

1 MORGAN, LEWIS & BOCKIUS LLP  
Jason S. Mills, Bar No. 225126  
2 300 South Grand Avenue  
Twenty-Second Floor  
3 Los Angeles, CA 90071-3132  
Tel: +1.213.612.2500  
4 Fax: +1.213.612.2501  
jason.mills@morganlewis.com

5 MORGAN, LEWIS & BOCKIUS LLP  
6 Sarah J. Allen, Bar No. 306286  
600 Anton Boulevard, Suite 1800  
7 Costa Mesa, CA 92626-7653  
Tel: +1.714.830.0600  
8 Fax: +1.714.830.0700  
sarah.allen@morganlewis.com

9 MORGAN, LEWIS & BOCKIUS LLP  
10 Aleksandr Markelov, Bar No. 319235  
1400 Page Mill Road  
11 Palo Alto, CA 94304  
Tel: +1.650.843.4000  
12 Fax: +1.650.843.4001  
aleksandr.markelov@morganlewis.com

13 Attorneys for Plaintiffs  
14 NATIONAL RETAIL FEDERATION; NATIONAL  
FEDERATION OF INDEPENDENT BUSINESS;  
15 RELLES FLORIST; MAYFIELD EQUIPMENT  
COMPANY; and ABATE-A-WEED, INC.

17 SUPERIOR COURT OF THE STATE OF CALIFORNIA

18 COUNTY OF SAN FRANCISCO

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

22 Plaintiffs,

23 vs.

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

28 Defendants.

Case No.

UNLIMITED JURISDICTION

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

1 Plaintiffs National Retail Federation, National Federation of Independent Business, Relles  
2 Florist, Mayfield Equipment Company, and Abate-A-Weed (collectively, “Plaintiffs”) bring this  
3 action against Defendants the California Department of Industrial Relations, Division of  
4 Occupational Safety and Health, the Occupational Safety & Health Standards Board, and Douglas  
5 Parker, in his official capacity as Chief of the California Department of Industrial Relations  
6 (collectively, “Defendants”), and allege as follows in their Complaint for declaratory and  
7 injunctive relief:

## 8 **INTRODUCTION**

9 1. In the wake of the novel coronavirus, the State of California and various  
10 governmental bodies within the state instituted a series of orders and regulations in an effort to  
11 stem the spread of the virus. These early efforts, aimed at protecting the general public’s health,  
12 safety and welfare, came at a steep price, especially for small businesses, and the millions of  
13 employees and members of the public who relied on those businesses.

14 2. California employers understand that defeating this pandemic requires  
15 extraordinary measures and for everyone to do their part. They have eagerly committed  
16 themselves to the task. Since March, California employers have established rigorous and science-  
17 driven safety measures, often at great expense, to adapt to this new environment and ensure that  
18 they operate in a safe and hygienic manner to help slow the spread of the virus and protect their  
19 workers and the public. The latest science and data reveal that employers’ efforts have generally  
20 been successful.

21 3. However, Defendants relied on unsupported speculation that there was a nexus  
22 between reopening workplaces and the increase in COVID-19 cases to claim that it was necessary  
23 to adapt the COVID-19 Emergency Temporary Standards (“ETS”), California Code of  
24 Regulations section 3205, *et seq.*, without prior public notice or a full public hearing, as required  
25 by the rulemaking provisions of the California Administrative Procedure Act, Government Code  
26 sections 11340, *et seq.*

27 4. These ETS regulations implement, interpret, and make specific the law that the  
28 Division of Occupational Safety and Health (“DOSH” or the “Division”) enforces. The ETS

1 regulations include policy decisions by Defendants, which should be subject to the deliberative  
2 processes required by the Administrative Procedure Act. The Administrative Procedure Act only  
3 allows for adoption of regulations without advance public notice and the opportunity to comment  
4 in circumstances “necessary for immediate preservation of the public peace, health and safety or  
5 general welfare.” *See, e.g.*, Gov. Code §§ 11342.545, 11346.1. For multiple reasons detailed  
6 below, the circumstances surrounding these regulations did not warrant emergency adoption.

7 5. The emergency regulations are also improper because DOSH exceeded the scope  
8 of its authority to promote occupational safety and health by attempting to regulate wages and  
9 paid leave, which are the domain of agencies like the Department of Labor Standards  
10 Enforcement and the Division of Workers’ Compensation.

11 6. Finally, the ETS regulations are improper because they arbitrarily and capriciously  
12 deprive Plaintiffs of property without just compensation or due process, particularly with respect  
13 to the COVID-19 testing and mandatory periods of paid exclusion from work that the emergency  
14 regulations purport to require. The ETS regulations apply equally to all employers, regardless of  
15 their size or the prevalence of cases for their specific industry, and despite the absence of a  
16 proven nexus between COVID-19 positivity rates and workplaces generally. Especially for small  
17 businesses, the obligation to comply with these mandates can be ruinous and poses a legitimate  
18 threat to their continued existence.

### 19 **PARTIES**

20 7. Plaintiff National Retail Federation (“NRF”) is the world’s largest retail trade  
21 association, representing discount and department stores, home goods and specialty stores, Main  
22 Street merchants, grocers, wholesalers, chain restaurants and internet retailers from the United  
23 States and more than 45 countries. Headquartered in Washington D.C., NRF has advocated on  
24 behalf of retailers on important policy issues for more than a century. NRF joins this action on  
25 behalf of its members operating in the State of California.

26 8. Plaintiff National Federation of Independent Business (“NFIB”) is a California  
27 nonprofit mutual benefit corporation. It is the nation’s leading association of small businesses,  
28 representing members in Washington, D.C., and all 50 states. Founded in 1943 as a nonprofit,

1 nonpartisan organization, NFIB’s mission is to promote and protect the rights of its members to  
2 own, operate, and grow in their businesses. While there is no standard definition of a “small  
3 business,” the typical NFIB member employs 10 people and reports gross sales of about \$500,000  
4 a year. The NFIB membership is a reflection of American small business. NFIB joins in this  
5 action on behalf of its members operating in the State of California.

6 9. Plaintiff Abate-A-Weed, Inc. (“Abate-A-Weed”), a NFIB member, is a small  
7 landscaping and gardening supply company founded in 1965. Abate-A-Weed is based in  
8 Bakersfield, California and owned by Darrell Feil, a California resident.

9 10. Plaintiff Mayfield Equipment Company, dba Rainbow Ag, Rainbow Pet, and  
10 Larsengines (“Mayfield Equipment”), another NFIB member, is a company with several retail  
11 locations that sell livestock feed, pet food and supplies, outdoor power equipment, workwear and  
12 other products to rural homeowners and agricultural producers. Mayfield Equipment is based in  
13 Ukiah, California and owned by Jim Mayfield, a California resident.

14 11. Plaintiff Relles Florist (“Relles Florist”), another NFIB member, is a small family  
15 business founded in 1946. Relles Florist is based in Sacramento, California and owned by Jim  
16 Relles, a California resident.

17 12. Defendant Division of Occupational Safety and Health is a Division of the larger  
18 California Department of Industrial Relations, which in turn is part of the Cabinet-level Labor and  
19 Workforce Development Agency of the State of California. DOSH supervises occupational  
20 safety and health at workplaces throughout the state of California and issues citations to  
21 employers found to be in noncompliance.

22 13. Defendant Occupational Safety & Health Standards Board (the “Board”) is the  
23 seven-member standards-setting agency within the Cal/OSHA program. The Board approves the  
24 standards that DOSH enforces.

25 14. Defendant Douglas Parker is sued in this lawsuit only in his official capacity as  
26 Chief of the California Department of Industrial Relations. Mr. Parker is responsible in his  
27 official capacity for ensuring that DOSH and the Board perform their functions in a lawful  
28 manner.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**REQUISITES FOR RELIEF**

15. Through its members, NRF represents California retail employers and many of the 3,661,850 California employees who work in the retail industry. NRF has standing to sue on behalf of its members because it includes and represents many California members of the retail industry that are subject to DOSH’s regulatory enforcement authority, and directly and adversely affected by the ETS regulations challenged in this lawsuit.

16. NFIB’s members include over 13,000 small businesses operating throughout California who are and will be affected by the COVID-19 Emergency Temporary Standards. NFIB has standing to sue on behalf of its members because it includes and represents many California small businesses that are subject to DOSH’s regulatory enforcement authority, and directly and adversely affected by the ETS regulations challenged in this lawsuit.

17. These individual members could have met the private interest standard if they had sued individually because they have a concrete and particularized private interest in avoiding the significant financial burdens the ETS regulations impose by requiring employers to cover the costs of testing employees for COVID-19 and providing mandatory paid exclusion periods. *See San Francisco Apartment Ass'n v. City & County of San Francisco*, 3 Cal. App. 5th 463, 472-74 (2016). These private interests are over and above that of the general public because the financial burdens of these regulations only apply to employers. *See Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal. 4th 155, 165 (2011). However, the claims NRF and NFIB assert and the relief they seek do not require their individual members’ participation in this lawsuit.

18. The private interests NRF and NFIB seek to protect in this lawsuit are germane to their central purpose of advocating on behalf of member employers on policy issues. There is no divergence of interests between NRF, NFIB, and their individual members in regards to the purpose of this lawsuit.

**JURISDICTION AND VENUE**

19. The Court has jurisdiction over this action pursuant to California Government Code section 11350.

1           20.     This Court is a proper venue for this action, pursuant to California Code of Civil  
2 Procedure section 401, because the California Attorney General maintains an office in the City  
3 and County of San Francisco.

4   **FACTUAL AND PROCEDURAL BACKGROUND**

5 **A.     The COVID-19 Global Pandemic**

6           21.     In December 2019, health officials in Wuhan, China reported a cluster of cases of  
7 pneumonia that were eventually identified as the novel coronavirus SARS-CoV-2. Symptoms  
8 include fever, dry cough, tiredness, and shortness of breath.

9           22.     Since the first reported cases, COVID-19 spread rapidly. On January 10, 2020, the  
10 World Health Organization (“WHO”) issued a comprehensive package of technical guidance  
11 online with advice to all countries on how to detect, test and manage potential cases, based on  
12 what was known about the virus at the time. On January 21, 2020, the Centers for Disease  
13 Control (“CDC”) confirmed the first Unites States coronavirus case in Washington State.

14           23.     On January 30, 2020, the WHO reported 7,818 total confirmed cases worldwide,  
15 with the majority of these in China, and 82 cases reported in 18 countries outside China. By  
16 March 3, 2020, there were more than 90,000 cases of coronavirus around the globe, causing  
17 approximately 3,000 deaths.

18           24.     On March 4, 2020, California Governor Gavin Newsom issued a proclamation of a  
19 state of emergency. On March 11, 2020, deeply concerned by the alarming levels of spread and  
20 severity, the WHO made the assessment that COVID-19 can be characterized as a pandemic. On  
21 March 13, 2020, the President of the United States proclaimed a national state of emergency in  
22 response to the rapid spread of COVID-19.

23 **B.     California Takes Action to “Flatten the Curve.”**

24           25.     Since March, public health officials in California and counties and localities across  
25 the state have issued public health orders requiring increasingly strict measures to protect its  
26 population, including “stay-at-home” orders. On March 9, 2020, and March 11, 2020, the public  
27 health officers of Santa Clara and San Francisco Counties, respectively, issued orders prohibiting  
28 gatherings of 1,000 or more to limit the spread of COVID-19. On March 12, 2020, San Mateo

1 County implemented a similar order prohibiting public or private gatherings of 250 people or  
2 more. By March 13, 2020, Bay Area Counties had orders in place prohibiting public or private  
3 gatherings of more than 100 people. The effective order in Santa Clara County further prohibited  
4 gatherings of more than thirty-five people unless mitigation measures were implemented.

5 26. On March 12, 2020, Governor Newsom issued an order directing all residents to  
6 "heed any orders and guidance of state and local public health officials, including but not limited  
7 to the imposition of social distancing measures, to control the spread of COVID-19." By March  
8 16, 2020, the public health officers for the counties of Alameda, Contra Costa, Marin, San  
9 Francisco, San Mateo, and Santa Clara, as well as the City of Berkeley, each issued legal orders  
10 directing their respective residents to shelter at home.

11 27. On March 19, 2020, Governor Newsom issued a statewide shelter-in-place order,  
12 an executive order requiring all California residents to stay-at-home or their place of residence,  
13 except as needed to maintain continuity of operations of certain specified federal critical  
14 infrastructure.

15 28. On April 17, 2020, the public health officers of Alameda, Contra Costa, Marin,  
16 San Francisco, San Mateo, and the City of Berkeley, each issued an order requiring all individuals  
17 to wear face coverings outside their home, with certain exceptions. The shelter-in-place orders  
18 and related directives have been extended on numerous occasions and largely remain in effect to  
19 this day.

20 **C. The Government Prioritizes COVID-19 Testing.**

21 29. Protecting the health and safety of its people, particularly during an emergency, is  
22 widely recognized as one of the core functions of government. Accordingly, the State of  
23 California placed great emphasis on providing widespread COVID-19 testing to help detect,  
24 trace, and control the spread of the virus.

25 30. On May 6, 2020, the California Department of Public Health's COVID-19 Testing  
26 Task Force launched an interactive website to help Californians find COVID-19 community  
27 testing sites near them. The new site allowed Californians to quickly search for testing sites by  
28 current location, address, city or zip code and schedule an appointment. It also featured an

1 interactive map of testing sites across the state. One of the stated goals of the Testing Task Force  
2 was to ensure that more than 90 percent of Californians were within 60 minutes driving distance  
3 of COVID-19 testing sites.

4 31. In furtherance of that goal, and consistent with its responsibility to protect the  
5 health and safety of its people, California made testing free for all individuals, including those  
6 who were uninsured or undocumented.<sup>1</sup> On May 12, 2020, Governor Newsom announced that  
7 California had conducted more than one million diagnostic tests statewide. By late November,  
8 California was conducting an average of 198,221 tests each day, while still providing them free of  
9 charge to anyone who requested them, despite a cost of \$150-200 for each test.<sup>2</sup>

10 **D. The Government Provides Financial Relief to Citizens.**

11 32. To help relieve some of the hardships that were caused by extended stay-at-home  
12 orders, lockdowns, and other restrictions on commerce and employment, the government enacted  
13 multiple new policies to provide financial relief.

14 33. On March 18, 2020, Congress enacted the Families First Coronavirus Response  
15 Act, which provided paid sick leave and unemployment benefits to workers and families. On  
16 March 25, 2020, Governor Newsom secured a financial relief package under which financial  
17 institutions provided a 90-day grace period for mortgage payments and did not negatively impact  
18 credit reports for Californians accessing payment relief. On March 27, 2020, the Governor issued  
19 an executive order banning the enforcement of eviction orders for renters affected by COVID-19  
20 through May 31, 2020, which has since been extended. That same day, Congress passed the  
21 federal CARES Act, a \$2.2 trillion economic stimulus bill that included \$300 billion in one-time  
22 cash payments to individual Americans and \$260 billion in increased unemployment benefits.

23 34. On April 2, 2020, Governor Newsom announced \$17.8 million in new state  
24 initiatives to support California workers impacted by COVID-19. On April 9, 2020, California

---

25 <sup>1</sup> Office of Public Affairs, *State Launches California COVID-19 Testing Sites Website Find a COVID-19 Testing Site*  
26 *Near You*, California Department of Public Health (May 6, 2020),  
27 <https://www.cdph.ca.gov/Programs/OPA/Pages/NR20-076.aspx>.

28 <sup>2</sup> Felicia Alvarez, *California to spend up to \$1.4 billion on new Covid-19 testing laboratory*, Sacramento Business  
Journal (Aug. 26, 2020), <https://www.bizjournals.com/sacramento/news/2020/08/26/california-plans-large-scale-testing-expansion.html>.



1 began implementing new federal benefit payments of \$600 on top of the weekly benefit received  
2 by California workers as part of the new Pandemic Additional Compensation (PAC) initiated by  
3 the CARES Act. On April 10, 2020, the Governor announced the release of \$100 million to  
4 support child care providers who were stepping up to serve essential infrastructure workers and  
5 vulnerable populations and their children. On April 16, 2020, Governor Newsom issued an  
6 executive order to give two weeks of supplemental paid sick leave to certain food sector workers  
7 if they were subject to a quarantine or isolation order or medical directive.

8 35. On May 6, 2020, Governor Newsom issued an executive order that created a time-  
9 limited rebuttable presumption for accessing workers' compensation benefits applicable to  
10 Californians who must work outside of their homes during the stay-at-home order.

11 **E. Employers Establish Rigorous and Effective Measures to Promote Employee and**  
12 **Public Safety.**

13 36. On May 7, 2020, California released updated Industry Guidance to begin  
14 reopening with modifications that reduce risks and establish a safer work environment for  
15 workers and customers. The Guidance advised reopening businesses to adjust their practices and  
16 “make radical changes within the workplace.” Employers eagerly committed themselves to the  
17 task.

18 37. For example, the retail industry spent upwards of \$8 billion to implement effective  
19 new protocols to combat COVID-19.<sup>3</sup> Retailers started by investing in their workers, including  
20 by training employees to practice COVID-19 hygiene and enforce mask mandates and other new  
21 policies. NRF designed special training programs to help retailers operate during the pandemic in  
22 a safe and productive way that complies with applicable laws.<sup>4</sup> These comprehensive training  
23 programs teach employees to recognize the symptoms of COVID-19 and react appropriately if  
24 exposed, to understand CDC best health practices and the tools used in retail to keep customers  
25 and employees safe, and to understand the critical importance of personal health practices.

27 <sup>3</sup>Inti Pacheco, *How Much Covid-19 Cost Those Businesses That Stayed Open*, The Wall Street Journal (June 23,  
28 2020), <https://www.wsj.com/articles/how-much-covid-19-cost-those-businesses-that-stayed-open-11592910575>.

<sup>4</sup> NRF Foundation, *Covid-19 Training*, <https://nrfoundation.org/riseup/special-training> (last visited Dec. 14, 2020).

1 Retailers instituted daily health screenings for employees, including temperature checks.

2 38. Retailers adopted social and physical distancing protocols, starting with strict  
3 mandates for employees and customers to wear masks. In fact, NRF was the first national  
4 industry group to call for national mask adoption.<sup>5</sup>

5 39. Measures such as one-way arrows and floor markings helped maintain social  
6 distancing and prevent unnecessary face-to-face contact. Similarly, metering was introduced at  
7 store entrances to enforce both mandatory and voluntary capacity limits. Check-stands were  
8 upgraded to include Plexiglass shields. NRF has also advised member on the use of new  
9 contactless and virtual payment technologies.

10 40. Retailers invested in hygiene by increasing the tempo of store cleanings and  
11 upgrading their cleaning protocols. Hand sanitizers became ubiquitous in stores. Retailers made  
12 significant investments in improved ventilation systems, including sophisticated systems that  
13 maximize the flow of outside air and use MERV 13 air filters, which trap 98% of airborne  
14 particles as small as .3 microns.

15 41. Retailers developed creative new strategies for ensuring the safety of their workers  
16 and the public. For example, dedicated shopping hours were introduced for vulnerable  
17 customers, such as the elderly and immune-compromised. To reduce the amount of time  
18 shoppers spend inside, retailers began offering options to buy online and pick up in-store or  
19 curbside, or to enjoy hyperlocal delivery. Retailers also began accepting appointments for  
20 shopping periods.

21 42. The retail industry has also launched outreach efforts to help beat COVID-19. The  
22 California Retailers Association launched its Safe Shopping for All Campaign to encourage safer  
23 shopping and promote its Safe Shopping Promise.<sup>6</sup> NRF's New Holiday Traditions Campaign  
24 encourages customers to shop early, take advantage of early sales, and avoid crowds.<sup>7</sup> NRF

25 <sup>5</sup> NRF, *NRF calls on retailers to set nationwide mask policy*, [https://nrf.com/media-center/press-releases/nrf-calls-](https://nrf.com/media-center/press-releases/nrf-calls-retailers-set-nationwide-mask-policy)  
26 [retailers-set-nationwide-mask-policy](https://nrf.com/media-center/press-releases/nrf-calls-retailers-set-nationwide-mask-policy) (July 15, 2020).

27 <sup>6</sup> California Retailers Association, *California Retailers Association Encourages Safe Holiday Shopping*,  
<https://calretailers.com/safe-shopping-for-all/> (last visited Dec. 14, 2020).

28 <sup>7</sup> NRF, *Shop safe, shop early*, <https://nrf.com/shop-safe-shop-early> (last visited Dec. 14, 2020).

1 partnered with the Retail Industry Leaders Association to create the Blueprint for Shopping Safe,  
2 a project that that promotes statewide rules of operation with protocols developed in accordance  
3 with CDC guidelines and benchmarking between leading retailers who have shared their  
4 operational experiences.<sup>8</sup> NRF also hosts a twice-weekly best practices sharing call as part of its  
5 Operation Open Doors program to encourage retail industry leaders to share safe shopping  
6 innovations with peers in real time, and has hosted hundreds of calls and webinars for members  
7 on topics ranging from ventilation to leave policies since the beginning of the pandemic.

8 43. Employers in almost every industry in California have made radical changes to the  
9 way they run their businesses in response to the COVID-19 pandemic. Various state and local  
10 agencies, including DOSH, have released detailed industry-specific orders, guidelines, checklists,  
11 and other resources to ensure that employers can operate while protecting the health and safety of  
12 employees and the public.<sup>9</sup>

13 44. Office workspaces have also adapted to the COVID-19 pandemic by instituting  
14 measures such as temperature screenings, upgrading cleaning schedules and quality, and  
15 upgrading air filtration systems. Offices workspaces have heavily utilized telework options,  
16 modified work schedules, reconfigured office layouts, and unidirectional walkways.

17 45. The movie and entertainment industries have also adopted mask mandates,  
18 unidirectional walkways, and staggered seating arrangements to increase social distancing.  
19 However, these industries have also experimented with creative solutions, such as a return to  
20 outdoor drive-thru movie theaters and an increased focus on providing content for virtual reality  
21 headsets.

22 46. As these examples illustrate, employers in many industries have committed to  
23 COVID-19 safety and being part of the solution.

---

24  
25  
26 <sup>8</sup> Retail Industry Leaders Association, *Open for Business – A Blueprint for Shopping Safe*,  
27 [https://rilastagemedia.blob.core.windows.net/rila-  
web/rila.web/media/media/pdfs/committee%20documents/coronavirus%20documents/final-reopen-retail-blueprint-  
rila-nrf.pdf](https://rilastagemedia.blob.core.windows.net/rila-web/rila.web/media/media/pdfs/committee%20documents/coronavirus%20documents/final-reopen-retail-blueprint-rila-nrf.pdf) (last visited Dec. 14, 2020).

28 <sup>9</sup> California Department of Industrial Relations, *Cal/OSHA and Statewide Industry Guidance on COVID-19*,  
(<https://www.dir.ca.gov/dosh/coronavirus/Guidance-by-Industry.html>) (last visited Dec. 14, 2020).

1 **F. Cal/OSHA Improperly Rushes Through Emergency Regulations.**

2 47. DOSH enforces Title 8 of the California Code of Regulations and has broad  
3 authority over every place of employment in this state, which is necessary to adequately enforce  
4 and administer all laws and lawful standards and orders, or special orders requiring such  
5 employment and place of employment to be safe. Prior to the adoption of the challenged  
6 emergency regulations, DOSH already had legal mechanisms to enforce COVID-19 orders and  
7 guidance documents through its authority to require employers to have an effective Injury and  
8 Illness Prevention Plan (“IIPP”) under section 3203.

9 48. Government Code section 11349.1(a)(6) prohibits overlapping and/or duplicative  
10 regulations. However, the Board’s own findings show how it operated directly contrary to this  
11 bar. The Board noted in its Finding of Emergency that “[u]nder existing section 3203, employers  
12 in California are already required to have a written and effective Injury and Illness Prevention  
13 Plan” that satisfies specific requirements that “already apply to the hazard of COVID-19.”  
14 **Exhibit A**, p. 45. The Board noted enforcement of these requirements, including that “the  
15 Division has issued COVID-19-related citations to employers based on section 3203.” *Id.* The  
16 Board also noted that “[m]uch of [Section 3205(c)] makes explicit actions that are already  
17 required by existing section 3203.” *Id.* Many additional statements demonstrate that large  
18 portions of the emergency regulations are overlapping and/or duplicative, in violation of section  
19 11349.1(a)(6). *See id.*, p. 48 (“The existing section 3203 already requires effective procedures to  
20 investigate workplace illnesses.”), p. 50 (“Employers are already required to provide training and  
21 instruction regarding COVID-19 hazards and prevention under section 3203(a)(7)[.]”), p. 50 (“all  
22 counties already require face coverings and social distancing of at least six feet when it is possible  
23 to do so”), p. 50 (“Evaluating the need for such partitions is already required under section  
24 3203”), p. 51 (“Counties already require the handwashing and cleaning/disinfection protocols  
25 required here”), p. 51 (“offices are already required to provide the specified respiratory protection  
26 under existing section 5144”), and p. 51 (“Existing section 3203 already requires employers to  
27 maintain illness records and records of steps taken to implement COVID-19 hazard correction.”).

28 49. Prior to the pandemic, DOSH already had enforcement authority under section

1 5199, the Aerosol Transmissible Disease standard. Section 5199 addresses airborne infectious  
2 diseases and pathogens transmitted by aerosols, such as the coronavirus, but the regulation only  
3 applies to specific industries in which the spread of aerosol transmissible diseases is endemic,  
4 such as medical and correctional facilities. This narrow set of regulations also provides for the  
5 exclusion from the workplace of an infected employee. However, under the narrowly drawn  
6 existing authority, such removal requires a physician's written opinion, unlike under the  
7 challenged emergency regulations. *See* 8 C.F.R. § 5199(h).

8 50. On May 20, 2020, the Board received a petition, filed by Worksafe and the  
9 National Lawyers' Guild, Labor & Employment Committee, requesting that the Board create new  
10 temporary emergency standards. The petitioners requested that the Board provide specific  
11 protections to California employees who may have exposure to COVID-19, but were not within  
12 the scope of the preexisting Aerosol Transmissible Diseases standards. Meanwhile, in May,  
13 businesses began to reopen according to the Governor and public health department's phased  
14 reopening plan.

15 51. Not until four months later, on September 17, 2020, did the Board first assert that  
16 emergency regulations were necessary. In the context of the COVID-19 pandemic and the  
17 rapidly changing conditions that have characterized it, four months was an exceptionally long  
18 time. During those four months, the Governor allowed most businesses to open, ordered many  
19 types of businesses to close again in response to rising cases, and then issued comprehensive  
20 COVID-19 standards that remain in effect today. In the interim, the legislature was in session  
21 and the government and businesses already implemented many of the very standards included in  
22 the ETS regulations.

23 52. These standards can be found in the Blueprint for a Safer Economy, the current  
24 gubernatorial order under which businesses are operating, which was unveiled on August 28,  
25 2020. The Blueprint imposes criteria on tightening and loosening COVID-19 allowable activities  
26 and expands the length of time between changes to assess how any changes affect the trajectory  
27  
28

1 of the disease.<sup>10</sup> The Blueprint purported to derive from knowledge gained through the first six  
2 months of experience with the disease – and the new scientific understanding that had been  
3 collected – to create a revised system for regulating COVID-19 transmissions.

4 53. The State continues to update the Blueprint based on the latest data. On November  
5 16, 2020, the Governor announced updates to the Blueprint, which imposed a strengthened face  
6 covering mandate, and which the Governor stated was “based on the best available public health  
7 data and science.”<sup>11</sup> The California Department of Public Health conducts weekly assessments  
8 based on the most reliable, county-specific data and accordingly adjusts the assignments of  
9 counties to different tiers under the Blueprint.<sup>12</sup>

10 54. Despite the constant flow of reopening guidance from the State of California,  
11 DOSH proceeded with “emergency” rulemaking. Instead of submitting proposed regulations for  
12 public comment during the four months after the petition was submitted, as required by  
13 Government Code section 11346.1(a)(2), the Board waited until September 17, 2020. At that  
14 point, the Board directed DOSH to work with Board staff to submit a proposal for an emergency  
15 regulation to cover all workers not covered by the Aerosol Transmissible Disease standard and to  
16 be considered no later than the November 19, 2020 Board meeting. Despite the four-month lag  
17 between the petition and the order, the Board asserted that the adoption of the proposed  
18 emergency regulations was necessary pursuant to Government Code section 11346.1(b)(1)  
19 because “immediate action must be taken to avoid serious harm to the public peace, health,  
20 safety, or general welfare.”

21 55. On November 19, 2020, the Board stated in its Finding of Emergency letter that  
22 “[t]he proposed emergency action is necessary to combat the spread of COVID-19 in California

23 <sup>10</sup> Office of Governor Gavin Newsom, *Governor Newsom Unveils Blueprint for a Safer Economy, a Statewide,*  
24 *Stringent and Slow Plan for Living with COVID-19*, [https://www.gov.ca.gov/2020/08/28/governor-newsom-](https://www.gov.ca.gov/2020/08/28/governor-newsom-unveils-blueprint-for-a-safer-economy-a-statewide-stringent-and-slow-plan-for-living-with-covid-19/)  
25 [unveils-blueprint-for-a-safer-economy-a-statewide-stringent-and-slow-plan-for-living-with-covid-19/](https://www.gov.ca.gov/2020/08/28/governor-newsom-unveils-blueprint-for-a-safer-economy-a-statewide-stringent-and-slow-plan-for-living-with-covid-19/) (Aug. 28,  
2020).

26 <sup>11</sup> Office of Governor Gavin Newsom, *Governor Newsom Announces New Immediate Actions to Curb COVID-19*  
27 *Transmission*, [https://www.gov.ca.gov/2020/11/16/governor-newsom-announces-new-immediate-actions-to-curb-](https://www.gov.ca.gov/2020/11/16/governor-newsom-announces-new-immediate-actions-to-curb-covid-19-transmission/)  
28 [covid-19-transmission/](https://www.gov.ca.gov/2020/11/16/governor-newsom-announces-new-immediate-actions-to-curb-covid-19-transmission/) (Nov. 16, 2020).

<sup>12</sup> California Department of Public Health, *Blueprint for a Safer Economy*,  
<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID19CountyMonitoringOverview.aspx>  
(last visited Dec. 14, 2020).

1 workers” and that “the proposed regulation would significantly reduce the number of COVID-19  
2 related illnesses, disability and deaths in California’s workforce.” **Exhibit A**, p. 5. However, the  
3 Board did not support these claims with any citation to supporting evidence. In fact, the Board  
4 noted the “absence of data” and that “the Division cannot presently quantify this cost, because the  
5 agency lacks data about the length of outbreaks.” *Id.*, pp. 53, 56.

6 56. Importantly, the Board’s adoption of the emergency regulations contradicts Board  
7 staff’s analysis of the initial petition for emergency regulations. On August 10, Board staff issued  
8 its evaluation, which concluded that “Board staff does not believe that the Petitioners’ emergency  
9 request is necessary and recommends that Petition File No. 583 be DENIED.” **Exhibit C**, p. 9.

10 57. Board staff noted that the “effort to prescribe specific requirements in conjunction  
11 with an IIPP-like framework may contradict the legislative intent described in Government Code  
12 Section 11340.1(a),” part of the Administrative Procedure Act, because “[u]nnecessarily creating  
13 an offshoot of the IIPP, without substantial evidence of need, can harm the existing protective  
14 nature of the regulation and its benefit to California workplaces by diluting its capacity to serve as  
15 the primary regulation requiring employers to address newly discovered hazards.” *Id.*

16 58. ***“Board staff is unable to find evidence that the vast majority of California***  
17 ***workplaces are not already in compliance with COVID-19 requirements and guidelines.”*** *Id.*,  
18 p. 5. Board Staff noted that “Petitioners have identified a concern in that the tragic effects of the  
19 COVID-19 pandemic disproportionately affect people of generally lower-income and socio-  
20 economic status, but they have provided no evidence that their proposed statewide ETS, which is  
21 necessarily limited to workers, will remedy this concern.” *Id.*, p. 9. “Board staff is ***not aware of***  
22 ***any California studies or data showing that employers are lacking the information necessary to***  
23 ***provide employee protections from COVID-19 hazards, nor that the vast majority of employers***  
24 ***are not already doing as much as they are able to keep their employees, customers, and***  
25 ***businesses functioning safely*** in accordance with federal, state, and local requirements.” *Id.*

26 59. Board staff “caution[ed] that a new regulation would place additional regulatory  
27 burden on California businesses that are already compliant with California’s COVID-19  
28 requirements and guidelines.” *Id.*, p. 6. “Instead of directing limited resources to create new

1 regulations to prescriptively require what is already required by the existing IIPP performance  
2 regulation, enforcement and consultative efforts could continue to focus on businesses in specific  
3 parts of the state . . . or on specific industries identified as having disproportionately high  
4 incidents of infection. Developing an ETS and a follow-up permanent regulation for the entire  
5 state may not be the most effective use of California’s limited Cal/OSHA and Board resources.”  
6 *Id.*, p. 8. It was “the opinion of Board staff that during the pandemic crisis, Cal/OSHA’s limited  
7 resources should continue to be focused on enforcement and consultation outreach specifically  
8 targeted at employers and sectors of the economy with deficient COVID-19 protections, as this is  
9 more likely to be effective at ensuring employee protections.” *Id.*

10 60. The Board’s adoption of the emergency regulations drafted by DOSH addressed  
11 none of these concerns, including the lack of supporting data or science.

12 61. California does not publish its contact tracing data. However, the available data on  
13 workplace infections contradicts the Board’s speculative conclusion about the nexus between  
14 COVID-19 and workplaces, especially retail workplaces.

15 62. On September 11, 2020, the CDC published a study based on data gathered from  
16 participants who had received a test for SARS-CoV-2 infection at an outpatient testing or health  
17 care center across 11 sites spread across the United States.<sup>13</sup> The study interviewed participants  
18 after receiving their test results and asked them a range of questions about their activities prior to  
19 their COVID-19 test. Approximately half of all participants reported shopping during the 14-day  
20 period prior to the onset of symptoms. Significantly, there was almost no difference in the  
21 amount of shopping engaged in by individuals who tested positive for COVID-19 and those who  
22 tested negative.

23 63. The CDC study also found that individuals who reported going to an office setting,  
24 salon, barber, or various other workplace settings were actually less likely to have positive test  
25 results for COVID-19 than individuals who did not go to those settings.

26 \_\_\_\_\_  
27 <sup>13</sup>Kiva A. Fisher, et. al., *Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic*  
28 *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](https://www.cdc.gov/mmwr/volumes/69/wr/mm6936a5.htm#F1_down).



1           64.     Other publicly available data leads to similar conclusions. During the first week of  
2 December 2020, the Colorado Department of Public Health & Environment published data  
3 related to 2,312 outbreaks in the state.<sup>14</sup> Of the 2,312 outbreaks examined, 155 were retail  
4 locations that resulted in 980 cases of infections. Those infections made up only 2.8% of total  
5 cases logged in the outbreaks, or just 0.3% of the total workforce.

6           65.     On November 23, 2020, Yale School of Management researchers published the  
7 results of a comprehensive study in which a large team of researchers created and continually  
8 updated a database of COVID-19 restrictions in every U.S. county.<sup>15</sup> The researchers also  
9 tracked each county’s reported fatalities from the virus. By comparing the data, the researchers  
10 were able to determine which policies were most effective and which were counterproductive.  
11 The data showed that “*closing low-risk retail businesses such as bookstores and clothing stores*  
12 *actually came with higher fatality growth rates*, likely because it pushed stir-crazy citizens  
13 toward higher-risk activities, like spending time indoors with friends.” The researchers noted,  
14 “You always have to be careful of what the tradeoffs are . . . because if you shut down one thing,  
15 people then engage in another activity.”

16           66.     Contrary to the Board’s speculative conclusion that emergency action was  
17 necessary to combat the spread of COVID-19 in the workforce, all of this data reveals that  
18 employers’ significant efforts and investments to create a safe environment for employees and the  
19 public have been effective.

20           67.     The Board nonetheless adopted the emergency regulations. The ETS regulations  
21 added Title 8 of the California Code of Regulations, sections 3205, 3205.1, 3205.2, and 3205.3,  
22 which impose significant new requirements on employers in relation to COVID-19. This lawsuit  
23 challenges specific testing and mandatory paid exclusion requirements.

24           68.     Sections 3205(c)(3)(B)(4.), 3205.1(b), 3205.2(b), and 3205.3(g) impose testing

---

25  
26 <sup>14</sup>Colorado State Emergency Operations Center, *Colorado COVID-19 Outbreak Map*,  
<https://covid19.colorado.gov/covid19-outbreak-data> (last visited Dec. 7, 2020).

27 <sup>15</sup>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-](https://insights.som.yale.edu/insights/study-shows-which-restrictions-prevent-covid-19-fatalities-and-which-appear-to-make-things?fbclid=IwAR0XfTg84RDZD6t3ktXsmdVECCRGpKLDTE7FGVJnLAWKYZXG87mUPhqIE0A)  
28 [shows-which-restrictions-prevent-covid-19-fatalities-and-which-appear-to-make-](https://insights.som.yale.edu/insights/study-shows-which-restrictions-prevent-covid-19-fatalities-and-which-appear-to-make-things?fbclid=IwAR0XfTg84RDZD6t3ktXsmdVECCRGpKLDTE7FGVJnLAWKYZXG87mUPhqIE0A)  
[things?fbclid=IwAR0XfTg84RDZD6t3ktXsmdVECCRGpKLDTE7FGVJnLAWKYZXG87mUPhqIE0A](https://insights.som.yale.edu/insights/study-shows-which-restrictions-prevent-covid-19-fatalities-and-which-appear-to-make-things?fbclid=IwAR0XfTg84RDZD6t3ktXsmdVECCRGpKLDTE7FGVJnLAWKYZXG87mUPhqIE0A).

1 requirements:

2 (B) The employer shall take the following actions when there has been a COVID-  
3 19 case at the place of employment:

4 . . .

4 4. Offer COVID-19 testing at no cost to employees during their working hours to  
5 all employees who had potential COVID-19 exposure in the workplace and  
6 provide them with the information on benefits described in subsections (c)(5)(B)  
7 and (c)(10)(C).

8 8 C.F.R. § 3205(c)(3)(B)(4.).

9 (1) This section applies to a place of employment covered by section 3205 if it  
10 has been identified by a local health department as the location of a COVID-19  
11 outbreak or when there are three or more COVID-19 cases in an exposed  
12 workplace within a 14-day period.

13 . . .

14 (b) COVID-19 testing.

15 (1) The employer shall provide COVID-19 testing to all employees at the exposed  
16 workplace except for employees who were not present during the period of an  
17 outbreak identified by a local health department or the relevant 14-day period(s)  
18 under subsection (a), as applicable. COVID-19 testing shall be provided at no  
19 cost to employees during employees' working hours.

20 8 C.F.R. § 3205.1(b)(1).

21 (1) This section applies to any place of employment covered by section 3205  
22 when there are 20 or more COVID-19 cases in an exposed workplace within a 30-  
23 day period.

24 . . .

25 (b) COVID-19 testing. Employers shall provide twice a week COVID-19 testing,  
26 or more frequently if recommended by the local health department, to all  
27 employees present at the exposed workplace during the relevant 30-day period(s)  
28 and who remain at the workplace. COVID-19 testing shall be provided at no cost  
to employees during employees' working hours.

8 C.F.R. § 3205.2(b).

69. Section 3205(c)(10) imposes mandatory exclusion and paid leave requirements:

(10) Exclusion of COVID-19 cases. The purpose of this subsection is to limit  
transmission of COVID-19 in the workplace.

(A) Employers shall ensure that COVID-19 cases are excluded from the  
workplace until the return to work requirements of subsection (c)(11) are met.

(B) Employers shall exclude employees with COVID-19 exposure from the  
workplace for 14 days after the last known COVID-19 exposure to a COVID-19  
case.

(C) For employees excluded from work under subsection (c)(10) and otherwise  
able and available to work, employers shall continue and maintain an employee's

1 earnings, seniority, and all other employee rights and benefits, including the  
2 employee's right to their former job status, as if the employee had not been  
3 removed from their job. Employers may use employer-provided employee sick  
4 leave benefits for this purpose and consider benefit payments from public sources  
5 in determining how to maintain earnings, rights and benefits, where permitted by  
6 law and when not covered by workers' compensation.

7 EXCEPTION 1: Subsection (c)(10)(C) does not apply to any period of time  
8 during which the employee is unable to work for reasons other than protecting  
9 persons at the workplace from possible COVID-19 transmission.

10 EXCEPTION 2: Subsection (c)(10)(C) does not apply where the employer  
11 demonstrates that the COVID-19 exposure is not work related.

12 . . .  
13 EXCEPTION to subsection (c)(10): Employees who have not been excluded or  
14 isolated by the local health department need not be excluded by the employer, if  
15 they are temporarily reassigned to work where they do not have contact with other  
16 persons until the return to work requirements of subsection (c)(11) are met.

17 70. The emergency regulations are deeply flawed for multiple reasons, including  
18 because they require employees to be excluded from the workplace for 14 days *even if they*  
19 *receive a negative test result*. This extremely burdensome requirement conflicts with the latest  
20 CDC guidelines, under which for a limited class of workers “quarantine can end after Day 7 if a  
21 diagnostic specimen tests negative and if no symptoms were reported during daily monitoring.”<sup>16</sup>

22 71. In its report recommending against adoption of the emergency regulations, Board  
23 staff identified this very issue. **Exhibit C**, p. 6 (“Because of the novel nature of the COVID-19  
24 virus, guidelines for employers to reference for assistance in protecting employees frequently  
25 change. Attempting to codify some of those requirements will no doubt result in confusion when  
26 the updated guidelines conflict with the written regulation.”).

27 72. Indeed, in an executive order issued on December 14, 2020, Governor Newsom  
28 suspended the exclusion periods required by subsections 3205(c)(10) and 3205(c)(11) to the  
extent that they exceed any applicable quarantine or isolation periods recommended by the  
California Department of Public Health (“CDPH”) or any local health officer who has jurisdiction  
over the workplace.<sup>17</sup> The executive order also requires Cal/OSHA promptly to provide public

<sup>16</sup> CDC, *Options to Reduce Quarantine for Contacts of Persons with SARS-CoV-2 Infection Using Symptom Monitoring and Diagnostic Testing*, <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-options-to-reduce-quarantine.html> (Dec. 2, 2020).

<sup>17</sup> 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).

1 notice of any subsequent changes to the exclusion and return to work periods specified in the ETS  
2 regulations.

3 73. That same day, CDPH issued guidance setting forth conditions for a limited class  
4 of workers to be able to return from quarantine after 7 days, overriding the rigid 14-day exclusion  
5 period mandated by the ETS regulations.<sup>18</sup> Other workers can return in 10 days. That the  
6 Governor saw fit to suspend and overrule these provisions of the ETS regulations with his own  
7 executive order further indicates that the regulations were not a proper use of emergency  
8 rulemaking to begin with.

9 74. The rushed manner in which the Board adopted the ETS regulations without the  
10 benefit of public comment has also resulted in in a great deal of confusion. The concept of an  
11 “exposed workplace” is central to the ETS regulations because it triggers the mandatory exclusion  
12 and testing requirements. The regulations broadly define the term to include “any work location,  
13 working area, or common area at work used or accessed by a COVID-19 case during the high-risk  
14 period, including bathrooms, walkways, hallways, aisles, break or eating areas, and waiting  
15 areas.” 8 C.F.R. § 3205(b)(7). However, effective January 1, 2021, that definition “also includes  
16 but is not limited to the ‘worksites’ of the COVID-19 case as defined by Labor Code section  
17 6409.6(d)(5),” also known as AB 685. Section 6409.6(d)(5) defines “worksites” as “the building,  
18 store, facility, agricultural field, or other location where a worker worked during the infectious  
19 period. It does not apply to buildings, floors, or other locations of the employer that a qualified  
20 individual did not enter.”

21 75. To address widespread confusion and uncertainty about the scope of this  
22 definition, DOSH has attempted to supplement the deeply flawed ETS regulations in multiple  
23 ways, including by issuing FAQs. The FAQs expand upon the other applicable definitions:

24 An exposed workplace is a work location, working area, or common area used or  
25

---

26 <sup>18</sup> California Department of Public Health, *COVID-19 Quarantine Guidance*,  
27 <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-Quarantine.aspx> (Dec. 14, 2020)  
28 (noting that “a 14-day quarantine can impose burdens that may affect physical and mental health as well as cause economic hardship that may reduce compliance. In addition, the prospect of quarantine may also dissuade recently diagnosed persons from naming contacts and may dissuade contacts from responding to contact tracer outreach if they perceive quarantine as onerous.”).

1 accessed by a COVID-19 case during the high-risk period, including bathrooms,  
2 walkways, hallways, aisles, break or eating areas, and waiting areas. If, within 14  
3 days, three COVID-19 cases share the same “exposed workplace,” then the  
4 Multiple COVID-19 Infections and COVID-19 Outbreaks standard (section  
5 3205.1) applies and additional testing will be required. When determining which  
6 areas constitute a single “exposed workplace” for purposes of enforcing testing  
7 requirements, Cal/OSHA does not expect employers to treat areas where masked  
8 workers momentarily pass through the same space without interacting or  
9 congregating as an “exposed workplace,” so they may focus on locations where  
10 transmission is more likely.

11 76. The significant and ongoing alterations to the ETS regulations further evidence the  
12 inappropriateness of the Board’s use of emergency rulemaking without the much-needed benefit  
13 of public comment.

14 **G. Cal/OSHA’s Emergency Regulations Will Cripple Businesses by Depriving Them of  
15 Labor and Requiring Quantities of Tests That Are Likely Impossible to Procure.**

16 77. The combination of the ETS regulations’ mandatory exclusion and testing  
17 provisions creates a regulatory environment that cripples or even endangers the very survival of  
18 businesses.

19 78. Without any scientific evidence for the necessity or efficacy of doing so, the ETS  
20 regulations require employers to exclude large numbers of employees from the workplace. This  
21 hampers employers’ ability to have qualified labor in the workplace, which can severely impact  
22 operations and the ability to get products on shelves for the consumers who rely on these essential  
23 businesses to sustain them without a scientific, well-considered basis for doing so.

24 79. The ETS regulations’ scientifically unsupported mandatory exclusions are  
25 particularly damaging in the context of large distribution centers, which employ hundreds of  
26 workers. The ETS regulations are an unjustifiably blunt instrument that applies equally to  
27 workplaces with 5 employees or 500 employees. If just 3 out of 500 employees test positive  
28 during a 14-day period, the emergency regulations could automatically trigger the requirement for  
multiple COVID-19 tests for *all* employees. *See* 8 C.F.R. § 3205.1(b). Much more damaging  
than that, the emergency regulations also may require employers to exclude all employees who  
may have had COVID-19 exposure, even if not actually infected, from the workplace for up to 14

1 days. *See* 8 C.F.R. § 3205.1(b). While much depends on the definition of “workplace,” the  
2 vague and unworkable nature of the regulations are already evident, given the FAQs that the  
3 agency has already released in an attempt to clarify this. For large distribution centers, the  
4 regulations on their face could result in the mandatory 14-day exclusion of hundreds of  
5 employees all at once, if not the majority of the workforce. Hundreds of qualified replacement  
6 workers cannot be found and on-boarded overnight, or even in 14 days.

7       80. For a large distribution center, the sudden loss of so many employees can leave it  
8 unable to process the massive volumes of product that are constantly delivered to it, thereby  
9 grinding entire shipping channels to an immediate halt. Distribution centers are one of the most  
10 critical parts of the supply chain, and the sudden incapacitation of a large distribution center can  
11 cripple hundreds of essential businesses and deprive thousands of consumers downstream,  
12 resulting in massive financial losses for the distribution center and everyone else. For the public,  
13 these supply chain disruptions can mean grocery stores without food, soap, toilet paper, and other  
14 essential supplies. With the unreasonable and arbitrary “outbreak” thresholds the ETS regulations  
15 uniformly set for *all* businesses, scenarios like these are not only possible, but inevitable.

16       81. A retail employer with more than 100 stores estimates that the cost of compliance  
17 with the ETS regulations could be in the millions of dollars *per store* depending on the  
18 unpredictability of how large a quarantine could be, as well as the extreme disruption and  
19 difficulty of hiring untrained replacements during the holiday season. These regulations could  
20 result in stores needing to shut down entirely because a store cannot remain open if the  
21 unavailability of staffing prevents it from operating properly.

22       82. A different office retail company calculated its anticipated losses in the event of  
23 the ETS regulations requiring mandatory exclusion periods. For a single warehouse facility with  
24 250 employees, one workplace exposure will cost approximately \$30,000 per test group, for an  
25 estimated total of \$750,000 for each outbreak or \$1,500,000 for each major outbreak. *See* 8  
26 C.F.R. § 3205.2 (if a workplace experiences 20 or more COVID-19 cases within a 30-day period,  
27 it becomes a “major outbreak” and the employer must “provide twice a week COVID-19 testing,  
28 or more frequently if recommended by the local health department, to all employees present at the

1 exposed workplace during the relevant 30-day period(s)"). Testing results in lost labor times of  
2 approximately 30 minutes per employee per test.

3 83. In addition to the labor shortages caused by the ETS regulations' mandatory  
4 exclusion periods, the regulations also impose unworkable testing requirements. One retail  
5 employer that operates hundreds of stores in California calculates that it will need up to 46,897  
6 tests per month for California employees based on current case trends. This employer calculates  
7 that the cost of each test will be \$70.00 with a monthly cost of \$3,282,790 just for testing. The  
8 employer estimates that this calculation is on the low end because it does not account for the most  
9 recent surge rates in California.

10 84. Applied to all California employers, compliance with these ETS regulations may  
11 require employers to provide *millions* of COVID-19 tests. The Board's Finding of Emergency  
12 did not consider the availability of testing supplies or the possibility that employers may be  
13 unable to comply with these requirements within the prescribed time periods, including in some  
14 cases the requirement to test all employees twice a week. *See* 8 C.F.R. § 3205.2(b). It is likely  
15 that the infection and testing numbers at issue will create supply shortages and testing delays that  
16 make compliance with the ETS regulations impossible for many employers. The ETS regulations  
17 offer no recourse for such employers.

18 85. The above calculations assume that the employer can acquire all of the necessary  
19 test kits at current pricing and that an outbreak, as defined by the ETS regulations, has a duration  
20 of approximately four months. However, test scarcity could become an unintended consequence  
21 of the ETS regulations, particularly if price increases prompt companies seeking to remain in  
22 compliance to stockpile large quantities of test kits. In turn, test kits could become less available  
23 to the general public.

24 86. The practical impact that this ETS will have on individual businesses is significant,  
25 and made all the more profound by the fact that it was not reasonably considered.

26 87. Relles Florist is a small family business in the Midtown area of Sacramento,  
27 California. Ross Relles Sr. started the business in 1946. His son, Jim Relles, owns the business  
28 today. Relles Florist has remained open during the pandemic because it is classified as an

1 essential business. Mr. Relles prides himself on his commitment to safety. For example, Relles  
2 Florist only allows three customers inside at a time. Masks are required at all times. Mr. Relles  
3 provides masks free of charge for customers who attempt to enter without a mask. A Plexiglas  
4 glass barrier safely separates employees and customers at checkout.

5 88. Despite all of these precautions, one of his employees tested positive for COVID-  
6 19 in September. The indications are that he contracted the virus while outside of the store. Store  
7 personnel engaged in contact tracing and notified anyone who may have come in contact with the  
8 infected employee. Fortunately, no other employees were infected that time.

9 89. Relles Florist has 22 mostly full-time employees, about 17 of whom are in the  
10 store on any given day. Mr. Relles is familiar with the ETS regulations and understands the  
11 consequences of having three positive COVID-19 cases in his workplace. Relles Florist is subject  
12 to all of the requirements of the ETS regulations. ETS has no small business exception.

13 90. If the emergency regulations triggered a mandatory exclusion period, Mr. Relles  
14 would be required to exclude approximately 17 of his 22 employees from work for 10-14 days  
15 regardless of any of the facts surrounding potential community exposure and precautions taken in  
16 the workplace. Due to staffing shortages, he would have no choice but to immediately close his  
17 store for 10-14 days. During a closure, Relles Florist would lose all revenue from sales, would  
18 have to continue paying full salary and benefits to all of the excluded employees, would have to  
19 continue paying overhead costs such as rent and utilities, and most of the plants in the store would  
20 die and become worthless. Moreover, while Mr. Relles could cancel shipments to his store of  
21 local plants, he also receives flowers from South America that he cannot cancel once they are  
22 being processed and in transit. During a 14-day closure, Relles Florist would lose about three  
23 shipments of flowers from South America.

24 91. The financial losses that Relles Florist would incur from one 14-day closure period  
25 because of the ETS regulations would be devastating. If it happened multiple times, Mr. Relles  
26 estimates that he could go out of business. He is keenly aware that, despite all of his best efforts,  
27 a future outbreak is a very real possibility. He cannot control what his employees and customers  
28 do when they are outside of his store. The thought that he may be powerless to stop an external



1 outbreak from shutting down his business is frequently on his mind, and it keeps him up at night

2 92. Mayfield Equipment operates retail locations in Petaluma, Ukiah, Lakeport,  
3 Middletown, and Hidden Valley Lake. Mayfield Equipment employs approximately 80 people,  
4 with approximately 25 employees in the largest store in Ukiah and 4 employees at the smallest  
5 location in Hidden Valley Lake.

6 93. Mayfield Equipment has been open throughout the pandemic as an essential  
7 business providing livestock feed, pet food, and supplies. Mr. Mayfield has consistently focused  
8 on protecting his business, his employees, and his customers through excellent sanitation and  
9 intentional and consistent social distancing and mask use by all employees. Mayfield Equipment  
10 implemented some of these measures even before public health departments issued similar  
11 requirements. Mr. Mayfield has also encouraged higher-risk staff to work remotely where  
12 feasible, and he has focused on nimbly addressing the individual needs of his employees and their  
13 families to ensure everyone's safety.

14 94. Mr. Mayfield's employees have experienced difficulty accessing COVID-19 tests  
15 because Mayfield Equipment retail stores are located in rural areas. Although Mayfield  
16 Equipment stores are open seven days per week, the limited COVID-19 testing providers are  
17 typically only open five days per week. Mr. Mayfield has sent employees who were feeling  
18 unwell home from work, and they agreed to get tested for COVID-19. However, these rural  
19 employees did not have access to same-day testing, and instead were required to make  
20 appointments two or three days after Mr. Mayfield first sent them home from work. Once these  
21 employees had the COVID-19 testing performed, it took another seven to ten days for them to  
22 receive results. For rural employers like Mayfield Equipment, these testing delays, which are a  
23 public health failure not attributable to employers, make compliance with ETS disproportionately  
24 burdensome.

25 95. Abate-A-Weed is a small business in Kern County that was founded in 1965 for  
26 the express purpose of providing weed and insect control for industrial, commercial, and  
27 residential property. The business now includes three segments: a retail store for the sale of lawn  
28 and garden equipment, parts, and chemicals; an adjacent small engines repair shop; and a weed

1 abatement service. Abate-A-Weed has approximately 40 employees.

2 96. Economic circumstances during the ongoing COVID-19 pandemic have severely  
3 harmed Abate-A-Weed's business, particularly its retail store and repair shop. Abate-A-Weed's  
4 owner, Darrell Feil, acknowledges the very real risk that if the ETS regulations require him to  
5 exclude workers from his retail store or repair shop for 10-14 days of mandatory exclusion,  
6 regardless of any of the facts surrounding potential community exposure and precautions taken in  
7 the workplace, he would have no choice but to shut down those parts of his business during the  
8 exclusion period. Because his employees have specialized skills and knowledge of equipment  
9 and parts that members of the public do not have, he could not simply hire replacement  
10 employees to staff the retail store and repair shop during the mandatory quarantine period. Mr.  
11 Feil reports that this loss of revenue, combined with the financial burden of continuing to pay full  
12 salary and benefits to excluded employees, would be devastating.

13 97. However, the weed abatement segment of the business is by far the most important  
14 source of revenue for Abate-A-Weed. The business has a major contract with a large utility  
15 company to abate weeds and grass from the areas around 70,000 utility poles. Abate-A-Weed is  
16 greatly dependent on this contract. The members of its abatement crew work together and at  
17 times occupy the same parts of the worksite. The ETS regulations could require Mr. Feil to  
18 exclude his entire abatement crew from work for 10-14 days, an unacceptable delay because this  
19 abatement work is necessary to prevent wildfires and required by law. Mr. Feil's greatest fear is  
20 that if the ETS regulations prevent Abate-A-Weed from being able to perform the terms of this  
21 contract, the business could lose this contract and the revenue on which it critically depends. At  
22 the same time, the business would be required to continue paying full salary and benefits for the  
23 excluded abatement crew.

24 98. Mr. Feil fears that those financial losses would be ruinous, and they could force  
25 him to close his family business after more than 50 years of operation. The ETS regulations  
26 legitimately and imminently threaten the survival of Mr. Feil's business.

27 **FIRST CAUSE OF ACTION**

28 **VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**

1 (California Government Code § 11340, *et seq.*)

2 (Against All Defendants)

3 99. Plaintiffs incorporate by reference and reallege each allegation set forth above.

4 100. Government Code section 11350(a) governs this challenge to DOSH’s emergency  
5 regulations:

6 Any interested person may obtain a judicial declaration as to the validity of any  
7 regulation or order of repeal by bringing an action for declaratory relief in the  
8 superior court in accordance with the Code of Civil Procedure. The right to  
9 judicial determination shall not be affected by the failure either to petition or to  
10 seek reconsideration of a petition filed pursuant to Section 11340.7 before the  
11 agency promulgating the regulation or order of repeal. The regulation or order of  
12 repeal may be declared to be invalid for a substantial failure to comply with this  
chapter, or, in the case of an emergency regulation or order of repeal, upon the  
ground that the facts recited in the finding of emergency prepared pursuant to  
subdivision (b) of Section 11346.1 do not constitute an emergency within the  
provisions of Section 11346.1.

13 101. Government Code section 11346.1(b)(2) (emphasis added) identifies deficiencies  
14 with a finding of emergency that can invalidate emergency regulations:

15 Any finding of an emergency shall include a written statement that contains the  
16 information required by paragraphs (2) to (6), inclusive, of subdivision (a) of  
17 Section 11346.5 and a description of the *specific facts demonstrating the*  
18 *existence of an emergency and the need for immediate action, and*  
19 *demonstrating, by substantial evidence, the need for the proposed regulation to*  
20 *effectuate the statute being implemented, interpreted, or made specific and to*  
21 *address only the demonstrated emergency.* The finding of emergency shall also  
22 identify each technical, theoretical, and empirical study, report, or similar  
23 document, if any, upon which the agency relies. The enactment of an urgency  
24 statute shall not, in and of itself, constitute a need for immediate action.

25 A finding of emergency based only upon expediency, convenience, best interest,  
26 general public need, or speculation, shall not be adequate to demonstrate the  
27 existence of an emergency. *If the situation identified in the finding of*  
28 *emergency existed and was known by the agency adopting the emergency*  
*regulation in sufficient time to have been addressed through nonemergency*  
*regulations adopted in accordance with the provisions of Article 5 (commencing*  
*with Section 11346), the finding of emergency shall include facts explaining the*  
*failure to address the situation through nonemergency regulations.*

102. Emergency regulatory actions also require “[a] statement by the submitting agency  
confirming that the emergency situation addressed by the regulations clearly poses such an  
immediate, serious harm that delaying action to allow notice and public comment would be

1 inconsistent with the public interest.” 1 C.C.R. § 50(b). That statement must include:

2 Specific facts demonstrating by substantial evidence that failure of the rulemaking  
3 agency to adopt the regulation within the time periods required for notice pursuant  
4 to Government Code section 11346.1(a)(2) and for public comment pursuant to  
5 Government Code section 11349.6(b) will likely result in serious harm to the  
6 public peace, health, safety, or general welfare; and  
7 Specific facts demonstrating by substantial evidence that the immediate adoption  
8 of the proposed regulation by the rulemaking agency can be reasonably expected  
9 to prevent or significantly alleviate that serious harm.

10 103. Defendants adopted the emergency regulations based on an improper and fatally  
11 flawed finding of emergency. Plaintiffs seek a judicial declaration invalidating the emergency  
12 regulations because the circumstances surrounding the regulations did not warrant emergency  
13 adoption, and the Board’s Finding of Emergency failed to meet the above requirements to  
14 demonstrate the existence of an emergency so immediate and serious that it made allowing notice  
15 and public comment inconsistent with the public interest.

16 104. The Addendum to the Finding of Emergency explained that in “the early stage of  
17 the pandemic,” the Board relied on existing regulations to protect those most likely to contract  
18 COVID-19 at work – employees directly involved in patient care and protected by the Aerosol  
19 Transmissible Disease Standard, section 5199. *See Exhibit B*, p. 1. Cal/OSHA protected other  
20 employees through Injury and Illness Prevent Plans under section 3203. If the Board believed  
21 those measures were insufficient, it could have begun the rulemaking process during those  
22 extremely eventful months in which the alleged emergency situation was known to it. It did not.

23 105. In May 2020, the Board received a petition requesting rulemaking to create  
24 temporary emergency standards for COVID-19. There was no reason that the regular rulemaking  
25 process, which involves public comment and a robust assessment of financial impact, could not  
26 have begun at that time. Instead, the Board “investigated” the petition’s proposals for four  
27 months and spent two additional months crafting emergency regulations presented to the Board in  
28 November 2020. *Id.*, p. 2. The fact that Defendants waited so many months during the COVID-  
19 pandemic before seeking to adopt emergency regulations disproves the existence of an  
actionable emergency. Significantly, the Board’s own investigation concluded that “Board staff  
does not believe that the Petitioners’ emergency request is necessary and recommends that

1 Petition File No. 583 be DENIED.” Exhibit C, p. 9.

2 106. The Finding of Emergency supporting the ETS also failed to provide the requisite  
3 substantial evidence. Emergency rulemaking was inappropriate because Defendants provided no  
4 substantial evidence that the ETS regulations’ specific requirements will prevent or significantly  
5 alleviate the spread of the virus. There was no substantial evidence that it was necessary for an  
6 employee with a potential workplace exposure to COVID-19 to be excluded from work for 14  
7 days, even after receiving negative test results. *See* 8 C.C.R. § 3205(c)(10)(B).

8 107. In fact, that provision of the ETS regulations contradicted the latest CDC  
9 Guidelines – which have now been recognized by the latest CDPH Guidelines and necessitated  
10 the Governor’s suspension of the ETS regulations to the extent they conflict with this guidance.<sup>19</sup>  
11 This suspended requirement is representative of the way in which the improperly adopted ETS  
12 regulations create substantially greater burdens than necessary.

13 108. Similarly, the Board presented no substantial evidence to establish the necessity of  
14 requiring employers to provide COVID-19 testing at their expense during work hours, regardless  
15 of testing availability in any geographical area. *See* 8 C.F.R. § 3205.1(b). The State has already  
16 made free testing available to Californians, and the Board presented no evidence that shifting  
17 testing allocation decisions and costs onto private employers will prevent or significantly alleviate  
18 the spread of the virus and advance workplace safety. Nor has the Board presented substantial  
19 evidence to establish that employers have the ability to comply with these requirements at all,  
20 particularly if the ETS regulations’ massive testing mandate outpaces supplies and exacerbates  
21 shortages.

22 109. The only purported evidence the Board provided relates to outbreaks for a single  
23 category of worker in a single industry. **Exhibit A**, pp. 3, 27, 28, 33-34. There was no rational  
24 basis, much less substantial basis, for generalizing the unique circumstances of that industry to  
25 workplaces generally, particularly for a finding of emergency. The Board identified no evidence  
26 that most California employers, let alone retailers, are the source of widespread infections, such  
27 that the ETS regulations are necessary. To the contrary, the recent studies and data provided with

28 <sup>19</sup> *See supra*, nn.16-18.

1 this Complaint establish the opposite.

2 110. The Board’s speculative and overly generalized approach to emergency  
3 rulemaking starkly contrasts with the State’s governing Blueprint for a Safer Economy, which  
4 was drafted and revised throughout the summer and fall with an eye toward evolving guidance  
5 and data. *See Exhibit C.*

6 111. With regard to the emergency adoption of mandatory paid exclusion periods, the  
7 Board exceeded its authority. *See* 8 C.C.R. § 3205(c)(10)(C). Given that coronavirus has many  
8 different vectors that are not inherent to the workplace, the Board did not establish a sufficient  
9 nexus with workplace safety to mandate unlimited paid exclusion periods, particularly given the  
10 enactment of numerous federal and state-mandated paid leave options.

11 112. Instead, the Board’s Finding of Emergency made bold, unsupported statements  
12 that “millions of California workers face potential exposure to COVID-19 on the job,” and that  
13 emergency regulations “would significantly reduce the number of COVID-19 related illnesses,  
14 disabilities and deaths in California’s workforce,” while simultaneously acknowledging a total  
15 lack of data as to workplace exposures to the coronavirus. **Exhibit A**, pp. 4, 5, 37. The Board  
16 relied on speculative claims that the rise in COVID-19 positivity rates is a result of employers  
17 “struggling to address the novel hazards presented by COVID-19.” **Exhibit B**, pp. 2-3.

18 113. The Board’s Finding of Emergency on those grounds violates Government Code  
19 section 11346.1(b)(2), which states that “[a] finding of emergency based only upon expediency,  
20 convenience, best interest, general public need, or speculation, *shall not be adequate to*  
21 *demonstrate the existence of an emergency.*”

22 114. Because it could not meet its statutory burden of establishing the necessity of  
23 emergency rulemaking by substantial evidence, the Board was required to comply with the  
24 Administrative Procedure Act and follow the normal rulemaking process. The Board had ample  
25 opportunity to conduct regular rulemaking during the course of this lengthy pandemic. It chose  
26 not to do so, and instead improperly attempts to shift regulations that unnecessarily deprive  
27 employers of their workforce and impose testing requirements that may be impossible to achieve  
28 onto California’s employers without notice and without an opportunity to participate in the

1 rulemaking process. That is not a proper exercise of the emergency power.

2 115. Accordingly, Plaintiffs request declaratory and injunctive relief to nullify  
3 California Code of Regulations sections 3205(c)(3)(B)(4.), 3205(c)(10), 3205.1(b), 3205.2(b),  
4 and 3205.3(g), and to enjoin Defendants from attempting to enforce them.

5 **SECOND CAUSE OF ACTION**

6 **VIOLATION OF THE CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH ACT**

7 **(California Labor Code § 6300, *et seq.*)**

8 **(*Against All Defendants*)**

9 116. Plaintiffs incorporate by reference and reallege each allegation set forth above.

10 117. DOSH has no authority to regulate wages or sick leave, and it overstepped its  
11 jurisdiction by adopting California Code of Regulations section 3205(c)(10)(C):

12 For employees excluded from work under subsection (c)(10) and otherwise able  
13 and available to work, employers shall continue and maintain an employee's  
14 earnings, seniority, and all other employee rights and benefits, including the  
15 employee's right to their former job status, as if the employee had not been  
16 removed from their job. Employers may use employer-provided employee sick  
17 leave benefits for this purpose and consider benefit payments from public sources  
18 in determining how to maintain earnings, rights and benefits, where permitted by  
19 law and when not covered by workers' compensation.

20 118. DOSH's jurisdiction, while broad, has limits. Labor Code section 6303 defines  
21 "places of employment" as "any place . . . where employment is carried on, except where the  
22 health and safety jurisdiction is vested by law in, and actively exercised by, any state or federal  
23 agency other than the division." Therefore, DOSH lacks jurisdictions where other agencies, such  
24 as the Department of Labor Standards Enforcement ("DLSE") and California Division of  
25 Workers' Compensation ("DWC") have jurisdiction over medical care, disability payments, and  
26 other benefits provided to employees with job-related injuries and illnesses.<sup>20</sup> The regulation of  
27 wages, hours, and working conditions, including paid leave, is the domain of the DLSE. DOSH's  
28 attempt to overstep its jurisdiction and regulate wage and paid leave issues is improper and  
creates considerable confusion about the interaction of the ETS regulations with the various

---

<sup>20</sup> California Department of Industrial Relations, *Cal/OSHA Jurisdiction*, <https://www.dir.ca.gov/dosh/calosha-jurisdiction.html> (last visited Dec. 14, 2020).

1 federal and state paid leave mandates and Workers' Compensation.

2 119. To the extent that DOSH made a determination that the emergency regulation is  
3 reasonably necessary to effectuate the purpose of its authorizing statute, this Court is "not bound  
4 by the agency's own interpretation of its jurisdiction as specified by legislation, since 'the courts  
5 are the ultimate arbiters of the construction of a statute.'" *Littoral Development Co. v. San  
6 Francisco Bay Conservation etc. Com.*, 24 Cal. App. 4th 1050, 1058 (1994). It is well  
7 established that "[a]dministrative regulations that alter or amend the statute or enlarge or impair  
8 its scope are void." *See, e.g. Pulaski v. Cal. Occupational Safety & Health Standards Bd.*, 75  
9 Cal. App. 4th 1315, 1332 (1999).

10 120. Requiring employers to provide unlimited paid exclusion periods does not advance  
11 the state's safety interest. The legislative intent behind Cal/OSHA is to regulate hazards created  
12 by the nature of the workplace. The ETS regulations improperly seek to regulate employers for a  
13 hazard that entered the workplace from outside, and to impose on employers financial  
14 responsibility to provide wages for a harm they did not cause.

15 121. As addressed above, there is no proven nexus between COVID-19 positivity rates  
16 and workplaces generally. The Board did not present any scientific evidence to support its  
17 speculative conclusion that employers' alleged inability to address the hazards presented by  
18 COVID-19 caused the rise in COVID-19 positivity rates. DOSH's overreach in this instance is  
19 inconsistent with the overall statutory scheme of Cal/OSHA and incongruous with its underlying  
20 legislative intent. Construing a remedial statute liberally does not mean applying it in a manner  
21 not reasonably supported by its statutory language. *Meyer v. Spring Spectrum LP*, 45 Cal. 4th  
22 634, 645 (2009).

23 122. Plaintiffs request declaratory and injunctive relief to nullify California Code of  
24 Regulations section 3205(c)(10) and enjoin Defendants from attempting to enforce it.

25 **THIRD CAUSE OF ACTION**

26 **VIOLATION OF DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT**

27 **(U.S. Const. amend. XIV, § 2)**

28 ***(Against All Defendants)***



1           123. Plaintiffs incorporate by reference and reallege each allegation set forth above.

2           124. Under the Due Process Clause of the Fourteenth Amendment, no State shall  
3 “deprive any person of life, liberty, or property, without due process of law.”

4           125. As an initial matter, the Board failed to comply with the procedural and  
5 substantive requirements of the U.S. Constitution and the Administrative Procedure Act by  
6 improperly adopting the ETS regulations on an emergency basis instead of through the normal  
7 rulemaking process. By doing so, the Board deprived Plaintiffs due process of law and denied  
8 them any meaningful opportunity to respond to the proposed regulations and explain how and  
9 why they are so deeply flawed. As detailed throughout this Complaint, the serious flaws in the  
10 ETS regulations arbitrarily and capriciously deprive employers of property without due process.

11           126. One of the consequences of the Board rushing the ETS regulations through the  
12 emergency rulemaking process without allowing meaningful public comment is that the  
13 regulations have serious flaws that expose employers to unanticipated and unjust outcomes that  
14 significantly infringe upon their property rights. For example, the ETS regulations as written can  
15 create an obligation for employers, including small business employers like Plaintiffs Relles  
16 Florist, Mayfield Equipment, and Abate-A-Weed, to provide ruinous mandatory paid exclusion  
17 periods that amount to unlimited paid leave. While California supplemental paid leave is capped  
18 at 14 days, but the ETS regulations do not specify any such limit. *Contrast* Labor Code §  
19 248.1(b)(2)(E), *with* 8 C.F.R. § 3205(c)(10)(C).

20           127. This flaw is significant because the ETS regulations provide no guidance about  
21 what evidence is required to establish workplace exposure. As detailed above, the term “exposed  
22 workplace” is subject to multiple contradictory definitions and interpretations. Nothing in the  
23 ETS regulations excludes employees who are immune, whether from vaccination or prior  
24 infection and recovery, from being counted as a “COVID-19 exposure” that must be excluded  
25 from the workplace. *See* 8 C.F.R. §§ 3205(b)(3), 3205(c)(10)(B). In fact, nothing in the ETS  
26 regulations prevents excluded employees from being counted as a “COVID-19 exposure”  
27 repeatedly. These flaws in the regulations create a mechanism by which any employer, regardless  
28 of size, may arbitrarily be compelled to incur the cost of unlimited paid exclusion periods. For

1 smaller employers, these flawed regulations can be an existential threat. For all employers, these  
2 arbitrarily and capriciously imposed costs constitute a deprivation of property without due  
3 process.

4 128. Similarly, ETS regulations' exception that "Subsection (c)(10)(C) does not apply  
5 where the employer demonstrates that the COVID-19 exposure is not work related" is an illusory  
6 exception. *See* 8 C.F.R. 3205(c)(10)(C). Without further guidance, this provision requires  
7 employers seeking relief from the exclusion period requirement to prove the negative that a  
8 COVID-19 exposure is not work-related. Given employers' inability to track employees' off-  
9 duty conduct, as well as the multiple days of delay between infection and the onset of symptoms  
10 or a positive test result, the ETS regulations as applied deprive employers of property by  
11 arbitrarily and capriciously requiring them to incur the significant costs of compliance with these  
12 regulations based on a global pandemic that is beyond their control.

13 129. Worse still, the ETS regulations' scientifically unsupported mandatory exclusion  
14 requirements can severely cripple or entirely shut down a business based on as few as three  
15 COVID-19 infections that can occur entirely outside of the workplace over a 14-day period. *See*  
16 8 C.F.R. § 3205.1(a). As detailed above, the ETS regulations' mandatory exclusions are an  
17 unjustifiably blunt instrument that applies equally to workplaces with 5 employees or 500  
18 employees. That an employer may be powerless to stop these emergency regulations from  
19 destroying its business almost overnight, despite observance of every COVID-19 precaution, can  
20 only be described as arbitrary and capricious.

21 130. Plaintiffs are acutely aware of the hardships that this pandemic continues to inflict  
22 on their valued employees, many of whom are friends and family. The purpose of this lawsuit is  
23 not to deprive financial relief to employees, and Plaintiffs continue to support the various  
24 measures that governments have enacted to provide much-needed relief to their employees during  
25 this period of unprecedented challenges. While small businesses generally cannot afford to offer  
26 some of the more generous benefits that many large business are able to offer their employees,  
27 such as extended paid leave, Plaintiffs have all acted to ensure that employees who need time off  
28 are able to get time off.

1           131.   However, the ETS regulations deprive Plaintiffs, including the smallest employers  
2 among them, of property without just compensation or due process by arbitrarily and capriciously  
3 requiring them to exclude employees from the workplace with potentially ruinous losses of  
4 productivity and revenue, while simultaneously requiring these employers to pay the full costs of  
5 the labor that they needed, but were denied, all without having engaged in reasoned decision-  
6 making. *See* 8 C.F.R. 3205(c)(10).

7           132.   With regard to COVID-19 testing, it is a core function of government to provide  
8 for the health and safety of its people during a public emergency. The State has properly carried  
9 out this responsibility by using public funds to accomplish this public purpose and make tests  
10 freely available to Californians.

11           133.   However, the ETS regulations arbitrarily and capriciously deprive Plaintiffs of  
12 property by requiring them to pay for testing costs that were not incurred because of their own  
13 conduct. The pandemic is a widespread public problem that Plaintiffs did not create. The ETS  
14 regulations unfairly shift the costs of this public health crisis onto private employers by requiring  
15 them to pay for testing on the unsupported assumption that an outbreak is workplace-related. If  
16 three or more employees test positive for COVID-19 because of infections that occurred outside  
17 of the workplace, these regulations unfairly require employers to incur the very significant – and  
18 given the staggering quantities of test kits required, potentially impossible – burden of providing  
19 COVID-19 testing to all employees at “the exposed workplace.” *See* 8 C.F.R. § 3205.1(a)-(b).  
20 Employers have almost no control over whether their employees are exposed to COVID-19 while  
21 off-duty and off-premises, but the emergency regulations violate due process by requiring  
22 employers to incur the costs for testing in such circumstances.

23           134.   Plaintiffs request declaratory and injunctive relief to nullify California Code of  
24 Regulations sections 3205(c)(3)(B)(4.), 3205(c)(10), 3205.1(b), 3205.2(b), and 3205.3(g), and to  
25 enjoin Defendants from attempting to enforce them.

26           135.   Plaintiffs found it necessary to engage the services of private counsel to vindicate  
27 their rights under the law. Therefore, Plaintiffs are entitled to an award of attorneys’ fees  
28 pursuant to 42 U.S.C. § 1988.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**FOURTH CAUSE OF ACTION**  
**VIOLATION OF THE CALIFORNIA CONSTITUTION**  
**(Cal. Const. Art. 1, § 1)**  
***(Against All Defendants)***

136. Plaintiffs incorporate by reference and reallege each allegation set forth above.

137. The California Constitution provides intrinsic and unalienable rights and liberties to its citizens. Chief among those rights and liberties are those found in Article 1, Section 1 of the California Constitution, which 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.”

138. 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 regulations deprive Plaintiffs of their property without just compensation or due process.

139. Plaintiffs request declaratory and injunctive relief to nullify California Code of Regulations sections 3205(c)(3)(B)(4.), 3205(c)(10), 3205.1(b), 3205.2(b), and 3205.3(g), and to enjoin Defendants from attempting to enforce them.

140. Plaintiffs found it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorneys’ fees pursuant to California Code of Civil Procedure section 1021.5.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, on behalf of their members, request that the Court grant relief as follows:

- (1) Issue a declaratory judgment with the following:
    - a) California Code of Regulations section 3205(c)(10) is null and void, of no effect,
- as:

- 1                   i.    in excess of statutory jurisdiction, authority, or limitations, or short of
- 2                   statutory right in violation of the Administrative Procedure Act; and
- 3                   ii.   in excess of statutory jurisdiction, authority, or limitations, or short of
- 4                   statutory right in violation of the California Occupational Safety and
- 5                   Health Act.
- 6                   iii.   arbitrary and capricious, an abuse of discretion, or otherwise not in
- 7                   accordance with the U.S. and/or California Constitutions.
- 8           b) California Code of Regulations sections 3205(c)(3)(B)(4.), 3205.1(b), 3205.2(b),
- 9           3205.3(g) are null and void, of no effect, as:
- 10                  i.    in excess of statutory jurisdiction, authority, or limitations, or short of
- 11                  statutory right in violation of the Administrative Procedure Act; and
- 12                  ii.   in excess of statutory jurisdiction, authority, or limitations, or short of
- 13                  statutory right in violation of the California Occupational Safety and
- 14                  Health Act,
- 15                  iii.   arbitrary and capricious, an abuse of discretion, or otherwise not in
- 16                  accordance with the U.S. and/or California Constitutions.

17           (2) Issue a temporary restraining order and a preliminary injunction preventing  
18 Defendants from enforcing or implementing the above-referenced provisions of the ETS  
19 regulations until this Court decides the merits of this lawsuit.

20           (3) Permanently enjoin Defendants and all persons and entities in active concert or  
21 participation with Defendants from enforcing the above-referenced provisions of the ETS  
22 regulations.

23           (4) Award Plaintiffs their costs of suits and reasonable attorneys’ fees incurred in this  
24 action; and

25    ///  
26    ///  
27    ///  
28    ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

(5) Grant all other such relief as the Court may deem just and proper.

Dated: December 16, 2020

MORGAN, LEWIS & BOCKIUS LLP

By 

Jason S. Mills  
Sarah J. Allen  
Aleksandr Markelov  
Attorneys for Plaintiffs  
NATIONAL RETAIL FEDERATION;  
NATIONAL FEDERATION OF  
INDEPENDENT BUSINESS; RELLES  
FLORIST; MAYFIELD EQUIPMENT  
COMPANY; and ABATE-A-WEED, INC.