

IN THE  
SUPREME COURT OF VIRGINIA

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Record No. 200767

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LINDA PARK, *et al.*,  
*Petitioners*,

v.

RALPH S. NORTHAM, in his official capacity  
as Governor of Virginia, *et al.*,  
*Respondents*.

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LIBERTY UNIVERSITY, INC.  
BRIEF *AMICUS CURIAE*,  
IN SUPPORT OF VERIFIED PETITION  
FOR WRIT OF MANDAMUS

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## STATEMENT

In the course of responding to a global pandemic, over the last five months Governor Northam has issued no fewer than 30 executive actions (<https://www.governor.virginia.gov/executive-actions/>), totaling more than 150 pages, imposing scores upon scores of unprecedented, ever-changing, arbitrary, and highly detailed rules regulating nearly every aspect of daily life in the Commonwealth. As Petitioners note, the Governor has imposed this regime without seeking or receiving participation from the legislative branch. Petition for Writ of Mandamus (“Pet.”) at ¶¶ 51-55.

Along the way, the Governor’s executive actions (some expired in part, some ongoing, but all capable of repetition in the near future<sup>1</sup>) have unilaterally decreed that Virginians may not routinely travel or even leave home (EO 55), may not engage in commerce (EOs 53, 61, 63, 65, 67), may not run a business or otherwise pursue their livelihoods (*id.*), may not seek medical care (Order of

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<sup>1</sup> Attempting to evade this Court’s review, the Governor asserts that many of “the slew of restrictions” he imposed on Virginians “have expired,” and that it is “pure speculation” to think that he “might reimpose” those restrictions. Response to Petition (“Resp.”) at 15, 22. Yet it was the Governor who warned that current events are capable of repetition in that “another wave of illness” could occur this summer and “it could be worse than what we’re dealing with right now.” “Virginia could see COVID-19 peak in next few weeks; New models show another wave could hit this summer,” NBC 12 (Apr. 13, 2020). Is it really “speculative” that the Governor would respond to a “worse” threat *less* severely than what he has already done?

Public Health Emergency Two), may not exercise their Article I, Section 12 rights of speech and assembly or engage in religious worship and practices (EOs 53, 55, 65), may not exercise their Article I, Section 13 right to train with arms (EO 53), may not attend school in person (EOs 53, 55, 61, 63, 65, 67), and may not congregate with others (*id.*). Other orders have postponed elections (EO 56), prescribed a manner of dress for the entire population (EO 61), and required individuals and businesses to engage in compelled speech (EOs 61, 63, 65).

Yet even as one man dictates nearly every aspect of life in Virginia, the Governor claims that he does not even need to seek legislative input or approval until July 1, 2021, leaving him free to rule the Commonwealth by edict for a period spanning 16 calendar months. Resp. at 28. In fact, the Governor asserts the power to govern in this manner indefinitely, asserting that “the Emergency Law clearly contemplates the need for additional orders if an emergency continues beyond” June 30, 2021. Resp. at 29 n.25.

The Governor has claimed that enforcement of his new legal landscape “is not a criminal matter,”<sup>2</sup> yet his executive orders have specifically and repeatedly threatened Virginians with prosecution (as a Class 1 Misdemeanor under either Va. Code § 32.1-27 or § 44-146.17) for even “neglect[ing]” to comply with any of the

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<sup>2</sup> “Despite Northam’s public health credentials, some Virginians question his leadership during pandemic,” *The Washington Post* (May 30, 2020).

multitudinous provisions. The Governor’s spokesman has claimed that “[i]t’s human nature to want clear, hard-and-fast rules that never change and are easy to understand, but that’s simply not possible in a global pandemic that affects literally everyone.” *Id.* Yet that is *precisely* what due process requires of rules that carry criminal penalties — indeed, laws that are unclear, fast-and-loose, ever-changing, and impossible to understand routinely are declared “void for vagueness.” *See Stoltz v. Commonwealth*, 297 Va. 529, 534-35 (2019).

The Governor claims that all of these actions are “necessary to save lives.”<sup>3</sup> Resp. at 7. Of course, while no one wishes for any lives to be lost, the very concept of a free society assumes that individuals have personal freedom to evaluate risks and rewards, and then make decisions for themselves. Human nature appears predisposed to cede freedom in exchange for the hope of security during times of fear and uncertainty. History teaches that some of our worst laws and legal opinions result from a willingness to disregard constitutional limits and bend legal strictures to the perceived needs of the day.<sup>4</sup> This Court should not

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<sup>3</sup> Claims of necessity must be met with skepticism, as “Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves.” William Pitt, speech to the House of Commons, Nov. 18, 1783.

<sup>4</sup> Justice Jackson’s warning about abuses of executive power, although rendered in a different context, has application here: “once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order,

countenance semi-permanent partial restrictions on movement coupled with the takeover of the economy with whole sectors reliant upon one person's opinion.

As the Governor is quick to remind, the human toll caused by COVID-19 is reportedly significant. But the Governor has given little indication that he has stopped to consider the human and economic toll his drastic actions have had on the Commonwealth. Thankfully, resolution of the Petition does not require a fact-intensive inquiry as to which is worse — the Northam cure or the COVID-19 disease. Rather, the purely legal question before this Court is whether the Governor possesses the constitutional and statutory authority to take the steps that he has taken. And the answer to that question is a resounding “No.”

## ARGUMENT

### **I. The Governor Is without Constitutional or Statutory Authority to Commandeer the People and the Economy of Virginia.**

The Governor characterizes Petitioners' argument as asserting that “Virginia's executive branch is largely powerless to respond to an ongoing, once-in-a-century global pandemic. Such a result would eviscerate the Commonwealth's efforts to slow the disease's spread....” Resp. at 23. The

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the Court for all time has validated the principle [which] then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.” See *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

Governor’s Response largely ignores the obvious — his option to convene a special session of the General Assembly to address the crisis. *See* Pet. ¶ 51. If the steps the Governor has taken to respond to COVID-19 have been so clearly “necessary,” “evidence-based,” and “effective” (Resp. at 2, 6, 36), then surely the General Assembly would have authorized them. Indeed, the Governor’s party controls both houses of the legislature, and thus even the concern of politically motivated delay is non-existent. Moreover, the legislature actually did convene in the annual “Veto Session” in the midst of the emergency.

On the contrary, the Governor believes that he can act alone, and that his powers are virtually unlimited, relying on Va. Code § 44-146.17’s broad statement that the Governor may “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,” those “purposes” being equally broad. Resp. at 25. The Governor reads § 44-146.17 to empower him to do literally anything<sup>5</sup> (*e.g.*, order

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<sup>5</sup> In response to Petitioner’s challenge to his authority to mandate the wearing of face masks, the Governor tries to change the issue, asserting “Petitioners set forth no legal argument as to why the orders requiring facial coverings ... are unlawful.” Resp. at 46. On the other side of the coin, the Governor never bothers to explain the basis for why such orders *are lawful*. Interestingly, the Governor’s principal medical support for the mask mandate was an article in *Lancet*, the same publication which was forced to retract a different fabricated COVID-19 story. S. Boseley & M. Davey, “Lancet retracts paper that halted hydroxychloroquine trials” *The Guardian* (June 4, 2020). Additionally,

incarceration in internment camps of persons infected with COVID-19) in order to “protect the public peace, health, and safety....” Resp. at 25-26. Fortunately, we do not interpret statutes in a vacuum, or in a manner that would abrogate our entire form of government. First, Virginia courts “interpret a statute to avoid a constitutional infirmity,” to say nothing of a constitutional repudiation. *Jaynes v. Commonwealth*, 276 Va. 443, 464 (2008).

Second, § 44-146.17 provides examples of the types of actions the Governor may take under the Emergency Law. The Governor argues that this list is not exhaustive (Resp. at 26-27), but it certainly is at least instructive as to the specific *types* of power the General Assembly has granted the Governor — to “declare a state of emergency to exist,” to “compel evacuation,” “procure supplies and equipment,” and enforce an “order of quarantine or an order of isolation.” None of these powers comes even close to authorizing the steps the Governor has taken — including severely curtailing or shuttering entire categories of businesses, outlawing provision of medical care, and ordering everyone in the state to remain in their homes for months on end.

Third, *even if* the General Assembly had purported to grant the Governor

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Governor Northam has had trouble following his own command, having been caught taking selfies with others at Virginia Beach without mask or social distancing. *See* C. McFall, “Virginia Gov. Northam criticized,” Fox News (May 23, 2020).

such sweeping powers, such delegation would be ineffectual because they are “powers the General Assembly does not have (and therefore could not delegate).” Pet. at ¶15. And *even if* the General Assembly possessed such broad powers, it is not permitted to giftwrap the entire legislative power and hand it over to the Governor, subject only to a sort of legislative veto in the next legislative session.

Separately, the Governor has claimed a similar unlimited authority under the powers of the State Health Commissioner, as laid out in Title 32.1. *See Resp.* at 30-31. Beginning with EO 61, the Governor began to add the State Health Commissioner to his executive orders. But the claim of authority under Title 32.1 fails for the same reasons set out above, as well as the fact that “[t]he Governor does not show how Title 32.1 grants power to close categories of businesses, nor does he explain how such authority transfers to him without the application of § 44-146.17’s emergency powers.” *Lynchburg Range & Training, LLC v. Northam*, No. CL20-0333, 2020 Va. Cir. LEXIS 57, \*3-4 (Lynchburg Circuit Court, Apr. 27, 2020). Indeed, § 44-146.17 specifically directs and limits the Governor’s authority to act in relation to Title 32.1, stating that he may do so only in relation to orders of quarantine and isolation. Yet none of the challenged executive orders relate to orders of quarantine and isolation (which are both particularized and subject to judicial review), but instead exercise powers far beyond such authority.

Finally, the Governor claims broad authority under the “chief executive” clause of Article V, Section 1 and the “take care” clause of Section 7, which together he alleges confer a so-called “‘general reservoir of power’ in the Constitution of Virginia ‘whereby the chief executive can marshal the resources of the state to protect the people in ... emergencies.’” Resp. at 21 n.19; *see also id.* at 25 n.22. Even if that were so, it would provide a general reservoir of *executive* power, not of the *legislative* power which Governor has exercised.<sup>6</sup> As with the other asserted bases of power above, any Article V “general reservoir of power” cannot permit violations of other constitutional principles or provisions. Nor would this be the same case if the Governor were asserting a type of common-law or so-called “inherent executive power” held by any sovereign state. On the contrary, the Governor here has asserted powers that are heretofore unheard of — including the power to in effect seize control over every business in the Commonwealth and to direct its activities, restrict its operation, or demand its closure. In this and other cases, “[t]he Governor appears to argue that, when he declares a state of emergency, he can ignore any law that limits his power, even

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<sup>6</sup> Not content to wield only executive and legislative power, the Governor also seeks to suppress this Court’s exercise of the *judicial* power, arguing that only he can guide the Commonwealth through this difficult time, and to second-guess his decisions would be nothing short of a death sentence to millions. *See* Resp. at 2-3, 48.

laws designed to limit his power during a state of emergency.” *Lynchburg Range & Training, LLC* at \*4. On the contrary, there is no Virginia corollary to the Nixonian assertion that “when the [Governor] does it, that means that it is not illegal.”

Deeply embedded in the Virginia legal tradition is “a cautious and incremental approach to any expansions of the executive power.” *Gallagher v. Commonwealth*, 284 Va. 444, 451 (2012). This tradition reflects our belief that the “concerns motivating the original framers in 1776 still survive in Virginia,” including their skeptical view of “the unfettered exercise of executive power.” *Id.* See *Howell v. McAuliffe*, 292 Va. 320, 327 (2016). The General Assembly already has granted the Governor and the State Health Commissioner a number of specific tools that they could exercise unilaterally in response to a pandemic and, of course, the Governor could have asked General Assembly for additional powers. But there is simply no possible reading of the Constitution of Virginia, the Code of Virginia, or any combination thereof, that could support the Governor’s claim to unlimited power to commandeer the People and economic life of Virginia.

## **II. Sovereign Immunity Provides the Commonwealth No Defense.**

Relying upon *Afzall ex rel. Afzall v. Commonwealth*, 273 Va. 226, 231 (2007), Respondents contend that the doctrine of sovereign immunity protects the

Governor and the Commissioner, and bars this Petition. Resp. at 32. Respondents' contention mischaracterizes Petitioners' claims and ignores this Court's decision in *Gray v. Va. Sec'y of Transp.*, 276 Va. 93 (2008).

The Petition asserts that the challenged orders were issued in violation of constitutional limitations on the exercise of power (*see e.g.*, Pet. at ¶¶ 29-31, 44), and are also invalid because the legislative delegation of authority to the Executive Branch lacks the required standards and conditions that must accompany such a delegation of authority (*see e.g.*, Pet. at ¶¶ 90-91). These assertions raise fundamental questions concerning the provisions of the Virginia Constitution establishing separation of powers (Art. I, § 5 and Art. III, § 1), the vesting of legislative power (Art. IV, § 1), and the vesting of executive power (Art. V, § 1).

In *Gray*, the Court held that the sovereign immunity defense does not bar challenges to enforce Article I, § 5, Article III, § 1 and Article IV, § 1. It follows from the Court's analysis in that decision of the self-executing nature of those constitutional provisions that Article V, § 1 is also self-executing. Based on the holding in *Gray*, the doctrine of sovereign immunity is no bar to the constitutional claims asserted in the Petition.

## **CONCLUSION**

The petition for a writ of mandamus should be granted.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing complies with Rules 5:6, 5:26 and 5:30, including the page and word limits, and further certifies that:

1. The *Amicus* is Liberty University, Inc. This brief *amicus curiae* is filed in support of Petitioners, who consent to its filing. Respondents oppose the filing of this brief *amicus curiae* and do not intend to file any response unless directed to do so by the Court.

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7. On this 13<sup>th</sup> day of July, the undersigned caused the foregoing to be electronically filed with the Supreme Court of Virginia via the VACES system, and to be served via electronic mail and first class mail on all counsel.

/s/ Patrick M. McSweeney  
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