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

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

**REPLY IN SUPPORT OF PLAINTIFFS' APPLICATION FOR ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION**

Date: January 28, 2021
Time: 1:30 p.m.
Dept.: 302

## I. INTRODUCTION

Without a hint of irony, Defendants' Opposition seemingly blames employers for the recent "spike" in COVID-19 cases. Defendants note that "[t]he number of daily positive tests has increased tenfold *over the last two and a half months* – to more than 40,000 positive tests per day – and the number of hospitalizations in that time has more than sextupled." Opp., 8:13-15 (emphasis added). Notably, Defendants' supporting authority states nothing about this spread being work-related. And Defendants opt not to note that this tenfold increase in cases and sextupled hospitalizations occurred, in large part, after the ETS effective date.

The fact is that no evidence suggests that this "tenfold" increase is, in any way, work-related. Retail employees (and all California employees, for that matter) face the hazard of COVID-19, not because they are employees, but because they are human beings living on this planet. The threat exists wherever they are – Thanksgiving dinner, nights out with friends, holiday celebrations with families, and any number of other life activities, all of which an employer cannot control. Cal/OSHA rightfully expects employers to institute protocols to keep employees safe while they are at work. But it is wrong to impose on employers the massive costs and burdens of a global pandemic where employers can control a person's activities only during a fraction of their day – through, in particular, paid exclusion leave and mandatory testing – without even the benefit of due process.

The Administrative Record is now before this Court, and it is clear it does not show, as the APA requires, "***substantial evidence***" that the COVID-19 Emergency Temporary standards were necessary "to address only the demonstrated emergency." The Record is replete with general suppositions and anecdotes about COVID-19 spread generally, but it is entirely devoid of evidence that (1) *work-related* COVID-19 spread was an "emergency" justifying immediate action, or that (2) the substantial COVID-19 safety requirements already in place through Cal/OSHA's enforcement authority were insufficient to protect employees. Nonetheless, with the ETS now in place, employers must test all employees at a worksite when an "outbreak" occurs – which simply means that three or more employees tested positive for COVID-19, without regard to whether the cases are even work-related. Employers also are required to exclude from the

worksite and pay full wages to employees who are "close contacts," which simply means they were within six feet of a COVID-19 case for a cumulative 15 minutes over 24 hours, whether or not they wore masks or had any high-risk interaction. This is a violation of the APA and an overreach of Cal/OSHA's enforcement authority. Regardless of how many "FAQs" Cal/OSHA publishes in an attempt to rein in its "emergency" regulations (69 to date), employers are forced to operate under the ETS's stringent (albeit often confusing) black-letter requirements or otherwise face the prospect of Cal/OSHA citations and penalties or any number of other potential offshoot enforcement efforts (e.g. PAGA representative actions). Accordingly, Plaintiffs respectfully request that this Court grant preliminary injunctive relief.

## II. LEGAL ARGUMENT

### A. IIPP Requirements Protected Workers Before the ETS Were Issued

Defendants take the position that "[p]rior to the adoption of the ETS, Cal/OSHA did not have a specific standard to enforce that protected the majority of workers from the hazard of COVID-19 in the workplace." Opp., 8:17-18. This position, evidently, turns on the word "specific," as Cal/OSHA – without question – *already* enforced COVID-19 safety protocols pursuant to 8 CCR §3203, which requires employers to identify and address workplace hazards as part of an Injury and Illness Prevention Plan ("IIPP"). Indeed, this IIPP requirement has always been unique to Cal/OSHA (as opposed to federal OSHA and most other state plans), and it ensured that Cal/OSHA had in place a framework to enforce workplace safety where a "specific" standard did not already exist. This, combined with Cal/OSHA's extensive COVID-19 guidance, including, for example, its detailed guidance for no fewer than 39 distinct industries,[1] provided comprehensive – not to mention, *specific* – requirements for employers to follow and a means for Cal/OSHA to enforce them. For this reason, the Board staff rejected Worksafe's initial petition, finding that sufficient protections already existed, and that creating a parallel standard would "dilute" the requirement already in place. Compl., Ex. C, p. 9. ("Unnecessarily creating an offshoot of the IIPP, without substantial evidence of need, can harm the existing protective nature

[1] Cal/OSHA and Statewide Industry Guidance on COVID-19, (last visited Jan. 22, 2021), https://www.dir.ca.gov/dosh/coronavirus/Guidance-by-Industry.html

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.") As such, any suggestion by Defendants, amici, or otherwise, that Plaintiffs seek to upend employee protections or somehow duck their responsibilities for keeping their employees safe from the spread of COVID-19 is simply a scare tactic. All that Plaintiffs request is a return to the rigorous enforcement mechanisms that were squarely in place prior to November 30, 2020.

### B. **Defendants' Administrative Record Does Not Support A Finding Of Emergency**

Ultimately, this Court's ruling will boil down to whether the certified Administrative Record supports Defendants' "Finding of Emergency." ("FOE") The APA requires the agency to demonstrate by specific findings that both an emergency exists and immediate action is required. Gov't Code §§ 11350(a), 11346.1. The agency must show "circumstances sufficient to justify the requested order or other action, as determined by the judge," i.e., "good cause." Code Civ. Pro., §116.130(j); *see also* 5 U.S.C. §553(b)(3)(B) (analogous federal standard for emergency rulemaking requirements). Under federal and state law, determining whether good cause exists "requires proof of facts from which a legal conclusion can be drawn." *CalPortland Cement Co. v. Calif. Unemp. Ins. Appeals Bd.*, 178 Cal.App.2d 263, 274 (1960); *Sorenson Comm'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) (whether good cause exists is a "legal conclusion" reviewed de novo; finding of emergency not within agency discretion or valid simply because agency acted reasonably).

Defendants seemingly acknowledge the overall absence of supporting evidence and, instead, route their argument around the evidence roughly as follows: First, Defendants attempt to broaden the defined term "emergency" by resorting to a purported "commonsense" meaning, and then similarly take a broad view of an agency's discretion in deciding whether an emergency exists. Opp., 11:7-12:20. Second, Defendants extol the purported *bulk* of the record, noting it is 57 pages with 71 attachments and then, without describing any specific piece of evidence, state general conclusions, such as "employees who report to work while sick increase health and safety risks for themselves … and others." Opp., 12:21-13:19. Third, Defendants cite to a purported

"wealth of testimony" from "workers and advocates" who, notably, all spoke at the November 19, 2020 pro forma comments hearing, immediately prior to the Board's evening vote to approve the ETS. Opp., 13:20-14:6. With that, Defendants conclude that "[t]he administrative record thus amply supports the Board's determination that emergency regulations were appropriate and needed." Opp., 14:7-8.

As an initial matter, Defendants do not and cannot show that "immediate action was clearly needed here" as their Opposition asserts. Opp., 11:21-22. The Government Code sections 11350(a) and 11346.1 are clear that where, as here, "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." (emphasis added). The FOE did not "include facts" to explain its delay, resorting instead to a later "Addendum" that indisputably *was not* part of the record before the Board at the November 19, 2020 meeting adopting the ETS. Western Growers Association's Ex Parte Application and OSC, 15:16-17, fn. 1; Decl. of Steven Escobar in Support of Opposition to Western Growers Association's Motion for Preliminary Injunction, ¶¶ 4-8. Second, Defendants did not and cannot show why they waited over six months – and after having rejected an ETS proposal – when COVID-19 "existed and was known" the entire time. Defendants do not explain this delay in their Opposition, and the only explanation the Board offers in the late-added Addendum is that investigations in the summer of 2020, and rising positivity rates, "showed that employers were struggling to address the novel hazards presented by COVID-19," which led them to pursue adopting the ETS in September 2020. A.R. 3E1, at v, vi. Again, to put this in perspective, in the same time period, the legislature passed AB685, which includes significant COVID-19 related provisions, and became effective on January 1, 2021 (incidentally, causing confusing overlap with the ETS, which was created after, but became effective before, AB685).

Defendants attempt to sidestep this requirement to show an "emergency" by, essentially, taking the position that they get to decide what an emergency is. Opp., 12:3-5 ("Historically, when reviewing the validity of emergency regulations … 'what constitutes an emergency is

primarily a matter for the agency's discretion'"). But, as Defendants admit, this Court is not bound by an agency's determination of its own authority (Opp., 12:6-7), and the APA is clear that "[a] finding of emergency based only upon expediency, convenience, . . . or speculation, shall not be adequate to demonstrate the existence of an emergency." Gov't Code § 11346.1(b)(2). As such, Defendants do not get to decide that *their* speculation *does* demonstrate an emergency. And, now as a matter of record, Defendants simply did not and cannot set forth "substantial evidence" that work-related COVID-19 spread was an "emergency" sufficient to justify immediate and onerous action beyond what already was in place. *See* Gov't Code § 11346.1(b)(2); Compl. ¶ 101.

The record evidence amounts to general statements about COVID-19 without any specific evidence establishing that work-related COVID-19 spread suddenly became an "emergency" by November 2020 or that the comprehensive requirements already in place were insufficient. Defendants' supporting evidence from the record is largely buried in the Opposition's footnotes, but it is summarized below for the Court's review, amounting to the following:

- **General statements in the FOE, CDPH orders, and Governor Newsom's executive order that are untethered to supporting evidence.** These statements include: "[c]lusters and outbreaks of COVID-19 have occurred in workplaces throughout California, including in food manufacturing, agricultural operations, and warehouses." (A.R. Tab 1E at pp. 4, 5) (Opp., 13:7-12); "employees who report to their places of employment are often exposed to an increased risk of contracting COVID-19, which may require medical treatment, including hospitalization" (A.R. Tab 1K4) (Opp.,13:12-16); and "COVID-19 infection is also disproportionately impacting our essential workforce." (A.R. Tab 1K46) (Opp.,14:2-9).

- **A statement from the CDHP that it was aware of nearly 400 COVID-19 outbreaks as of September 30, 2020** in California that were not covered by Section 5199 (ATD Standard), without any indication that these "outbreaks" were work-related or even that this number was somehow significant or otherwise different than "outbreaks" throughout the population overall. (A.R. Tab 1E at 52)(Opp., 13:16-19).

- **The number of complaints received by Cal/OSHA regarding COVID-19 protections,** Cal/OSHA received 6,937 complaints alleging inadequate protections for and/or potential exposure to COVID-19 in the workplace, without any indication as to how this number compared to complaints generally, whether any of these complaints were substantiated, and whether Cal/OSHA identified any safety protocol violations as a result. (A.R. Tab 1E at ¶15) (Opp., 13:16-19).

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- **A "wealth of testimony" from essential workers and advocates**, which amounted to brief telephonic/video conference anecdotes from individuals regarding their isolated experiences, without information on when such incidents occurred, whether they were isolated or part of a pattern, or whether the substantial orders and regulations in place already covered their grievances. A.R. Tab 5 at 35:24-36:2 ["I've seen the store I work at and most of the other stores on the block I work at fail to comply with local health orders and make necessary changes to keep workers safe."], 47:18-50:15 [restaurant failed to identify and notify potential contacts of positive cases or report positive cases to local authorities], and 104:6-105:17 [grocery store cashier describing how "[m]y employer is failing to comply with basic public health orders protections . . .. We have experienced an outbreak at my job"]." (Opp., 13:20-28).

- **General *ex ante* suppositions from Dr. Robert Harrison at UCSF, a former Board member**, who stated without regard to the actual content of the ETS that, "[E]mployers who already are largely compliant with good worker protection, programs for COVID, I think they have little to be concerned about. … Employers who are already doing a good job I think are not going to have much concern over that emergency standard. … And I would assume that any ETS if and when it's passed becomes in effect that it would be accompanied by that kind of guidance so employers can be clear about what they need to do. …" (A.R. Tab 5 at 52:13-55:4) (Opp., 14:4-6).

- **An August 2020 article from the European Centre for Disease Prevention and Control, which identified general concerns of workplace spread without connecting them to any particular requirement not already in place (**identifying "[w]orking in confined indoor space," "difficulties maintaining the recommended distance of at least two metres," working as "transport workers" or "sales people," and "'presenteeism' (i.e. reporting to work despite being symptomatic for a disease)" as "[p]ossible factors contributing to clusters and outbreaks in occupational settings" (A.R. Tab 1K8 at 2) (Opp., 14:2-9).

- **Further general statements from CDPH, dated September 8, 2020, and without evidentiary support,** explaining that "[e]mployers must use the reporting threshold of three or more laboratory-confirmed cases of COVID-19 among workers who live in different households within a two-week period"; "[t]esting all workers should be the first strategy considered for identification of additional cases"; "[e]mployers should offer on-site COVID-19 testing of workers or otherwise arrange for testing"; and "[c]lose contacts should be instructed to quarantine at home for 14 days from their last known contact with the worker with COVID-19."] (A.R. Tab 1K54) (Opp., 14:4-6).

Notably absent from the Administrative Record is evidence such as:

- Data indicating that workplaces are a major source of COVID-19 infection
- Data indicating that the precipitous rise in COVID-19 infections in the fall was correlated, or at all related, to an increased risk of COVID-19 infection in the workplace
- Data indicating that the existing COVID-19 enforcement under the IIPP was ineffective

In short, the administrative record is entirely devoid of the required factual support and otherwise comprised of general statements, observations, and anecdotes that are untethered to actual evidence indicating that the spread of COVID-19 is work-related or that further regulations, not already in place, will curb further transmission. The same was the case when the Board staff stated 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." The fact is that this evidentiary record was created to support a purported "emergency" finding – not the other way around, as is required.

**C. Defendants Exceeded Their Statutory Authority in Requiring Paid Leave**

Beyond the fact that Defendants forced on employers complex and burdensome regulations on an "emergency" basis, they have now imposed on employers regulations that exceed Cal/OSHA's enforcement authority. Similar to their view on establishing an emergency, Defendants simply take the position that they define their own enforcement authority because Cal/OSHA is "vested with quasi-legislative authority to adopt occupational safety and health standards." Opp., 15:20-21. Defendants' argument here seemingly is that Cal/OSHA's enforcement authority is virtually unlimited, so long as they can say that, no matter how far removed, the regulation theoretically connects to workplace safety.

The APA provides that to be effective, regulations (emergency or not) "shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law" (§ 11342.1) and that "no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute" (§ 11342.2). Further, "[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void." *Pulaski v. Cal. Occupational Saf. & Health Standards Bd.*, 75 Cal. App. 4th 1315, 1332 (1992). Here, Cal/OSHA cannot – let alone on an "emergency" basis – expand its authority to regulate workplace safety to include requiring employers to provide indefinite paid "exclusion leave." Even Cal/OSHA admits that it cannot enforce paid leave

requirements – because it issues citations, not awards of back pay. *See* FAQ[2] No. 58 (issued January 8, 2021), stating, "As with any violation, Cal/OSHA has the authority to issue a citation and require abatement. Whether employees or another agency can bring a claim in another forum is outside the scope of Cal/OSHA's authority."

Defendants cite *Bendix Forest Prod. Corp. v. Division of Occupational Safety & Health* to support its proposition that Cal/OSHA may impose wage requirements to further its workplace safety mandates. Opp., 16:24-28. *Bendix* addressed on-site PPE requirements, stating that DOSH has "the authority to enforce the laws and standards relating to protective hand coverings at the Bendix facility, … [and] require the employer to bear the expense," which bears no resemblance to the ETS leave requirements here. *Bendix*, 25 Cal. 3d 465, 473 (1979). Because Cal/OSHA lacks authority to regulate employee wages and leave in the first place, this Court should enjoin Cal/OSHA from enforcing these requirements – on an "emergency" basis, no less. *See S. Cal. Gas Co. v. S. Coast Air Quality Mgmt. Dist.*, 200 Cal. App. 4th 241, 268 (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.").

Likewise, the Board exceeded its authority with the testing requirements. The ETS does not cover employees who are exposed to higher risks of contracting COVID-19 because of the nature of their work (and Defendants certainly do not show otherwise) as it expressly excludes health care workers with known COVID-19 exposure in the workplace (§ 3205(a)(1)(C)). Cal/OSHA does not have authority to require testing where the purported hazard does not arise from the workplace. See *Pulaski*, 75 Cal.App.4th at 1333–34; *see also* Lab. Code §§ 147.2 & 6408(d); Cal. Code Regs., tit. 8, § 340.2; *see, e.g.*, *In re Behavioral Health Servs. Inc.* (Ca. O.S.H.A A.L.J. 2003) 2003 WL 27363747, *9 (medical surveillance under Cal. Code Regs., Title 8, § 5193 (blood-borne pathogens) applies to employees where "direct exposure to blood and other bodily fluids experienced by health care workers constitutes a greater hazard than that of the

[2] COVID-19 Emergency Temporary Standards Frequently Asked Questions, (last visited Jan. 22, 2021), https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html#exclusions.

general population”).

Finally, Plaintiffs ask this Court to reject Defendants’ necessary (and improper) presumption that all COVID-19 cases at the workplace are “work-related.” The ETS presumes that COVID-19 cases are work-related unless the employer can show otherwise, requiring the employer to place the employee on indefinite paid leave, regardless of the employer’s financial and staffing resources. The ETS requirements apply regardless of the employer’s size, with no allowance for small employers disproportionately impacted by the exclusion requirement. The ETS further presumes that “outbreaks” (just three or more positive tests) are work-related – and that testing of all employees at the “worksite” is required – even if all workers separately contracted COVID-19 from their own family events. This is both an improper way to shoehorn jurisdiction (presuming work-relatedness) and a due process violation. *See Griffiths v. Super. Ct.*, 96 Cal.App.4th 757, 779 (2002); *Marquis v. St. Louis-S.F. Ry. Co.*, 234 Cal.App.2d 335, 341 (1965) (finding that a statute creating a presumption that is arbitrary or that denies a fair opportunity to repel it violates the due process clause). Defendants do not and cannot show otherwise.

**D. <u>Plaintiffs Face Irreparable Harm Absent This Court Enjoining the ETS.</u>**

Plaintiffs are not required to show that their businesses have already been forced to permanently close due to the ETS in order for this Court to grant a preliminary injunction – that would render a preliminary injunction entirely ineffectual if Plaintiffs can only receive one after it is too late to protect their interests. *Dingley v. Buckner*, 11 Cal. App. 181 (Cal. Ct. App. 1909) (“no proceeding at law can afford an adequate remedy for the destruction of one's business” *citing*, *Watson v. Sutherland*, 72 U.S. 74 (1866) (“Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings in limine, brings the parties before it, hears their allegations and proofs, and decrees, either that the proceedings shall be restrained, or else perpetually enjoined.”) Thus, 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*

1 *California,* 4 Cal. 4th 668, 693-94 (1992).

2 To the contrary, Defendants' contention that Californians will be irreparably harmed
3 should the ETS be enjoined is entirely speculative. Substantial regulations and protocols already
4 were in place before November 30, 2020, which is not to mention the fact that, as Defendants
5 note, global spread is "spiking" with the ETS *now in place*. Defendants set forth absolutely no
6 evidence to suggest that workplace exposure has improved with the ETS or that Californians will
7 somehow be irreparably worse off without. This evidence does not exist. Defendants cite to the
8 number of employer-reported "outbreaks" (Opp., 20:3-5), but this says nothing about work-
9 relatedness because employers are required to report "outbreaks" simply if three employees show
10 up to work with COVID-19. It is unfair to require employers to report "outbreaks," regardless of
11 work-relatedness, and then hold the reports against employers as if the cases were work-related
12 all along.

13 As it stands, employers throughout California face the daily threat of an "outbreak"
14 occurring, without any connection to the workplace, followed by paid exclusion leave and
15 mandatory testing. Unless this Court enjoins the challenged ETS regulations, employers will face
16 the Hobson's choice described in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381
17 (1992): "continually violate the [ETS] and expose themselves to potentially huge liability; or
18 violate the law once as a test case and suffer the injury of obeying the law during the pendency of
19 the proceedings and any further review." Plaintiffs face imminent and irreparable harm where,
20 however they proceed, a significant penalty attaches.

21 **III. CONCLUSION**

22 For the foregoing reasons, Plaintiffs respectfully request that this Court enjoin Defendants
23 from enforcing the ETS, 8 C.C.R. §§ 3205, 3205.1, 3205.2, and 3205.3, or otherwise prohibiting
24 enforcement of specific sections 3205(c)(3)(B)(4.), 3205.1(b), 3205.2(b), 3205.3(g), and
25 3205(c)(10) addressing exclusion leave and COVID-19 testing.

26 Dated: January 22, 2021 MORGAN, LEWIS & BOCKIUS LLP

27 By */s/ Jason S. Mills*
Jason S. Mills
28 Attorneys for Plaintiffs

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**PROOF OF SERVICE BY ELECTRONIC MAIL**

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 22, 2021, I served copies of the within document(s):

**REPLY BRIEF IN SUPPORT OF PLAINTIFFS' *EX PARTE* APPLICATION FOR ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION**

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<br>Lee Sherman, Lee.Sherman@doj.ca.gov<br>James Stanley, James.Stanley@doj.ca.gov<br>Corey Friedman, CFriedman@dir.ca.gov | Attorneys for Defendants:<br>*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 22, 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