only if* the level of lead in the blood reaches a certain level. 8 CCR § 1532.1. However, both standards contemplate a nexus to the workplace that is lacking from the ETS—in each, the hazard existed *at the workplace*—and medical testing to confirm that exclusion is necessary. In contrast, the ETS require employers to provide wages and benefits regardless of occupational exposure and requires exclusion even in the event of a negative test. 8 C.C.R. § 3205(c)(10)(B)-(C).

1 does not), the regulation in this case is not tailored to capture COVID-19 cases that are *work-*
2 *related*. The Court should reject DOSH's attempt to bootstrap wage and leave requirements into
3 its enforcement authority by creating a presumption that COVID-19 cases are "work-related."
4 The ETS purport to provide an exception for the wage/leave requirement, stating that the
5 requirement "does not apply where the employer demonstrates that the COVID-19 exposure is
6 not work related." § (c)(10)(C). But by this language, DOSH creates a presumption that *all*
7 COVID-19 cases are work-related, forcing employers to prove otherwise or face the added
8 expense of indefinite paid exclusion leave simply because the employer could not "demonstrate"
9 that the employee contracted COVID-19 outside of work. This blanket presumption is wholly
10 unsupported by any evidence set forth by DOSH and the Board, and it suggests without basis that
11 DOSH is somehow regulating workplace safety – because DOSH created the presumption that all
12 COVID-19 cases are work-related in the first place. This circular logic cannot cause wage and
13 leave requirements to fall within DOSH's enforcement authority.

14 DOSH may believe that it has such authority, or that the ETS are "reasonably necessary,"
15 but this Court is "not bound by the agency's own interpretation of its jurisdiction as specified by
16 legislation, since 'the courts are the ultimate arbiters of the construction of a statute.'" *Littoral*
17 *Dev. Co. v. S. F. Bay Conservation & Dev. Comm'n*, 24 Cal. App. 4th 1050, 1058 (1994). It is
18 well established that "[a]dministrative regulations that alter or amend the statute or enlarge or
19 impair its scope are void." *See, e.g., Pulaski ,*75 Cal. App. 4th at 1332. The Code's "reasonably
20 necessary" requirement exists because the Legislature found that "[s]ubstantial time and public
21 funds have been spent adopting regulations, the necessity for which has not been established."
22 Gov't Code § 11340(c).

23 Here, the Court should invalidate the ETS regulations' paid exclusion requirement
24 because substantial evidence does not support a finding that it is reasonably necessary to promote
25 workplace safety, given the measures that employers are already taking to protect their
26 employees. *See Pulaski*, 75 Cal. App. 4th at 1329-30 (recognizing that a "court may invalidate a
27 regulation if it finds '[t]he agency's determination that the regulation is reasonably necessary to
28 effectuate the purpose of the statute . . . that is being implemented, interpreted, or made specific

by the regulation is not supported by substantial evidence.'" (quoting Gov't Code § 11350(b)(1))). In fact, and as discussed in detail above, the Board acted without any scientific evidence to support its speculative conclusions that employers were not adequately addressing the hazard presented by COVID-19 or its unsupported assumption that COVID-19 is endemic to the workplace.

3. The ETS Violate Constitutional Due Process.

Finally, Plaintiffs should prevail on their constitutional claims against Defendants. Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." Similarly, Article 1, Section 1 of the California Constitution provides in pertinent part that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

As an initial matter, the Board failed to comply with the procedural and substantive requirements of the U.S. Constitution and the APA by improperly adopting the ETS on an emergency basis instead of through the normal rulemaking process. By doing so, the Board denied Plaintiffs any meaningful opportunity to respond to the proposed regulations. By requiring Plaintiffs to exclude employees from the workplace for potentially unlimited periods of time and to pay the potentially ruinous costs associated with these exclusions despite Plaintiffs' effective compliance with measures being taken to serve the public health interest, the ETS deprive Plaintiffs of their property without just compensation or due process.

As detailed throughout the Complaint and this Application, the serious flaws with the ETS arbitrarily and capriciously deprive employers of property without due process. For example, the ETS force large employers to conduct mandatory testing of all employees at the workplace if only *three* employees (of potentially hundreds) are "COVID-19 Cases," even if not work-related. With this, a large employer that is beating the general public's rate of COVID-19 *still* must incur the massive expense and virtually impossible logistics of requiring its employees to be tested, all with no clear benefit. Further, the ETS require employers to exclude from the workplace and provide full pay and benefits to all employees who were potentially exposed to COVID-19, based

on the overly simplistic calculation of having been within six feet of a "COVID-19 Case" for 15 cumulative minutes over 24 hours – regardless of whether employees wore face coverings, are vaccinated, already had COVID-19, or had just returned from another mandatory paid exclusion period due to a previous COVID-19 exposure. *See* 8 C.F.R. §§ 3205(b)(3), 3205(c)(10)(B). These are not just puzzling ambiguities; these are black letter regulations that direct specific actions with potentially disastrous financial consequences. These arbitrarily and capriciously imposed costs constitute a deprivation of property without due process.

B. An Injunction Is Warranted Because Plaintiffs Will Be Irreparably Injured.

Given the strong likelihood of success on the merits, Plaintiffs need only demonstrate that a denial of injunctive relief will result in a greater harm to them than to Defendants. *See, e.g., Butt v. State of California,* 4 Cal. 4th 668, 693-94 (1992). Because Plaintiffs have no other adequate remedy at law to prevent immediate and irreparable harm, this Court should enjoin Defendants. The supposed benefit of the ETS regulations is unclear, given the lack of evidentiary support identified in the Board's Finding of Emergency, while the negative impact of the ETS on Californian businesses is severe and imminent. *See supra* Part II.E; Martz Decl., ¶¶ 10-25; Harned Decl., ¶¶ 8-20; Relles Decl., ¶¶ 4-8; Feil Decl., ¶¶ 5-8; Mayfield Decl. ¶¶ 3-5. If an injunction is not granted, Plaintiffs and employers throughout California face the imminent and unpredictable threat of severe financial harm, potentially to the extent of being forced out of business. *See id.* There simply is no substantial evidence, and certainly none in the Board's Finding of Emergency, suggesting that shifting the COVID-19 burden to employers is effective or fair. Thus, the public interest favors enjoining Defendants until this Court can decide the merits of this lawsuit.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant this Application for a preliminary injunction prohibiting Defendants from enforcing the ETS, 8 C.C.R. §§ 3205, 3205.1, 3205.2, and 3205.3, or otherwise prohibiting enforcement of specific sections 3205(c)(3)(B)(4.), 3205.1(b), 3205.2(b), 3205.3(g), and 3205(c)(10) addressing exclusion leave and COVID-19 testing.

Dated: January 5, 2021

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I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is One Market, Spear Street Tower, San Francisco, California 94105.

On January 5, 2021, I served copies of the within document(s):

PLAINTIFFS' *EX PARTE* APPLICATION FOR ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF [UNOPPOSED PROPOSED HEARING DATE AND BRIEFING SCHEDULE]

by transmitting via electronic mail the document(s) listed above to each of the person(s) set forth below.

James Zahradka, James.Zahradka@doj.ca.gov Lee Sherman, Lee.Sherman@doj.ca.gov James Stanley, James.Stanley@doj.ca.gov Corey Friedman, CFriedman@dir.ca.gov	Attorneys for Defendants: *California Department of Industrial Relations, Division of Occupational Safety and Health; Occupational Safety and Health Standard Board; and Douglas Parker in his official capacity as Chief of the California Department of Industrial Relations*

Executed on January 5, 2021, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Monica Brennan