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VIA EMAIL

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**Re: Demand for Rescission of Illegitimate and Unconstitutional April 8, 2020
Order of the Health Officer of Merced County**

Dear County Supervisors:

This firm, in coordination with the Center for American Liberty, has been retained by residents of Merced County in connection with the County's adoption and enforcement of the April 8, 2020 Order of the Health Officer of Merced County (hereinafter "Order").¹ For the reasons addressed in this letter, the Order is unconstitutional on numerous grounds. Accordingly, we ask that the County immediately rescind the Order and notify this office and the public of the same by **5:00 p.m. on April 21, 2020**. If the County fails to do so, our client is prepared to file a federal lawsuit in the immediate future, seeking immediate injunctive relief.

I. The April 8th Order Discriminates Against Religious Institutions and Individuals by Banning Church Services as "Non-Essential" While Allowing "Essential" Businesses to Have Gatherings with Social Distancing.

In a recent press release, Attorney General William Barr stated:

¹ As of the date of this letter, the April 8, 2020 Order is available online at:
<https://www.co.merced.ca.us/DocumentCenter/View/23832/Stay-at-Home-Order?bidId=>

[W]here a state has not acted evenhandedly, it must have a compelling reason to impose restrictions on places of worship and must ensure that those restrictions are narrowly tailored to advance its compelling interest. While we believe that during this period there is a sufficient basis for the social distancing rules that have been put in place, the scope and justification of restrictions beyond that will have to be assessed based on the circumstances as they evolve.

Religion and religious worship continue to be central to the lives of millions of Americans. This is true more so than ever during this difficult time. The pandemic has changed the ways Americans live their lives. Religious communities have rallied to the critical need to protect the community from the spread of this disease by making services available online and in ways that otherwise comply with social distancing guidelines.

The United States Department of Justice will continue to ensure that religious freedom remains protected if any state or local government, in their response to COVID-19, singles out, targets, or discriminates against any house of worship for special restrictions.

Press Release, U.S. Dep't of Justice, *Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing; Department of Justice Files Statement of Interest in Mississippi Church Case* (April 14, 2020).²

Merced County, by not allowing churches to conduct services with the same social distancing precautions that “essential businesses” abide by, violates the Department of Justice’s guidelines on social distancing and limiting religious gatherings, and unconstitutionally discriminates against religious organizations and members.

II. Ban on Religious Services Violates the First Amendment.

The First Amendment to the U.S. Constitution prohibits government actors from enforcing any “law respecting an establishment of religion, or prohibiting the free exercise thereof.” U. S. Const. amend. I; *see also Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (applying the First Amendment to the States through the Fourteenth Amendment). The California Constitution similarly protects freedom of religion. Cal. Const., art. I, § 4. Accordingly, the County cannot ban “faith based services” taking place outside the home without first satisfying the most exacting standard of judicial review: strict scrutiny. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 562 (2004).

Under strict scrutiny, the government cannot burden religious activity unless it first establishes (1) a compelling interest for imposing such burdens, and (2) that the burdens are the “least restrictive means” necessary to further that compelling interest. Federal courts routinely enjoin the enforcement of laws and policies under this standard. *See e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 524.

² <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-issues-statement-religious-practice-and-social-distancing-0>.

Merced’s Order states that all public or private gatherings are prohibited regardless of venue or size. The April 8th Order makes no exceptions for religious observances. The April 8th Order also makes no exceptions for congregations taking extensive protective measures, such as drive-in services in which participants remain isolated in their cars, or in-person services in which participants are separated by more than six feet. Simply put, there was essentially *no* effort to narrowly tailor the Order so as not to violate individuals’ First Amendment right to religious freedom. Instead, the County proclaimed its draconian restrictions, essentially blanket-banning participation in religious services for an indefinite period of time, while at the same time allowing other necessary and important movement. As the Order cannot withstand strict scrutiny—or any other form of scrutiny—it must be rescinded immediately.

III. The Order Is Void for Vagueness.

A regulation is constitutionally void on its face when, as matter of due process, it is so vague that persons “of common intelligence must necessarily guess at its meaning and differ as to its application” *Connally v. General Const. Co.* (1926) 269 U.S. 385, 391; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115. The void for vagueness doctrine is designed to prevent arbitrary and discriminatory enforcement. *Ketchens v. Reiner* (1987) 194 Cal.App.3d 470, 477. The problem with a vague regulation is that it “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis....” *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108–109.

Here, the Order is vague for several reasons, including but not limited to those addressed below.

A. The Order Relies on Inapplicable Authority.

The County states that the Order is authorized by California Health and Safety Code Sections 101085. This is simply incorrect. Emergency powers exercised pursuant to Section 101085 require that an emergency be declared pursuant to Section 101080, which in turn applies only when “a release, spill, escape, or entry of waste occurs as described in paragraph (2) of subdivision (b) of Section 101075.” Since there is no “release, spill, escape, or entry of waste,” Section 101085 is not applicable, and the Order is void.

B. Governor Newsom’s Order Requires Only that Persons “Heed” the Public Health Official’s “Stay-at-Home” Notice.

The County brazenly mischaracterizes Governor Newsom’s March 19, 2020 Executive Order N-33-20.

Contrary to the County’s assertions in the Order, Governor Newsom’s order does *not* state that “all individuals . . . are ordered to shelter at their place of residence. . .”. A careful reading of the Governor’s order reveals that residents are only instructed to “heed” State public health directives . . .”. According to Meriam-Webster, the plain meaning of the word “heed” is “to give consideration or attention to”—not to submit or comply with, as suggested

by the County’s interpretation. Governor Newsom’s order that California residents give careful thought to the directives of the Department of Public Health does not equate to an order to comply with those directives.

The Public Health directive itself carries no legal weight, despite nominally “ordering” that all persons not engaging in essential activities stay at home. Under established California law, the Public Health Department cannot forcibly quarantine persons unless there is probable cause that such persons are actually infected. *Ex parte Martin* (1948) 83 Ca.App.2d 164, 167; *Jew Ho v. Williamson* (C.C. Cal. 1900) 103 F. 10 [San Francisco’s quarantine to contain bubonic plague in May 1900 found to be unreasonable]; *Wong Wai v. Williamson* (CC Cal. 1900) 103 F. 1 [holding that San Francisco’s May 1900 quarantine violated rights secured by the Equal Protection Clause]; see also *Ex parte Arta* (1921) 52 Cal.App. 380, 383 [“a mere suspicion, unsupported by facts giving rise to reasonable or probable cause, will afford no justification at all for depriving persons of their liberty and subjecting them to virtual imprisonment under a purported order of quarantine.”]. As such, directives from California public health officials are enforceable only to the extent there exists probable cause that *each* such non-essential worker has contracted Covid-19—which is clearly not the case. Absent such probable cause, the directive has no legally enforceable effect as to any person not shown to be exposed within the meaning of the statute and precedent.

IV. The Order Violates the Fundamental Right to Travel.

The United States Supreme Court has held that the “right to travel is a part of the liberty of which the citizen cannot be deprived without the due process of law under the Fifth Amendment.” *Kent v. Dulles* (1958) 357 U.S. 116, 126. The Court found that “[t]ravel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.” *Id* at 126. They have also ruled that the “right to travel is an unconditional personal right, a right whose exercise may not be conditioned.” *Dunn v. Blumstein* (1972) 405 U.S. 330, 341.

Courts apply the compelling state interest test to assess the constitutionality of the government’s action when that action implicates the fundamental right to travel. *See, e.g., Memorial Hospital v. Maricopa County* (1974) 415 U.S. 250; *Dunn v. Blumstein* (1972) 405 U.S. 330; and *Shapiro v. Thompson*, (1969) 394 U.S. 618. Under the compelling state interest test, the government must prove that there is a “clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest.” *Dunn* at 341. The *Dunn* Court continued by finding that in order to prove that there is a substantial government interest, the government “cannot choose means that unnecessarily burden or restrict constitutionally protected activity”, that the statute must be “drawn with precision”, and “must be tailored to serve their legitimate objectives.” *Dunn* at 343.

The County fails to satisfy this standard. The County is picking and choosing which enterprises may open and which may not open. As such, the Order is not narrowly tailored, and the fact that the County is not allowing businesses or churches to attempt to practice social distancing clearly shows that the government is not executing a plan that is the least

restrictive one possible – in fact is has imposed the *most* restrictive possible means of accomplishing its ends.

In conclusion, for the foregoing reasons, we feel that the Order is defective and must be rescinded immediately in order to limit the County's liability for violations to county residents' constitutional rights. Our firm is preparing the necessary paperwork to file a suit seeking immediate relief. Failure to rescind this order by the end of business on April 21, 2020 will result in a lawsuit being filed.

Regards,

A handwritten signature in blue ink that reads "Harmeet K. Dhillon". The signature is fluid and cursive, with the first name being the most prominent.

Harmeet K. Dhillon

cc: Mark Trammell, Esq.
Center for American Liberty