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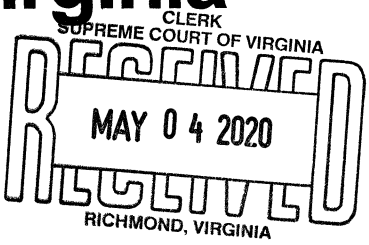

MERRILL C. "SANDY" HALL, *et al.*,

Petitioners,

V.

RALPH S. NORTHAM, THE GOVERNOR OF THE COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

PETITION FOR REVIEW
PURSUANT TO VIRGINIA CODE SECTION 8.01-626

William M. Stanley (VSB 37209)
C. Gregory Phillips (VSB 32904)
James T. Taylor (VSB 83113)
THE STANLEY LAW GROUP
13508 Booker T. Washington Hwy.
Moneta, Virginia 24121
(540) 721-6028
(540) 721-6405 (Fax)
bstanley@vastanleylawgroup.com

Counsel for Petitioners

Ryan T. McDougle (VSB 40147)
McDOUGLE LAW FIRM, P.C.
11159 Air Park Firm, P.C.
Ashland, Virginia 23005
(804) 266-7211
No fax number
ryan@mcdouglelaw.com

Counsel for Petitioners

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

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Assignments of Error

1. Despite finding Appellants proved irreparable harm absent temporary injunctive relief, the trial court erred in holding that Appellants could not succeed on the merits (Order p. 2; Tr. 114), when it applied erroneous standards of review and construction (Order p.2; Tr. 107) to hold that:
    a. Executive Order 53(4)'s "[C]losure of all public access" required Appellants' health clubs to close to private members (Tr. 112); and
    b. Code § 44-146.17(1) grants the Governor unlimited emergency powers to protect the public health, including closing categories of businesses with EO 53 (Order p. 2; Tr. 118), and both the order and delegation of such power are constitutional (Order p. 2, Tr. 107, 111, 114, 118);
2. The court erred by disregarding Appellants' equities in re-opening to prevent permanent closure, and to protect their property and liberty interests, in favor of "the rights of the citizenry… to remain free of any disease," such that permitting Appellants to re-open would require a security bond of "a billion dollars" to compensate the public (Order p. 2, Tr. 115-118); and
3. The court erred by holding that the public interest compelled closure of businesses because "the Executive Orders may in fact have made a difference" statewide, though "we do not know the total spread" of COVID-19, ignoring the public interest in avoiding the loss from losing Appellants' businesses and jobs, or in re-opening businesses with protocols that minimize risk. (Order p.2).

Nature of the Case and Proceedings

Appellants petition for review under Code § 8.01-626 of the denial of a Motion for Temporary Injunction by the Circuit Court of Culpeper County. On April 21, 2020, Appellants filed a Petition for Declaratory Judgment and Injunctive Relief, along with a Petition for Emergency, Temporary Injunction. The trial court (Hon. Claude Worrell presiding, after recusals) held a video hearing and denied the injunction by Order, both on April 30, 2020. Appellants preserved objections. (Order, p. 3, 4). The Order denied the temporary injunctive relief, and also denied

the other, declaratory relief requested in the Petition, declaring "no existing justiciable controversy between the parties" remained (Order p. 2, 3). Appellants thus appeal under Rule 5:17A(f); this Petition appeals "only that part of the final order that actually addresses injunctive relief," while review of the Order's final judgments are subject to a separate Notice of Appeal filed May 1, 2020.

Summary of Facts

Until March 24, 2020, Appellants operated nine Gold's Gym locations, employing 1,100 Virginians while improving the health and fitness of over 56,000 club members. Appellants proved with unrebutted evidence that they and the people affiliated with their businesses are suffering irreparable harm—jobless employees, defaults on obligations, destruction of goodwill, reputation, and solvency, personal obligations and guarantees of millions of dollars, all at the point of collapse.[1] (*E.g.*, Declaration Ex. A, ¶¶ 25-26, 28; Tr. 70, 91). And unless they can re-open now, their nine businesses will fail permanently—and their owners, employees, contractual partners, lenders, members, and local economies—will suffer immeasurable loss without remedy. The court conceded that Appellants had demonstrated irreparable harm (Tr. 114-115, Order p. 2), but gave it no practical weight or attention.

Instead, the trial court held that Code § 44-146.17(1) permitted the Governor

[1] On April 16, 2020, Gold's Gym International permanently closed over 30 corporate-owned locations. This week, that company is declaring bankruptcy.

to issue executive orders of unlimited scope and power during an emergency. In addition, the Court held "there wasn't any way" that the "public equities" prong would favor keeping Appellants' businesses alive, when balanced against the worst imaginable scenario of those businesses recklessly spreading disease to the public. (Tr. 118) (reasoning that Appellants would be required to post a security bond of "a billion dollars" to protect the public). The court had no evidence of risks specific to Appellants' gyms re-opening—the pertinent scope of the inquiry. Instead, it premised its rulings upon concerns that reopening Appellants "and all of the other gyms and other like businesses" create an unknowable risk of spreading infection, which automatically outweighs the equity of losing those businesses (Tr. 115-118).

The court stated in its Order that the public interest compelled keeping all such businesses closed, because "we do not know the total spread of COVID-19 due to the lack of large-scale testing and contact tracing throughout the Commonwealth." (Order, p. 3.). While the court declared that fear and a lack of general, statewide evidence about COVID-19's extent justified permanent shutdown of Appellants' businesses, it did not address any of the actual evidence presented about Appellants themselves, including stringent protocols for sanitary operation and distancing to minimize risk, nor the public interest in the economic or health-related contributions that Appellants provide. (Tr. 25-26, 62-63, 96;

Record Ex. O, P, Q).

Argument

Under Virginia law, the traditional prerequisites for an injunction are "irreparable harm and lack of an adequate remedy at law." *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 61, 662 S.E.2d 44, 53 (2008). The Court found Appellants demonstrated these elements, but denied temporary relief. (Tr. 114-115, Order p. 2). Instead, the trial court justified the death of these businesses based on the summary conclusion that Appellants would not "win at trial" on the merits, inventing erroneous, deferential standards of review. (Order, p. 2; Tr. 107, 114). The court's refrain was that the General Assembly granted the Governor, in the first sentence of Code § 44-146.17(1), unlimited yet "constitutional" emergency powers to do whatever he decides, subject only to his "judgment," any exercise of which deserves deference precluding scrutiny. (Tr. 111, 114, 118).

From this unprecedented premise, the court ruled that EO 53(4) requires Appellants to close to private membership access, that the Governor had the authority under Code § 44-146.17 to issue executive orders closing businesses limited only by his "judgment," and that Code § 44-146.17 was a valid delegation despite no definite standards governing those powers. Pronouncing the general interests of the Commonwealth in closing categories of businesses as superior to the survival of those businesses even where they pose minimum risk, the trial court

held that the public interest and equities foreclosed the court from re-opening Appellants' health clubs. An injunction, opined the court, would require Appellants to post a bond accounting for the broadest conceivable risks to the public of spreading disease, exceeding "a billion dollars" in potential damages. (Tr. 117-118).

Fortunately, this Court reviews *de novo* the trial court's construction and application of such laws. *Lahey v. Johnson*, 283 Va. 225, 229, 720 S.E.2d 534, 536 (2012). A trial court's ultimate decision about injunctive relief is traditionally a discretionary act, but "[a circuit] court by definition abuses its discretion when it makes an error of law." *Porter v. Commonwealth*, 276 Va. 203, 260, 661 S.E.2d 415, 445 (2008) (quotations omitted). So, when a trial court's decision about a temporary injunction rests in part on legal errors, this Court may reverse, or directly order the requested relief. *Commonwealth ex rel. Bowyer v. Sweet Briar Inst.*, Va. No. 150619, 2015 WL 3646914, at *2 (2015) (unpublished) (citations omitted). The trial court erred in its legal conclusions, and improperly construed and applied the balance of equities and public interest considerations, disregarding the actual evidence in the record particular to these Appellants. Appellants request this Court order relief.

I. Proper constructions establish that EO 53(4) permits Appellants to operate with only private member access; that Code § 44-146.17 does not grant unlimited powers to issue emergency, executive orders closing businesses; and that if Code § 44-146.17(1) were the unlimited grant of

power that the trial court ruled, it would be unconstitutional.

Appellants first presented the trial court a narrow opportunity to permit them to reopen without upsetting the validity of EO 53(4). Applying either plain meaning or strict construction[2] of the order's terms, EO 53(4) does not require Appellants to close their particular businesses—just "public access." Appellants are "health clubs" defined under Code § 59.1-296, providing only private membership access, and should not be constrained by EO 53(4)'s "Closure of all public access to ... fitness centers, gymnasiums." Appellants operate without "public access," as that term is commonly understood. Indeed, Appellants' security systems and protocols prevent "public access," and impose social distancing and sanitary conditions as a condition of private access that exceed the standards imposed on "essential retail businesses" operating under EO 53(5), let alone the recreation and amusement businesses open to the public. (Tr. 25-26, 62-63, 96; Petition for Decl., Ex. O, P, Q). The trial court misconstrued this argument, opining that "gym" in "Gold's Gym" equated to "everyone's common understanding of what a gym is," and held that EO 53(4) closed all gym operations, ignoring the "public access" qualifier. (Tr. 112).

The trial court erred. Even if EO 53(4) governs Appellants, the chosen

[2] As penal statutes, Code § 44-146.17 and EO 53 "must be strictly construed, and any ambiguity or reasonable doubt" resolved in favor of the affected party. *Rooney v. Commonwealth*, 27 Va. App. 634, 639–40, 500 S.E.2d 830, 832 (1998).

phrase "public access" is a plain and material limitation on "closure," especially relevant where Appellants' business model ensures no "public access" and enforces sanitary protocols. *See Flinchum v. Commonwealth*, 24 Va. App. 734, 737–38, 485 S.E.2d 630, 631–32 (1997), for discussion of analogous "public access" to a business.

The trial court's primary legal holdings—and the glaring causes for *de novo* review—are in its constructions of the order's enabling statute. Specifically, the court quoted the initial half of the preamble[3] of Code § 44-146.17(1) as its basis to hold that the General Assembly has authorized the Governor to issue any order that the governor's "judgment" determines necessary to protect the public health, with *no limitations* by the phrasing, or enumerated powers and standards that follow. (Order p. 2; Tr. 106). This, held the court, even *altered judicial review standards*:

> That is a pretty remarkable statement for a number of reasons, but it leads the Court to conclude... that the only way that the Court gets to in this instance make some determination in contravention of the Governor's order is if the Governor is plainly wrong, acting in bad faith, or the Governor has violated the constitutional rights of individual or individuals in Virginia. (Tr. 106-107; *see also* Order, p. 2 (same standards)).

The canons of review and construction do not vanish during a declared health emergency. They begin the Virginia Supreme Court's "deeply embedded"

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[3] "The Governor shall have... the following powers and duties: (1) To proclaim and publish such rules and regulations and to issue such orders as may, in his judgment, be necessary to accomplish the purposes of this chapter including, but not limited to such measures as are in his judgment required..."

principle of taking 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). They proceed with a textual review of all of the applicable provisions of Code § 44-146.17 to determine whether the intent was—as the trial court held—to grant the Governor effectively unlimited power, including to indefinitely shutter sectors of businesses and restrict movement. *See Howell v. McAuliffe*, 292 Va. at 368 (summarizing canons). Proper review involves scrutinizing the executive's power to restrict (without substantive or procedural due process) the property and liberty interests inherent in business operations and the movement of citizens, with enforcement by criminal penalties. The Court uses strict construction to ensure the careful exercise of authority, as in the analogous (less intrusive) contexts of eminent domain, *e.g., Light v. City of Danville*, 168 Va. 181, 196, 190 S.E. 276, 281 (1937), penal statutes, *e.g., Lewis v. Commonwealth,* 184 Va. 69, 73, 34 S.E.2d 389, 390 (1945), or taxation, *e.g., Commonwealth v. Stringfellow*, 173 Va. 284, 284, 4 S.E.2d 357, 357 (1939). The trial court's decision to impose deferential standards of review violated the rules that Virginia has erected for evaluating the legislative delegation of powers.

In addition, the court erred by isolating the first clause of Code § 44-146.17(1) to hold that it grants the Governor powers limited only by his "judgment," ignoring the law's subsequent enumerations and limitations upon

executive orders—including the statutory scheme proscribing how the executive branch may issue orders of quarantine or isolation that effect restrictions upon liberty. But "a statute is not to be construed by singling out a particular phrase" and ignoring its context. *JSR Mech., Inc. v. Aireco Supply, Inc.*, 291 Va. 377, 384, 786 S.E.2d 144, 147 (2016). Also, "when one statute speaks to a subject generally and another deals with an element of that subject specifically, the statutes will be harmonized, if possible, and if they conflict, the more specific statute prevails." *Gas Mart Corp. v. Bd. of Sup'rs of Loudoun County,* 269 Va. 334, 350, 611 S.E.2d 340, 348 (2005). This ensures that "a specific statute cannot be controlled or nullified by a statute of general application unless the legislature clearly intended such a result." *Id.*

Specifically, the trial court's isolated, elastic reading of Code § 44-146.17(1)'s first sentence to permit the Governor to issue any executive order within "his judgment," ignored (and rendered meaningless) other provisions in sub. (1):

- When a Governor's order addresses "exceptional circumstances" involving the restrictions of movement or isolation inherent in an order of quarantine or an order of isolation concerning a communicable disease of public health, he must follow the procedures, limitations, and standards the General Assembly proscribed as limitations on executive power to restrict liberties,

codified under Article 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 of Title 32.1;

- The power to "issue such orders as may, in his judgment, be necessary" is specifically linked to "state or federal emergency services programs," and the Commonwealth of Virginia Emergency Operations Plan; and
- The General Assembly specified by amendment that the Governor may make orders "to include those declaring a state of emergency and directing evacuation," punishable as a Class 1 misdemeanor, signaling an intended limitation on orders that carry such penalties, not a pointless example.

Each of these provisions (and those in subs. (2-9)) would be pointless if as the trial court held, the first clause of subsection (1) of Code § 44-146.17 permits the Governor to issue whatever orders he chooses, impinging liberty and property interests, checked only by his "judgment." The trial court's interpretation would neuter the other rules that the legislature proscribed. This would make no sense; Title 32.1, for instance, restricts the Governor and his State Health Commissioner to specific standards, procedures, and protections, for orders effecting less restrictive orders on rights of movement than EO 53. The court's holding that the Governor can in his "judgment" impose far greater restrictions upon the entire populace, while sidestepping all of the pesky standards and procedures the legislature installed to govern more limited infringements on liberty, trampled the canons of construction.

This Court has long "recognized that an injunction will lie to enjoin the threatened enforcement of an invalid statute or ordinance where the lawful use and enjoyment of private property will be injuriously affected by its enforcement, or where the right of a person to conduct a lawful business will be injuriously affected thereby, unless the remedy at law be manifestly as complete and adequate as an injunction suit." *Thompson v. Smith*, 155 Va. 367, 386–87, 154 S.E. 579, 586 (1930). If the canons of construction indeed require the Governor's powers under Code § 44-146.17(1) to be internally harmonized, then it cannot be so broad as the trial court ruled, EO 53's business closures are invalid and *ultra vires*, and an injunction lies.

Unlike this trial court, the Lynchburg Circuit Court rejected the Governor's identical argument that "when he declares a state of emergency, he can ignore any law that limits his power, even laws designed to limit his power during a state of emergency." *Lynchburg Range & Training, LLC v. Northam,* 2020 WL 2073703, at *2 (City of Lynchburg, April 27, 2020). Thus, even if Code § 44-146.17 grants the Governor "the power to close whole categories of businesses," the courts must credit other laws limiting such power. *Id.; see also* Tr. 108 (trial court suggesting "I would have disagreed with Judge Yeatts"). Consistent with this Court's analysis in *Howell v. McAuliffe, supra,* EO 53 transgresses the anti-suspensory provision of the Virginia Constitution, because the Governor is exercising powers that effect the

waiver of suspension of other rights, including constitutional provisions and statutory laws. *See* "Plaintiffs' Memorandum in Support of Petition" below, Args. II(A)(1, 4) (discussing *Howell v. McAuliffe,* and the laws that EO 53 violates).

As a final point, the trial court's interpretation of Code § 44-146.17(1) to grant unlimited emergency powers would also make the statute unconstitutional. "[D]elegations 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, 389 S.E.2d 702, 705 (1990). If Code § 44-146.17(1) authorizes the power the trial court describes, then it violates this rule. *See* Plaintiffs' Memorandum in Support, Arg. III, to which the court did not explicitly respond, but implicitly rejected. (Order p. 2, Tr. 107, 111, 114, 118). The trial court held that EO 53 was authorized by Code § 44-146.17 precisely because that statute does not fix any definite standards to limit the Governor's power—such a delegation would violate the separation of powers.

II. The trial court erred by declaring that the balance of equities justified Appellants' permanent closure, violating their property and liberty interests, because the general "rights of the citizenry... to remain free of any disease" outweigh those equities.

Charged with balancing the equities—which typically favor restoring the *status quo* before the intrusive action—the trial court ignored the equities of

Appellants' own property and liberty interests, and their impending, permanent closure. Additionally, the trial court never discussed the equities at issue for the thousands of affiliated people—owners, employees, vendors, and members—directly affected by such closures. Nor did the court discuss the Governor's equity.

Instead, the trial court announced a new focus of equity: "the rights of the citizenry of the Commonwealth... to remain free of any disease, illness or other." (Tr. 115). The court then embarked on a curious discussion about how permitting Appellants to re-open would require a security bond of "a billion dollars" to cover "all of the things that are possible" as consequences if anyone "suffered a contraction of COVID-19," apparently believing that Code § 8.01-631 requires a bond to protect the general public's speculative, non-economic damages. (Tr. 116-118). Indeed, this bond dilemma "convinced" the court "there wasn't any way that [Appellants] can win that particular prong" (Tr. 118), and the Order provided no further clarity. Even setting aside the fact that the court was supposed to balance equities to the parties—not the population at large—these were improperly speculative considerations. It is also conspicuous that the court relied on worst-case health scenarios, presuming that Appellants would recklessly spread disease, while ignoring the equity of the economic and health impacts from closing Appellants' health clubs permanently.

III. The court erred by concluding the public interest compelled Appellants' closure because while "we do not know the total spread of COVID-19,"

"the Executive Orders may in fact have made a difference" in reducing it statewide, ignoring evidence that these particular Appellants will re-open under strict sanitary protocols minimizing risks of transmission.

In its Order, the court concluded that the public interest required enforcing EO 53(4) to keep all businesses closed. The trial court noted but brushed aside Appellants' unrebutted evidence that they would re-open under particular, strict protocols that minimize the risks of disease transmission at their nine facilities, protecting their members and communities. The court also overlooked the public's obvious interests in protecting constitutional rights in liberty and property, without any due process or evidence of particular risks, and "the public interest to see parties abide by their contractual obligations." *Great Am. Ins. Co. v. Gross,* E.D. Va. No. CIV.A. 305CV159, 2005 WL 1048752, at *6 (E.D. Va. May 3, 2005).

Indeed, the trial court cited as its reasoning in the Order the generic bromide that "the Executive Orders may have in fact made a difference in the number of illnesses and deaths," and that "we do not know the total spread of COVID-19 due to the lack of large-scale testing and contact tracing throughout the Commonwealth." (Order, p. 2). According to the court, the "public interest" has nothing to do with evidence particular to Appellants, their requested relief of re-opening, or their particular fate in dying. Rather, the public interest prioritizes appeasing fears about the unknowable presence and risks of the virus statewide. The trial court elevated the *absence* of governmental evidence about general risks

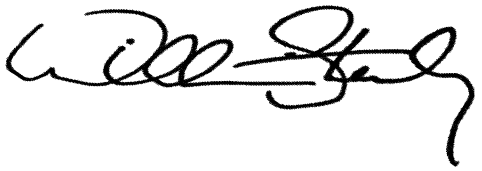
over Appellants' actual evidence about the safety of their particular re-opening. This was error.

Conclusion

The trial court denied temporary relief that would have restored the status quo of Appellants' business operations, saving them from ruin. The court conceded irreparable harm would result, but relied an erroneous legal premise that the General Assembly has validly granted the Governor emergency powers limited only by his "judgment." To prevent irreparable destruction to Appellants—and to prevent a dangerous precedent validating unchecked, executive power over constitutional and statutory rights during any emergency the Governor declares—Appellants ask the Court to order that Appellants may immediately re-open their businesses.

Respectfully submitted,

MERRILL C. "SANDY" HALL, et al.
By Counsel



By: _____
Of Counsel

William M. Stanley, Esq. (VSB #37209)
C. Gregory Phillips, Esq. (VSB #32904)
James T. Taylor, Esq. (VSB #83113)
THE STANLEY LAW GROUP
13508 Booker T. Washington Hwy.
Moneta, Va. 24121
(540) 721-6028: phone
(540) 721-6405: fax
bstanley@vastanleylawgroup.com

and

Ryan T. McDougle, Esq. (VSB #40147)
McDougle Law Firm, P.C.
11159 Air Park Road
Ashland, Va. 23005
(804) 266-7211
ryan@mcdouglelaw.com

CERTIFICATE OF SERVICE

CERTIFICATE REQUIRED BY RULE 5:17A(iii)

NAMES OF PETITIONERS:

Merrill C. "Sandy" Hall,
GG Ashburn, LLC (a Va. Corporation)
GG Cascades, LLC (a Va. Corporation)
Beyond Fitness, LLC (a Va. Corporation)
DGL, LLC (a Va. Corporation)
GG Midlothian, LLC (a Va. Corporation)
GG Roanoke, LLC (a Va. Corporation)
SSGG, LLC (a Va. Corporation)
GG Gayton Crossing, LLC (a Va. Corporation)
More Fitness, LLC (a Va. Corporation)

NAMES OF RESPONDENTS:

Ralph S. Northam, the Governor of the Commonwealth of Virginia, and

Dr. M. Norman Oliver, Virginia State Health Commissioner, and
Gary T. Settle, Virginia State Police Superintendent

COUNSEL FOR PETITIONERS:

William M. Stanley, Esq. (VSB #37209)
C. Gregory Phillips, Esq. (VSB #32904)
James T. Taylor, Esq. (VSB #83113)
THE STANLEY LAW GROUP
13508 Booker T. Washington Hwy.
Moneta, Va. 24121
(540) 721-6028: phone
(540) 721-6405: fax
bstanley@vastanleylawgroup.com

and

Ryan T. McDougle, Esq. (VSB #40147)
McDougle Law Firm, P.C.
11159 Air Park Road
Ashland, Va. 23005
(804) 266-7211
ryan@mcdouglelaw.com

COUNSEL FOR RESPONDENTS:

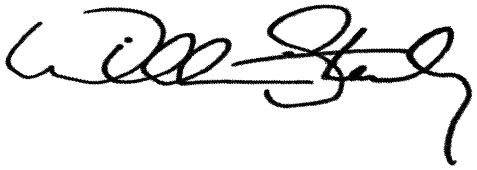
Honorable Mark R. Herring, Esq.
Attorney General of the Commonwealth of Virginia,
202 N. 9th Street
Richmond, Virginia, 23219

Toby J. Heytens, Esq. (VSB 90788)
Solicitor General for the Honorable Mark R. Herring
Office of the Attorney General
202 North 9th Street
Richmond, VA 23219
804/786-7240
THeytens@oag.state.va.us

A copy of this Petition for Review has been mailed and emailed to counsel for appellee on this 4th day of May, 2020.

Counsel for Petitioner certifies that the record in this case is an accurate copy of the record of the proceedings in the Circuit Court and contains everything necessary for a review of this petition.

Counsel does ask for oral argument before a panel of this Court in person or by telephone call.



By: _____
Of Counsel