STATEMENT OF NANDAN KENKEREMATH IN SUPPORT OF HB 777

Before the Virginia House of Delegates Committee on Rules

February 8, 2022

Thank you, Mr. Chairman, and Members of the Committee, for the opportunity to express my support for the bill of Delegate Dave La Rock, HB 777. It is an important and common-sense bill.

I. HB 777 Is Necessary to Help Address the Problem of Unbridled Emergency Authorities

I am writing in support of HB 777, a bill to add some policy principles and standards for the exercise of certain emergency authorities by the Executive Branch. For background, I worked in the U.S. House of Representatives as Committee Staff for about 17 years including work on issues like emergency and pandemic preparedness as well as many regulatory programs. I also worked in the Office of General Counsel for the Environmental Protection Agency for about 7 years with respecting to many rulemakings. I have reviewed a great deal about the applicable law and positions of the Executive Branch regarding these authorities.

For months on end in 2020 and 2021, the Governor and the Commissioner of Health signed orders with constantly shifting standards, to subject millions of Virginians and tens of thousands of Virginia businesses to harmful and

burdensome regulations, most carrying the threat of criminal penalty, and nearly all without legal precedence, justification, or authority. The Governor and Health Commissioner wielded, unilaterally and indefinitely, unbridled power over every citizen, household, business and church under color of a declared "emergency." The mandates of the Governor and Health Commissioner in these orders infringed on multiple fundamental rights including their freedom of assembly, freedom of association, free exercise of religion, free speech, privacy, and due process of law. The infringements on these rights are further compounded by an entire scheme of unequal treatment. There was no public comment, no public docket, no economic impact analysis, no regulatory flexibility analysis for small businesses.

I have never seen a situation where one or two individuals can sign orders that operate as rules for months and which impose criminal sanctions for each violation of up to a year in jail and $25,000. There are no legislative standards guiding these orders. According to the Executive Branch, if it is about COVID, the Executive Branch can issue orders and there are no legislative standards beyond the fact there is a public health emergency. And the Governor can declare virtually anything an emergency. Moreover, according to Governor Northam, even though the orders operate as rules with the meaning of the Virginia Administrative Process Act (VAPA), the Executive Branch purports to operate outside of VAPA and fought judicial review.

Much more oversight is necessary. There should be a public docket with all of the communications and deliberations of Governor Northam, Health Commissioner Oliver, and staff along with comments and analysis of this extended period where two men ruled through threats of criminal sanctions.

II. Broadly Stated Authority Infringed on Fundamental Rights for Months with No Legislative Principles.

The mandates of Governor Northam and Commissioner Oliver in the rules in these Executive Orders (EO) and Orders of Public Health Emergency (OPHE) infringed on multiple fundamental rights, including without limitation their freedom of assembly, freedom of association, free exercise of religion, free speech, privacy, and due process of law. Such mandates are illegal for at least three fundamental reasons, expressed in the following well-established legal maxims: A government actor may only permissibly infringe on fundamental rights under the Virginia Constitution if: (A) they have followed applicable procedures required by law, *and* (B) they are operating pursuant to a permissible grant or delegation of authority, *and* (C) they meet the high standards for infringing on fundamental rights under the Virginia Constitution. Neither the Governor nor Health Commissioner met any of these standards. Moreover, the situation was even worse than that because the Governor and Health Commissioner did not just haphazardly

violate these elemental principles here-and-there in isolated areas of the law, but violated all of them simultaneously.

By way of example, consider a religious wedding service. Governor Northam and Commissioner Oliver purported to define a "family," which determines who may legally sit or stand together at a wedding, thus infringing on freedom of association. Governor Northam and Health Commissioner Oliver also set limits on the size of gatherings, including weddings, which infringes on the freedom of assembly. At the same time, Governor Northam and Health Commissioner Oliver expressly imposed burdensome regulations on religious wedding services that they do not impose on non-religious weddings, thus infringing on the free exercise of religion. Furthermore, Governor Northam and Commissioner Oliver compelled speech by requiring government messages about the coronavirus for a religious wedding but not at other services, thereby infringing on free speech, free exercise of religion, assembly, and association. To enforce their seating mandates, the EOs and OPHE required private event organizers and government enforcement officials to enquire about attendees' private living arrangements, infringing on privacy rights. There was no administrative procedure, no public docket, no notice and comment period, no regulatory impact analysis, and no regulatory flexibility analysis. Hence, rules and regulations of general applicability, having the force and effect of law, were erected and sustained for

many, many months without due process, including the failure to follow the procedures under the Virginia Administrative Process Act ("VAPA").

Governor Northam and Commissioner Oliver purported to have a government definition of who must distance and who may sit, stand or be together for ordinary conversation within 6 feet, in certain settings. In several settings the definition is "family" or "household" which are government definitions that define association for purposes of distancing. A government definition of association is extraordinary and not well thought through. There are dozens of examples of the problems. Defendants also set limits on the size of gatherings with no exceptions for political gatherings and political speech, among other problems.

By definition, a numerical limitation by the state on the size of assemblies is an infringement on rights to peaceably assemble. A statewide limitation on the size of assemblies in Virginia is unprecedented. Moreover, the infringement on the right of assembly had uneven application under the rules of the orders. For months, there was a 10-person, and then a 50-person, restriction on assembly, including for weddings, celebrations, sporting events, family reunions, and Easter church services. However, these same restrictions did not apply to a large meeting of lawyers at a law firm. Countless individuals performing functions together through their employment is not a "gathering" under the Order. Crowds are allowed at a Walmart, Lowes, or other large "essential" stores without those restrictions. The

definition of "Family members" in the EOs and OPHE would not even include a married couple who are not currently "residing in the same household."

Virginians have a fundamental right in who they choose to dance with, who to hold close, who to have a normal conversation with, and, generally, who to be next to as long as the other person wants the same. While the First Amendment does not, by its terms, protect a "right of association," the United States Supreme Court has recognized such a right in certain circumstances. *Dallas v. Stanglin*, 490 U.S. 19, 23-24 (1989). In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court defined the right at issue to include choices to enter into and maintain certain intimate human relationships and the separate but related right to "expressive association."

These restrictions and government definitions of who may or may not sit, stand, or have an ordinary conversation with one another created negative impact in numerous contexts. The rules created violations for failing to prevent customers or parishioners from following the rules, thus, forcing churches and businesse, themselves, to infringe on fundamental rights. These infringements applied in the context of weddings and religious events and activities; political rallies, meetings and events; family social events; and the broader entertainment, restaurant, and event business context.

As stated in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (Nov. 25, 2020)

> "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Citing *Elrod* v. *Burns*, 427 U. S. 347, 373 (1976) (plurality opinion)

III. Legislation Must Address the Need for Legislative Standards and Principles and not Allow an Unbridled Autocracy

The doctrine concerning impermissible grants of rulemaking authority is described in *Ames v. Town of Painter*, 239 Va. 343, 349 (1990) and *Bell v. Dorey Elec*. Co., 248, Va. 378, 380 (1994). In *Bell* the Virginia Supreme Court states:

> "….[D]elegations of legislative power are valid only if they establish specific policies and fix definite standards to guide the official, agency, or board in the exercise of the power. Delegations of legislative power which lack such policies and standards are unconstitutional and void." (citing *Ames* v. *Town of Painter*, 239 Va. 343, 349 (1990)). *Id.*

The trial court in *Bell* went on to determine that the requirement of sufficient legislative standard was not satisfied by the general direction in the statute that the regulations be designed to protect and promote the safety and health of employees:

> We agree that the General Assembly cannot delegate its legislative power accompanied only by such <u>a broad statement of general policy</u>. *Id*. at 381. (citing *Andrews* v. *Board of Supervisors*, 200 Va. 637, 641 (1959)0. [Emphasis added]

The *Bell* Court focused primarily on limits to overregulation with three limiting standards and legislative factors to consider that apply to the universe that regulation is issued. Defendant Health Commissioner has not identified anything close to the limitations in *Bell*. The Governor relies on the very general and unbounded language of Va. Code §44-167.17 which states:

> The Governor "shall have, in addition to his powers hereinafter or elsewhere prescribed by law, the following powers and duties:
>
> (1) To proclaim and publish such rules and regulations and to issue such orders as may, in his judgment, be necessary to accomplish the purposes of this chapter….. (emphasis added)

Purposes of the chapter are defined under Va. Code §44-167.14 which states:

> "…it is hereby found and declared to be necessary and to be the purpose of this chapter:
>
> (1) To create a State Department of Emergency Management, and to authorize the creation of local organizations for emergency management in the political subdivisions of the Commonwealth;
> (2) To confer upon the Governor and upon the executive heads or governing bodies of the political subdivisions of the Commonwealth emergency powers provided herein…."

The General Assembly simply did not draft the provision to provide specific policies and fixed principles which meet the *Bell* and *Ames* test. Simple, there are no "specific policies" and fixes "definite standards" at all.

Note in Virginia the renewal authority under Va. Code §44-167.17 is unbounded:

> Except as to emergency plans issued to prescribe actions to be taken in the event of disasters and emergencies, no rule, regulation, or order issued under this section shall have any effect beyond June 30 next following the next adjournment of the regular session of the General Assembly but the same or a similar rule, regulation, or order may thereafter be issued again if not contrary to law; (emphasis added)

With respect to the decisions of Commissioner Oliver, it is important to note that the Commissioner's authority under Va. Code § 32.1-20 is only derivative of the authority of the State Board of Health under Va. Code § 32.1-20 and, thus, further attenuated. Va. Code § 32.1-20:

> The Commissioner shall be vested with all the authority of the Board when it is not in session, subject to such rules and regulations as may be prescribed by the Board.

The State Board of Health never created a record or met in special session in the face of COVID-19. Considering this was the most important public health situation for Virginia, the absence of meetings or the State Board of Health was abdication and there must be further oversight on this failure. Given that the Board had been in session numerous times and had opportunities to create a record and vote on the Orders, the derivative authority of the Commissioner should never have applied.

IV. The COVID Monarchy Must Not Return

Governor Northam and Commissioner Oliver operated for months as an autocracy that the Virginia Constitution and Virginia Code protects against. The Governor and Health Commissioner issued rules that subject businesses and

citizens to criminal sanctions 1) without operating through a permissible delegation of rulemaking authority which establishes "specific policies" and fixes "definite standards" (*see* impermissible delegation argument below), 2) with no public docket or official public comments structure, 3) that place limits on assemblies (including religious and political assembly), 4) that provide a government definitions of who may sit, stand or have an ordinary conversation within 6 feet in various settings, 5) that determine which businesses win and which lose in the face of the same level of risks, and 6) which are un-Constitutionally vague. Throughout the process Governor Northam and Health Commissioner Oliver fought the right to judicial review in every conceivable manner.

HB 777 would bring some legislative standards to these issues and by limiting the longer-term use of emergency authorities without further engaging the legislative branch. Separation of Powers belongs to everyone in Virginia. It is important that the General Assembly respect this element of the Virginia Constitution and provide the type of guidance and limitations that are required before threatening millions of Virginians, hundreds of thousands of Virginia businesses, and tens of thousands of religious institutions with criminal sanctions. These provisions are common sense standards and by no means prevent the exercise of such authorities as appropriate. These standards would focus on

assuring a proper record and that rules, if any are limited and properly tailored particular with respect to fundamental rights in Virginia. Open-ended Executive authority that proceeds for months at a time is not appropriate. Virginia suffered rule for over a year. It is long past time to end this approach that is deeply antithetical to the Virginia Constitution and the rights of all Virginians.

I would be happy to answer any questions or provide further information regarding this issue for the Committee.

Nandan Kenkeremath