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8

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

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

14 Plaintiffs,

15 v.

16 CALIFORNIA DEPARTMENT OF  
INDUSTRIAL RELATIONS, DIVISION  
17 OF OCCUPATIONAL SAFETY AND  
HEALTH; OCCUPATIONAL SAFETY &  
18 HEALTH STANDARDS BOARD;  
DOUGLAS PARKER, in his official  
19 capacity as Chief of the California  
Department of Industrial Relations; and  
20 DOES 1-50, inclusive,

21 Defendants.

Case No. CGC-20-588367

**BRIEF OF AMICI CURIAE  
IMPACT FUND, CALIFORNIA RURAL  
LEGAL ASSISTANCE, INC., AND  
16 ADDITIONAL CALIFORNIA LEGAL  
SERVICES ORGANIZATIONS IN  
SUPPORT OF DEFENDANTS'  
OPPOSITION TO PLAINTIFFS'  
REQUEST FOR PRELIMINARY  
INJUNCTION**

Hearing Date: January 28, 2021  
Hearing Judge: Hon. Ethan P. Schulman  
Time: 1:30 pm  
Place: Dept. 302

Date Action Filed: December 16, 2020

Trial date: None set

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**COMPLETE LIST OF AMICI CURIAE**

Impact Fund

California Rural Legal Assistance, Inc.

Asian Americans Advancing Justice | Los Angeles

Bet Tzedek

Centro Legal de la Raza

California Rural Legal Assistance Foundation

Disability Rights California

Disability Rights Education & Defense Fund

Labor & Employment Committee of the National Lawyers Guild

Lawyers' Committee for Civil Rights of the San Francisco Bay Area

Legal Aid at Work

Legal Aid of Marin

Legal Services of Northern California

National Employment Law Project

Public Interest Law Project

San Diego Volunteer Lawyer Program

Western Center on Law & Poverty

Worksafe, Inc.

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1 **INTRODUCTION**

2 With 2.9 million Californians infected by a deadly and highly transmissible disease  
3 and over 31,000 dead, Plaintiffs ask this Court to enjoin workplace safety rules adopted by  
4 the Occupational Safety and Health Standards Board pursuant to specific emergency  
5 provisions. (Gov. Code, § 11346.1.) The Standards Board created a thorough record of the  
6 COVID-19 crisis, detailed in its Finding of Emergency, and established specific Emergency  
7 Temporary Standards designed to protect California’s workers from this novel infectious  
8 disease. Plaintiffs’ request puts this critical effort in jeopardy during the most catastrophic  
9 period of the pandemic in our state to date.

10 As documented in the Finding of Emergency, COVID-19 is a highly contagious virus  
11 that transmits easily through in-person contact, causing numerous outbreaks with severe  
12 and/or lingering symptoms and even death for those infected. While state officials and  
13 public health experts have attempted to curb the spread of the virus since March 2020  
14 through declarations of emergency and safety recommendations, the number of people  
15 infected with COVID-19 has escalated. Essential workers, low-income families, and  
16 communities of color are bearing the brunt of the pandemic’s devastation.

17 The California Division of Occupational Safety and Health and other Defendants  
18 implemented the Emergency Temporary Standards—practical, evidence-based, and  
19 enforceable workplace standards—in an effort to prevent further work-related outbreaks.  
20 Amici submit this brief to describe the well-founded basis for the Occupational Safety and  
21 Health Standards Board’s Finding of Emergency, the genesis of the Emergency Temporary  
22 Standards in generally accepted public health recommendations, and the critical importance  
23 of the Standards to low-wage essential workers.

24 California has called upon the state’s employers to protect workers and stem the tide  
25 of an unprecedented public health crisis. The Court should reject Plaintiffs’ attempt to avoid  
26 bearing their share of this crucial effort.



1 **ARGUMENT**

2 **I. The COVID-19 Pandemic Is an Emergency That Warrants Immediate Action to**  
3 **Avoid Serious Harm to the Public Health and General Welfare.**

4 Plaintiffs’ attempt to undermine the emergency proceedings of the Standards Board  
5 relies on misdirection. They assert that Defendants may only initiate emergency rulemaking  
6 to address emergencies *arising from* California employers and workplaces. (Pls.’ App. for  
7 OSC re Prelim. Inj., p. 11.) To the contrary, the Government Code defines “emergency” as  
8 “a situation that calls for immediate action to avoid serious harm to the public peace, health,  
9 safety, or general welfare,” (Gov. Code, § 11342.545), without requiring an exclusive source  
10 in the workplace. Plaintiffs’ argument also ignores the reality that when employers put their  
11 employees to work under circumstances where they will be exposed to conditions that may  
12 injure them, the employers’ action causes the exposure. Previous emergency regulations  
13 adopted and enforced by the Division of Occupational Safety and Health illustrate the  
14 breadth of the emergency provision.<sup>1</sup>

15 Plaintiffs’ attempt to minimize employers’ role in the widespread nature of the  
16 COVID-19 crisis defies the collective experience of Californians required to continue  
17 working amidst rising numbers of infections and deaths. Plaintiffs also ignore the evidence  
18 presented and relied on by the Standards Board in its Finding of Emergency.<sup>2</sup> The  
19 Standards Board fully met its obligation to identify an emergency requiring immediate action  
20 to protect public health and safety. (See Gov. Code, § 11346.1, subd. (b)(2).)

21 **A. COVID-19 Is a Threat to Human Life.**

22 There can be no dispute that COVID-19 is a dangerous illness. According to the  
23 documents cited in the Standards Board’s Finding of Emergency, approximately 10-15  
24 percent of cases progress to severe disease, and about 5 percent of infected people become

25 <sup>1</sup> See, e.g., Dept. of Industrial Relations, *Emergency Regulation on Protection from Wildfire*  
26 *Smoke* (Sept. 2019) < <https://tinyurl.com/y3nhjge8>>.

27 <sup>2</sup> Documents cited herein that appear in the Standards Board’s Finding of Emergency are  
28 designated as “FOE.” (See Compl. Ex. A.) They are further identified by the number  
assigned to each under “Technical, Theoretical, or Empirical Studies, Reports, or Documents  
Relied Upon.” (FOE at pp. 39-44.)

1 critically ill.<sup>3</sup> In otherwise healthy patients, the virus causes difficulty breathing, pneumonia,  
2 and in some cases, organ failure and death.<sup>4</sup> Approximately 5 percent of those infected and  
3 20 percent of those hospitalized experience severe symptoms necessitating intensive care.<sup>5</sup>  
4 Approximately 15 percent to 20 percent of those admitted to the hospital die from COVID-  
5 19, and that number rises up to 40 percent among patients admitted to the ICU.<sup>6</sup> Those with  
6 certain underlying medical conditions (such as sickle cell disease, chronic kidney disease,  
7 cancer, and heart conditions) experience higher rates of severe illness, defined as  
8 “hospitalization, admission to the ICU, intubation or mechanical ventilation, or death.”<sup>7</sup>  
9 Hospitalizations are six times higher and deaths are twelve times higher among patients with  
10 preexisting cardiovascular disease, diabetes, and chronic lung disease.<sup>8</sup>

11 Those who survive a COVID-19 infection may face lingering or recurring symptoms  
12 for weeks or months following their initial recovery, including fatigue, cough or congestion,  
13 loss of taste or smell, head and body aches, diarrhea and nausea, chest or abdominal pain, and  
14 confusion.<sup>9</sup> Though the long-term consequences of COVID-19 infection are currently  
15 unknown, health experts expect that the virus will increase the risk of long-term health  
16 problems related to major body systems and organs.<sup>10</sup> A Centers for Disease Control and

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17  
18 <sup>3</sup> World Health Organization, *What We Know About Long-Term Effects of COVID-19*  
(September 9, 2020) “COVID-19 disease severity and lingering symptoms,” p. 8  
<<https://tinyurl.com/y6cntj87>> (FOE 33) (hereafter World Health Organization).

19 <sup>4</sup> Parker, Div. of Occupational Safety & Health, Dept. of Industrial Relations, *Evaluation of*  
20 *Petition 583 to Adopt an Emergency Regulation to Protect Workers from COVID-19, and a*  
21 *Permanent Regulation to Protect Workers from Infectious Diseases* (July 30, 2020) p. 5  
<<https://tinyurl.com/y2arokls>> (FOE 6), citing Stokes et al., CDC, *Coronavirus Disease 2019*  
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23 <sup>5</sup> Wiersinga et al., *Pathophysiology, Transmission, Diagnosis, and Treatment of Coronavirus*  
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24 <sup>6</sup> *Id.* at “Prognosis” (FOE 32).

25 <sup>7</sup> CDC, *Evidence used to update the list of underlying medical conditions that increase a*  
26 *person’s risk of severe illness from COVID-19* (Oct. 6, 2020) <<https://tinyurl.com/yywyf2ls>>  
(as of Oct. 15, 2020) (FOE 35).

27 <sup>8</sup> Parker, *supra*, at pp. 5-6 (FOE 6), citing Stokes et al., *supra*.

28 <sup>9</sup> World Health Organization, *supra*, at pp. 8-9 (FOE 33).

<sup>10</sup> *Id.* at p. 12 (FOE 33).

1 Prevention (CDC) multistate telephone survey of symptomatic adults with COVID-19 found  
2 that, among people aged 18 to 34 in good health, 20 percent reported prolonged symptoms.<sup>11</sup>  
3 One life-threatening response to COVID-19 infection can be the development of viral sepsis,  
4 which may contribute to multiorgan failure.<sup>12</sup> Survival from sepsis is associated with  
5 increased risk of death for at least two years, new physical disability, new cognitive  
6 impairment, and increased vulnerability to recurrent infection and further health  
7 deterioration.<sup>13</sup> Similar complications are expected in survivors of severe COVID-19.<sup>14</sup> The  
8 evidence gathered by the Standards Board confirms that COVID-19 poses a clear and  
9 unprecedented danger of critical and chronic illness and death.

10 **B. COVID-19 Continues to Spread in Workplaces.**

11 As documented in the Finding of Emergency, since the start of the pandemic, the  
12 number of people infected with COVID-19 has continued to rise at ever faster rates. By fall  
13 2020, the United States topped the lists of countries with the highest cumulative number of  
14 cases and deaths.<sup>15</sup> On October 15, 2020, the California Department of Public Health  
15 reported 855,072 confirmed COVID-19 cases in the state, including 16,639 fatalities and  
16 2,239 confirmed COVID-19 hospitalizations with 622 of those cases in intensive care units.<sup>16</sup>

17 Part of the overwhelming challenge identified by the Finding of Emergency is how  
18 quickly and easily the virus spreads. As one scientific journal article described it, “The  
19 enormous scope and magnitude of the COVID-19 outbreak reflect not only a highly  
20  
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22 <sup>11</sup> *Id.* at p. 10 (FOE 33), citing CDC, *Symptom Duration and Risk Factors for Delayed*  
23 *Return to Usual Health Among Outpatients with COVID-19 in a Multistate Health Care*  
24 *Systems Network – United States, March-June 2020* (July 31, 2020)  
25 <<https://tinyurl.com/yybp7mgu>>.

26 <sup>12</sup> Wiersinga et al., *Pathophysiology, Transmission, Diagnosis, and Treatment of*  
27 *Coronavirus Disease 2019 (COVID-19): A Review*, *supra*, at “Observations” (FOE 32).

28 <sup>13</sup> *Id.* at “Prognosis” (FOE 32).

<sup>14</sup> *Ibid.*

<sup>15</sup> World Health Organization, *supra*, at p. 3 (FOE 33).

<sup>16</sup> Cal. Dept. of Public Health, COVID-19, *California COVID-19 By the Numbers*  
<<https://tinyurl.com/y3vrq2x>> (as of Oct. 15, 2020) (FOE 7).

1 contagious nature but also exceedingly efficient transmission for [the virus].”<sup>17</sup> The virus  
2 spreads mainly through close personal contact, including between people who are within six  
3 feet of each other.<sup>18</sup> Under certain conditions, namely in enclosed spaces with inadequate  
4 ventilation, people with COVID-19 have seemingly infected others who are more than six  
5 feet away.<sup>19</sup> Prevention is further complicated by asymptomatic transmission—a person can  
6 be infected and infectious without showing any symptoms of the virus.<sup>20</sup> Studies gathered by  
7 the Standards Board show that pre-symptomatic and asymptomatic transmission of the virus  
8 are significant means by which the virus spreads.<sup>21</sup>

9 The well-developed record before the Standards Board indicated that workplaces are  
10 prime locations for COVID-19 outbreaks. As the pandemic spread across the globe, multiple  
11 outbreaks of COVID-19 were observed in several occupational settings in Europe, including  
12 slaughterhouses, meat processing plants, mines, and building sites.<sup>22</sup> Multiple factors  
13 contribute to workplace outbreaks, as groups of workers are often required to gather in  
14 confined indoor spaces without proper ventilation or the ability to leave sufficient distance  
15 between themselves and their coworkers.<sup>23</sup> Another key factor is “presenteeism,” continuing  
16 to report to work despite being symptomatic for a disease. Workers who fear losing their  
17 jobs or who cannot reduce their working hours may continue commuting and working, even

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20 <sup>17</sup> Zhang et al., *Identifying airborne transmission as the dominant route for the spread of COVID-19* (June 30, 2020) p. 14858 <<https://tinyurl.com/ybtktrjp>> (FOE 18).

21 <sup>18</sup> CDC, *How COVID-19 Spreads* (Oct. 28, 2020) <<https://tinyurl.com/y2tx6ztg>> (as of November 6, 2020) (FOE 62).

22 <sup>19</sup> *Id.* at “COVID-19 can sometimes be spread by airborne transmission” (FOE 62).

23 <sup>20</sup> *Id.* at “How COVID-19 Spreads” (FOE 62).

24 <sup>21</sup> See, e.g., *ibid.*; European Centre for Disease Prevention & Control, *Transmission of COVID-19* (Aug. 10, 2020) at “Role of asymptomatic and pre-symptomatic individuals” <<https://tinyurl.com/y6pewo6p>> (as of Oct. 14, 2020) (FOE 8); Wei et al., CDC, *Presymptomatic Transmission of SARS-CoV-2—Singapore, January 23–March 16, 2020* 69 (2020) Morbidity and Mortality Weekly Report 411, 415 <<https://tinyurl.com/y6p7vm9w>> (FOE 9).

27 <sup>22</sup> European Centre for Disease Prevention & Control, *Transmission of COVID-19, supra*, at “Occupational settings” (FOE 8).

28 <sup>23</sup> *Ibid.*

1 when they or one of their family members exhibit COVID-19 symptoms.<sup>24</sup>

2 Particular occupations, such as agricultural work, pose higher risk for contracting and  
3 spreading COVID-19. The risk increases for multiple reasons: farmworkers stay in close  
4 contact with one another in the fields, indoors, when clocking in or out, during breaks, when  
5 sharing transportation, and in shared housing; the mobility of the workforce, “who, in  
6 moving from farm to farm, can potentially spread the virus between communities”; and poor  
7 access to clean water for hygiene purposes throughout the day.<sup>25</sup> The Finding of Emergency  
8 identified multiple virus outbreaks among farmworkers documented by the media. In  
9 California, a month-long investigation by CalMatters and *The Salinas Californian* uncovered  
10 reports of six outbreaks among workers at seven agricultural guest worker employers,  
11 resulting in more than 350 COVID-19 infections.<sup>26</sup> A separate investigation identified 188  
12 farmworkers who worked at various work sites throughout Ventura County, shared  
13 communal housing, and tested positive for COVID-19 over the summer.<sup>27</sup>

14 The Occupational Safety and Health Standards Board gathered more than sufficient  
15 data to conclude that workers who return to worksites during the COVID-19 pandemic place  
16 their health and that of their families at risk.

17 **C. State Officials and Leading Public Health Organizations Confirmed that**  
18 **the COVID-19 Pandemic Is a State-Wide Emergency.**

19 As further documented in the Finding of Emergency, Governor Newsom issued a  
20 Proclamation of a State of Emergency on March 4, 2020.<sup>28</sup> At that moment, there were more  
21 than 94,000 confirmed cases of COVID-19 across the globe and more than 3,000 deaths

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23 <sup>24</sup> *Ibid.*

24 <sup>25</sup> CDC, *Agriculture Workers and Employers* (June 11, 2020) <<https://tinyurl.com/y6r2cjx2>  
> (as of Nov. 6, 2020) (FOE 61).

25 <sup>26</sup> Botts et al., *COVID-19 Rips through California Motel Rooms of Guest Workers Who Pick*  
*Nation's Produce* (Aug. 17, 2020) *The Californian* <<https://tinyurl.com/y32hwdmb>> (FOE  
26 56).

27 <sup>27</sup> Rode, *Farmworker Housing Coronavirus Outbreak: 188 Test Positive for COVID-19* (July  
27 4, 2020) *Ventura County Star* <<https://tinyurl.com/y33uvmdu>> (FOE 57).

28 <sup>28</sup> Newsom, *Proclamation of a State of Emergency* (March 4, 2020)  
<<https://tinyurl.com/t2hljfn>> (FOE 1).

1 worldwide, with 53 confirmed cases in California,<sup>29</sup> figures that pale in comparison to the  
2 current explosion of cases. In the Proclamation, Governor Newsom stated that the then-  
3 present conditions met the standard of a “State of Emergency” under Government Code  
4 § 8558, subdivision (b): “existence of conditions of disaster or of extreme peril to the safety  
5 of persons and property within the state.” Governor Newsom has continued to issue  
6 executive orders renewing provisions of the State of Emergency.<sup>30</sup>

7 In an attempt to control the spread of the virus, the State Public Health Officer issued  
8 the first state-wide “Stay-at-Home” order on March 19, 2020, directing all residents to avoid  
9 non-essential activities outside their homes. Multiple state and local orders followed,  
10 including the Statewide Public Health Officer Order issued on August 28, 2020, which  
11 observed that “[c]ommunity spread of infection remains a significant concern across the  
12 state.”<sup>31</sup>

13 The Finding of Emergency further observed that, as the emergency escalated, the  
14 CDC and the California Department of Public Health issued recommendations for workplace  
15 practices to slow the spread of COVID-19. The CDC advised increasing ventilation from the  
16 outdoors as much as possible, modifying workspaces to maintain six feet between  
17 employees, and installing transparent shields or other physical barriers to separate employees  
18 and visitors.<sup>32</sup> CDC guidance urged employers to encourage employees who have COVID-  
19 19 symptoms or a family member at home with COVID-19 to notify their supervisors and  
20 stay home.<sup>33</sup> The California Department of Public Health also issued guidance on managing  
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23 <sup>29</sup> *Ibid.*

24 <sup>30</sup> Newsom, Executive Order N-71-20 (June 30, 2020) <<https://tinyurl.com/y24ubp5n>>  
(FOE 52).

25 <sup>31</sup> Cal. Dept. of Public Health, Statewide Public Health Officer Order (Aug. 28, 2020) p. 1  
26 <<https://tinyurl.com/y99u2zp7>> (FOE 46).

27 <sup>32</sup> CDC, *COVID-19 Employer Information for Office Buildings* (Oct. 29, 2020) at  
28 “Engineering controls: Isolate workers from the hazard” <<https://tinyurl.com/y3pljjdw>> (as  
of Nov. 6, 2020) (FOE 64).

<sup>33</sup> *Id.* at “Administrative controls: Change the way people work” (FOE 64).

1 workplace outbreaks, including identifying and reporting cases, communicating with  
2 workers, and determining when employees should return to work.<sup>34</sup>

3 Despite the CDC and Department of Public Health guidance, the number of COVID-  
4 19 infections and deaths in California continued to climb relentlessly. When the Standards  
5 Board issued its Finding of Emergency in November 2020, COVID-19 infection rates were  
6 higher than ever,<sup>35</sup> vaccines were not yet available, and the state was entering the winter  
7 holiday season, which was likely to increase multi-family indoor social gatherings. Workers  
8 faced (and continue to face) a “situation that calls for immediate action to avoid serious harm  
9 to the public peace, health, safety, or general welfare,” (Gov. Code, § 11342.545), warranting  
10 emergency rulemaking and specific, easily enforceable workplace protections.

## 11 12 **II. The Emergency Temporary Standards Are Necessary to Protect the Health of 13 Vulnerable Workers.**

### 14 **A. The Standards are Based on Substantial Evidence from the Public Health 15 Community.**

16 The California Department of Industrial Relations, Division of Occupational Safety  
17 and Health implemented entirely appropriate measures to address the serious harm that the  
18 pandemic presents to the health and safety of California’s workers. (See Cal. Code Regs., tit.  
19 1, § 50 subd. (b)(3)(B).) Despite Plaintiffs’ protestations that the Emergency Temporary  
20 Standards lack evidentiary support, the Division adopted credible recommendations intended  
21 to slow the proliferation of COVID-19 in workplace settings, as documented in the Finding  
22 of Emergency. The Emergency Temporary Standards are reasonable and important  
23 protections for Californians who must return to the workplace during the pandemic.

24 The Standards reflect the overwhelming scientific consensus that the most likely  
25 method of contracting COVID-19 is via airborne aerosol transmission within six feet of an

26 <sup>34</sup> Cal. Dept. of Public Health, *Responding to COVID-19 in the Workplace* (Sept. 18, 2020)  
27 <<https://tinyurl.com/ybo4sxfe>> (FOE 54).

28 <sup>35</sup> Cal. Dept. of Public Health, COVID-19, *California COVID-19 By the Numbers*  
<<https://tinyurl.com/y66ssy8n>> (as of Nov. 19, 2020).

1 infected person.<sup>36</sup> (See, e.g., Cal. Code Regs., tit. 8, § 3205, subd. (b) [defining “COVID-19  
2 exposure” and “COVID-19 hazard”]; *id.*, § 3205, subd. (c)(5)(C) [employer trainings].)<sup>37</sup>  
3 They also follow the scientific determination that transmission is particularly acute in indoor  
4 spaces, including office buildings, bars, and restaurants, and can occur at distances greater  
5 than six feet under these conditions.<sup>38</sup> (See, e.g., § 3205, subd. (c)(5)(E).)<sup>39</sup> The Standards  
6 reflect accepted recommendations that wearing face coverings and encouraging physical  
7 distancing are effective measures to prevent and mitigate transmission (see, e.g., § 3205,  
8 subds. (c)(5)(C)-(D), (c)(6)-(7),<sup>40</sup> as are improving ventilation systems for indoor spaces  
9 (see, e.g., § 3205, subds., (c)(2)(E), (c)(8); see also, e.g., § 3205.2, subd. (e)(1) [mandating  
10 changes to employers’ air filtration systems in the event of a major outbreak]).<sup>41</sup>  
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12 <sup>36</sup> See, e.g., Morawska and Milton, *It Is Time to Address Airborne Transmission of*  
13 *Coronavirus Disease 2019 (COVID-19)* (July 6, 2020) 71 *Clinical Infectious Diseases* 2311  
14 <<https://tinyurl.com/y3x6kan6>> (FOE 21); CDC, *How COVID-19 Spreads*, *supra* (FOE 62).

15 <sup>37</sup> All further regulatory references are to title 8 of the California Code of Regulations unless  
16 otherwise indicated.

17 <sup>38</sup> See, e.g., EPA, *Ventilation and Coronavirus (COVID-19)* (July 16, 2020)  
18 <<https://tinyurl.com/yxf9b9f9>> (as of Nov. 6, 2020) (FOE 63); CDC, *COVID-19 Employer*  
19 *Information for Office Buildings*, *supra*, at “Engineering controls: Isolate workers from the  
20 hazard” (FOE 64); CDC, *Considerations for Restaurants and Bars* (Oct. 29, 2020)  
21 <<https://tinyurl.com/yxpkjtrc>> (as of Nov. 6, 2020) (FOE 38); European Centre for Disease  
22 Prevention & Control, *Heating, ventilation and air-conditioning systems in the context of*  
23 *COVID-19* (June 22, 2020) pp. 1-2 <<https://tinyurl.com/y8fsb6ue>> (FOE 29); Burton, *Air*  
24 *Handling in the Era of Corona Virus: Roles Ventilation Can Play in the Control of COVID-*  
25 *19 Transmission in Non-Medical-Care Facilities* (May 13, 2020)  
26 <<https://tinyurl.com/y39bpvrq>> (FOE 27); Nishiura et al., *Closed Environments Facilitate*  
27 *Secondary Transmission of Coronavirus Disease 2019 (COVID-19)* (Apr. 16, 2020)  
28 <<https://tinyurl.com/y2daar7v>> (FOE 37).

29 <sup>39</sup> See, e.g., Setti et al., *Airborne Transmission Route of COVID-19: Why 2 Meters/6 Feet of*  
30 *Inter-Personal Distance Could Not Be Enough*, (April 23, 2020) 17 *Internat. J.*  
31 *Environmental Research & Pub. Health* 1, 4 <<https://tinyurl.com/yxqs2vpk>> (FOE 12).

32 <sup>40</sup> CDC, Press Release, *CDC Calls on Americans to Wear Masks to Prevent COVID-19*  
33 *Spread* (July 14, 2020) <<https://tinyurl.com/ydhbd65f>> (FOE 66); Bourbouiba, *Turbulent*  
34 *Gas Clouds and Respiratory Pathogen Emissions: Potential Implications for Reducing*  
35 *Transmission of COVID-19* (Mar. 26, 2020) 323 *JAMA* 1837 <<https://tinyurl.com/qnu3cjd>>  
36 (FOE 13).

37 <sup>41</sup> See, e.g., Am. Conference of Governmental Industrial Hygienists, *White Paper on*  
38 *Ventilation for Industrial Settings during the COVID-19 Pandemic* (Aug. 2020) p. 15  
39 <<https://tinyurl.com/y5w7cr7e>> (FOE 25); Am. Industrial Hygiene Assn., *Reducing the Risk*  
40 *of COVID-19 Using Engineering Controls* (Aug. 28, 2020) pp. 3-6  
41 <<https://tinyurl.com/y9r8bmmd>> (FOE 26).



1 In addition to challenging the Emergency Temporary Standards in their entirety,  
2 Plaintiffs specifically target two aspects of the Standards: workplace testing and mandatory  
3 exclusion of COVID-positive employees with pay and benefits. Testing and exclusion are  
4 scientifically sound tools for identifying and isolating COVID-positive employees to prevent  
5 workplace outbreaks. The Standards' testing requirements are grounded in documented  
6 findings that pre-symptomatic and asymptomatic carriers pose a high risk of infecting others,  
7 especially in indoor, confined worksites.<sup>42</sup> According to the CDC, diagnostic and screening  
8 testing can help identify infection in asymptomatic persons, including in workplace  
9 settings.<sup>43</sup> For this reason, the CDC recommended “the need to scale up the capacity for  
10 widespread testing and thorough contact tracing to detect asymptomatic infections, interrupt  
11 undetected transmission chains, and further bend the curve downward.”<sup>44</sup>

12 Following CDC recommendations, the Standards Board explained that providing no-  
13 cost testing to employees exposed to COVID-19 would “encourage these employees to get  
14 tested,” “to not report to work following a COVID-19 exposure,” and “prevent the spread of  
15 COVID-19 in the workplace.” (FOE at p. 13; see § 3205, subd. (c)(3)(B)(4); § 3205.2.)  
16 Testing ensures that “employees who test positive and have symptoms can get care earlier,”  
17 and “self-isolation or quarantine can be started sooner.” (FOE at pp. 21, 25; see §§ 3205.1,  
18 subd. (b); 3205.2, subd. (b); see also FOE at p. 31 [“diagnostic testing identifies which  
19 residents are infected and in need of isolation”]; see § 3205.3, subd. (g).) The Emergency  
20 Temporary Standards impose more stringent testing requirements only as multiple cases are  
21 detected. (§ 3205.1 [three or more cases identified within a 14-day period]; § 3205.2 [twenty  
22 or more cases identified within a 30-day period].)

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24 <sup>42</sup> European Centre for Disease Prevention & Control, *Transmission of COVID-19, supra*, at  
“Occupational settings” (FOE 8).

25 <sup>43</sup> CDC, *Interim Guidance for Rapid Antigen Testing for SARS-CoV-2* (Sept. 4, 2020) at  
“Definitions of Diagnostic, Screening, and Surveillance Testing for SARS-CoV-2”  
26 <<https://tinyurl.com/y2mqpg36>> (as of Oct. 15, 2020) (FOE 36).

27 <sup>44</sup> Furukawa et al., *Evidence Supporting Transmission of Severe Respiratory Syndrome  
Coronavirus 2 While Presymptomatic or Asymptomatic* (Jul. 2020) 26 *Emerging Infectious  
Diseases*, at “Public Health Implications of Transmission While Asymptomatic”  
28 <<https://tinyurl.com/y3a8deaa>> (FOE 22).

1 The exclusion (i.e., quarantine) requirements for COVID-positive employees are  
2 based on the widely accepted understanding that contagious individuals need to be isolated  
3 away from communal spaces to avoid spreading the virus. The CDC has recommended that  
4 infected or exposed individuals should self-isolate at home and away from others.<sup>45</sup> Yet the  
5 regular demands of a job often conflict with public health recommendations. As described  
6 above, “presenteeism” (“reporting to work despite being symptomatic for a disease”) is a  
7 significant factor in workplace COVID-19 outbreaks.<sup>46</sup>

8 To discourage contagious employees from returning to the workplace, the Standards  
9 Board adopted appropriate exclusion standards to limit transmission and eliminate incentives  
10 for presenteeism. (FOE at pp. 19-20; see § 3205, subd. (c)(10) [setting standards for  
11 exclusion].) Namely, employers must continue to pay an excluded employee’s earnings and  
12 maintain their seniority and all other workplace rights and benefits, as if they remained on the  
13 job. (FOE at p. 19; see § 3205, subd. (c)(10).) Continued pay and benefits for excluded  
14 employees eliminates the financial incentives to return to work while contagious. The  
15 mandatory employer instructions to employees also include “the importance of not coming to  
16 work and obtaining a COVID-19 test if the employee has COVID-19 symptoms.” (§ 3205,  
17 subd. (c)(5)(H).)

18 The Emergency Temporary Standards, including those provisions specifically  
19 targeted by Plaintiffs, are grounded in conventional scientific and public health findings  
20 about COVID-19 and provide critical protections to frontline workers.

21 **B. The Standards Fulfill the Division’s Mandate to Protect Those Workers**  
22 **Most Vulnerable to COVID-19.**

23 The Division of Occupational Safety and Health implemented the Emergency  
24 Temporary Standards in accordance with its mandate to protect the health and safety of *all*

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26 <sup>45</sup> See, e.g., CDC, *How COVID-19 Spreads*, *supra*, at “Protect Yourself and Others” (FOE  
27 62); CDC, *When to Quarantine* (Sept. 10, 2020) <<https://tinyurl.com/yxwzsgij>> (as of Oct.  
28 25, 2020) (FOE 11).

<sup>46</sup> European Centre for Disease Prevention & Control, *Transmission of COVID-19*, *supra*, at  
“Occupational settings” (FOE 8).

1 California workers. (See Gov. Code, § 6300; *Cortez v. Abich* (2011) 51 Cal.4th 285, 291-  
2 292.) COVID-19 has affected all workplaces, yet the preexisting standards addressing  
3 aerosol transmissible diseases—like COVID-19—covered only a narrow subset of  
4 workplaces: the healthcare industry; facilities working with hazardous materials; certain  
5 police, public health, and social services facilities; and certain medical laboratories. (§ 5199,  
6 subd. (a); see FOE at p. 5, ¶ 16.) The Division was entirely justified in issuing emergency  
7 regulations that contain specific provisions to address the threat of COVID-19 in all  
8 workplaces, while streamlining and strengthening enforcement. Absent these standards, the  
9 vast majority of California workers would be left without specific, mandated protections  
10 against COVID-19.

11 The Standards Board specifically considered the health and safety of vulnerable low-  
12 wage workers in preparing the Emergency Temporary Standards. It looked to existing public  
13 health guidance protecting transportation workers,<sup>47</sup> restaurant workers,<sup>48</sup> and workers with  
14 greater risk to the effects of heat exposure and wildfires.<sup>49</sup> In particular, the Standards Board  
15 expressed concern about the “overrepresentation of migrant temporary farmworkers testing  
16 positive for COVID-19 in California compared to workers in any other industry,” noting the  
17 media reports of outbreaks among farmworker communities described above.<sup>50</sup> The Finding  
18 of Emergency also cited a CDC report that agricultural workers face special risk of COVID-  
19 19 exposure due to crowded working and living conditions and close and prolonged contact

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21 <sup>47</sup> CDC, *Protecting Yourself When Using Transportation* (Oct. 21, 2020)  
22 <<https://tinyurl.com/yy4gpqn5>> (as of Nov. 6, 2020) (FOE 67); CDC, *Cleaning and*  
23 *Disinfection for Non-emergency Transport Vehicles* (Apr. 14, 2020)  
24 <<https://tinyurl.com/yxu3oktq>> (as of Oct. 15, 2020) (FOE 40); see also European Centre for  
25 Disease Prevention & Control, *Transmission of COVID-19, supra*, at “Occupational settings”  
26 (stating that “transport workers” face notable risk of exposure) (FOE 8).

25 <sup>48</sup> CDC, *Considerations for Restaurants and Bars, supra* (FOE 38).

26 <sup>49</sup> CDC, *Employer Information for Heat Stress Prevention during the COVID-19 Pandemic*  
27 (Aug. 26, 2020) <<https://tinyurl.com/yydt85jp>> (as of Nov. 6, 2020) (FOE 70); CDC,  
28 *COVID-19 Considerations for Cleaner Air Shelters and Cleaner Air Spaces to Protect the*  
*Public from Wildfire Smoke* (May 1, 2020) <<https://tinyurl.com/y3rqplp5>> (as of Nov. 6,  
2020) (FOE 68).

<sup>50</sup> FOE at p. 3; see *supra* notes 26-27 (FOE 56-57).

1 with coworkers.<sup>51</sup> Recognizing the unique risks farmworkers face, the Standards Board  
2 adopted protections for workers who live in employer-sponsored housing or use employer-  
3 sponsored transportation to address the elevated risk of exposure in those places. (See  
4 §§ 3205.3; 3205.4.)<sup>52</sup>

5 The Standards provide valuable protections for vulnerable low-wage workers,  
6 especially those working in the agricultural, service, retail, and transportation industries, who  
7 are disproportionately suffering the detrimental effects of the pandemic and are at heightened  
8 risk of contracting the virus.<sup>53</sup> An estimated 52 percent of low-wage workers are employed  
9 in front-line essential jobs.<sup>54</sup> The front-line essential jobs with highest percentages of low-  
10 wage positions are farmworkers, janitors and building cleaners, and cashiers.<sup>55</sup> The majority  
11 of these positions are occupied by Latinx, Asian, and Black workers.<sup>56</sup> These are the people  
12 who were exempted from the State’s shelter-in-place order and expected to appear at their  
13 worksites without any state-mandated protections from aerosol transmission of viruses in  
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15 <sup>51</sup> FOE at pp. 3, fn. 13; 28-34, fns. 19-20, 22, 27-32, citing CDC, *Agriculture Workers and*  
16 *Employers, supra*, at (FOE 61).

17 <sup>52</sup> On employer-sponsored housing, see CDC, *Living in Shared Housing* (Oct. 28, 2020)  
18 <<https://tinyurl.com/y5mb55xk>> (FOE 71); CDC, *COVID-19 Guidance for Shared or*  
19 *Congregate Housing* (Aug. 22, 2020) <<https://tinyurl.com/y4xzrjp7>> (as of Nov. 6, 2020)  
(FOE 60). On employer-sponsored transportation, see CDC, *Protecting Yourself When*  
20 *Using Transportation, supra* (FOE 67); CDC, *Cleaning and Disinfection for Non-emergency*  
21 *Transport Vehicles, supra* (FOE 40).

22 <sup>53</sup> Morgante, *Low-Wage Work Is Linked to Spread of COVID-19, Study Finds* (July 21, 2020)  
23 Univ. of Cal., Merced <<https://tinyurl.com/y218nmae>> (finding a strong relationship between  
24 low-wage work including “agricultural work, food services, transportation, and other  
25 essential roles” and COVID-19 positive test rates); Bohn et al., *Essential Workers and*  
26 *COVID-19* (Mar. 31, 2020) Public Policy Institute of Cal., <<https://tinyurl.com/y4u7m6o7>>  
27 (finding that “[g]rocery store cashiers, store clerks, farmworkers, and delivery and truck  
28 drivers make up sizeable shares of the essential workforce” with increased vulnerability to  
COVID-19 transmission); Schneider and Harknett, *Essential and Unprotected: COVID-19-*  
*Related Health and Safety Procedures for Service-Sector Workers* (May 2020) The Shift  
Project, at p. 7 <<https://tinyurl.com/yy2ytx6t>> (“In the absence of comprehensive federal  
action, states and localities can play an important role in promoting workplace health and  
safety and public health.”).

<sup>54</sup> Thompson and Bernhardt, U.C. Berkeley Labor Ctr., *Front-Line Essential Jobs in*  
*California: A Profile of Job and Worker Characteristics* (May 14, 2020) fig. 1  
<<https://tinyurl.com/y2298vyf>>.

<sup>55</sup> *Id.* at fig. 2.

<sup>56</sup> *Id.* at fig. 4.

1 order to ensure continuity of essential services. Refusing to appear at work would mean loss  
2 of income and benefits, as well as rendering them ineligible for unemployment insurance and  
3 other lost income supplements.

4 One recent poll found that nearly two-thirds of California’s registered voters with  
5 incomes less than \$20,000 described the coronavirus as a “major threat” to their personal and  
6 family health and financial situations, and almost nine out of ten are “extremely concerned”  
7 or “somewhat concerned” about risks to them and their immediate family members from  
8 working outside the home.<sup>57</sup> Low-income workers are more likely to be people of color,  
9 who experience disproportionately higher rates of COVID-19 hospitalizations and deaths  
10 than white individuals.<sup>58</sup> Black, Latino, and Asian/Pacific Islander Californians express far  
11 higher concerns about their health and financial situations and the risk of working outside the  
12 home than their white counterparts.<sup>59</sup>

13 The Emergency Temporary Standards provide basic workplace protections for low-  
14 wage essential workers and others. These protections are also an important step toward  
15 mitigating the health, income, and racial inequities caused by the COVID-19 pandemic.

## 17 CONCLUSION

18 For the foregoing reasons, as well as those presented by Defendants and fellow amici,  
19 Plaintiffs’ request for a preliminary injunction should be denied.

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22 <sup>57</sup> DiCamillo, *Big disparity in the coronavirus’ impact on the lives of Californians across*  
*major racial and ethnic subgroups* (Aug. 6, 2020) Berkeley IGS Poll, at pp. 2-3, 6  
<<https://tinyurl.com/yxm2upe7>>.

23 <sup>58</sup> Wiersinga et al., *supra*, at “Disparities” (FOE 32). See also, e.g., Artiga and Rae, *The*  
*COVID-19 Outbreak and Food Production Workers: Who is at Risk?* (June 3, 2020), Kaiser  
24 Family Foundation <<https://tinyurl.com/y4tbuu4o>> (finding that “outbreaks among food  
25 production workers may exacerbate the disproportionate impact COVID-19 is having on  
26 people of color”); Mahajan and Larkins-Pettigrew, *Racial Demographics and COVID-19*  
*Confirmed Cases and Deaths: a Correlational Analysis of 2886 US Counties* (May 21, 2020)  
42 J. of Pub. Health 445, at p. 446 <<https://tinyurl.com/y3lhecfcz>>; Artiga et al., *Growing*  
27 *Data Underscore that Communities of Color are Being Harder Hit by COVID-19* (Apr. 21,  
2020) Kaiser Family Foundation, <<https://tinyurl.com/y6a6gbsn>>.

28 <sup>59</sup> DiCamillo, *supra*, at pp. 2-3, 6.

1 Dated: January 19, 2021

Respectfully submitted,



LINDSAY NAKO, Impact Fund

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