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14 *Attorneys for Petitioners*
15 *Joseph L. Muller, Laura Ferguson, and*
16 *Gregory Raths*

17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

18 **COUNTY OF ORANGE—UNLIMITED JURISDICTION**

19 **JOSEPH L. MULLER**, in his individual
20 capacity; **LAURA FERGUSON**, in her
individual capacity; **GREGORY RATHS**, in his
21 individual capacity;

Petitioners,

22 v.

23 **GAVIN NEWSOM**, in his official capacity as
24 the Governor of California; **XAVIER**
25 **BECERRA**, in his official capacity as the
Attorney General of California; **MARK**
26 **GHILARDUCCI**, in his official capacity as the
Director, Governor's Office of Emergency
27 Services; and **WADE CROWFOOT**, in his
official capacity as the Secretary, California
28 Natural Resources Agency;

Respondents.

Case Number:

**EMERGENCY APPLICATION FOR WRIT
OF MANDAMUS [CAL. CODE CIV. PRO. §
1085]**

IMMEDIATE RELIEF REQUESTED

1 By this petition for extraordinary relief, Petitioners ask this Court to intervene immediately
2 and uphold the clear and direct requirements of our California Constitution.

3 **PARTIES**

4 Petitioner Joseph L. Muller is made a party to this Action in his individual capacity and not in
5 his official capacity as an elected member of the Dana Point City Council. He was first elected to the
6 city council in 2014. Muller lives within walking distance of the Pacific Ocean. He visits his local
7 beach approximately three times a week. This last weekend, he personally visited the beach and did
8 not see any overcrowding, nor blatant disregard for social distancing.

9 Petitioner Muller as a local elected has been carefully studying the coronavirus data available
10 as the outbreak has unfolded. He has been in contact with his local elected officials discussing the
11 need to reopen Orange County, because the data did not support an extension of the local shutdown.
12 Muller fully supports his county supervisors who voted Tuesday to start the process of reopening
13 Orange County so long as federal Centers for Disease Control guidelines were followed. He believes
14 that the only reason Governor Newsom is shutting down the Orange County beaches is a direct
15 retaliation to Orange County Supervisors standing up for the Constitutionally-protected liberty rights
16 of their constitutions.

17 Petitioner Laura Ferguson is made a party to this Action in her individual capacity and not in
18 her official capacity as an elected member of the San Clemente City Council. She was first elected to
19 the city council in 2018. Ferguson was at the beach all day last Sunday, April 25, 2020. She did not
20 observe any overcrowding, nor did she observe obvious violations to the CDC social distancing
21 guidelines.

22 Petitioner Ferguson, as a local elected official, has been carefully following the data related to
23 COVID-19. It is her opinion based upon Orange County data and the data in her own city that the
24 “Shelter in Place” orders should be lifted for her community. It is her belief that the only reason why
25 Newsom is shutting down Orange County beaches is in retaliation to the cities and county looking at
26 their data and deciding that it was safe to start reopening the local economy, in contradiction to what
27 Newsom was saying.

28 Petitioner Gregory Rath is made a party to this Action in his individual capacity and not in his

1 official capacity as an elected member of the Mission Viejo City Council. He was first elected to city
2 council in 2014. Last Sunday, April 25, 2020, he drove by Newport beach and was able to carefully
3 observe the beach situation. The beach was not overcrowded, and he did not see any clear violations
4 to CDC guidelines.

5 Petitioner Rath, as a local elected leader, has had the opportunity to review coronavirus data.
6 Based on his review of this data, he believes it is safe for the community to go to the beach as long as
7 they follow the CDC social distancing guidelines. Based on the last six weeks, Rath believes that the
8 people in his community have been trained to follow the CDC guidelines as they have visited essential
9 businesses. He believes it is safe to open up all businesses in his community now that they have been
10 trained in social distancing.

11 Respondent Gavin Newsom is made a party to this Action in his official capacity as the
12 Governor of California. The California Constitution vests the “supreme executive power of the State”
13 in the Governor, who “shall see that the law is faithfully executed.” (Cal. Const. Art. V, § 1.)
14 Governor Newsom signed the statewide shelter-in-place order.

15 Respondent Xavier Becerra is made a party to this Action in his official capacity as the
16 Attorney General of California. Under California law he is the chief law enforcement officer with
17 supervision over all sheriffs in the state. (Cal. Const. Art. V, § 13.)

18 Respondent Mark Ghilarducci is made a party to this Action in his official capacity as the
19 Director of the Governor’s Office of Emergency Services.

20 Respondent Wade Crowfoot is made a party to this Action in his official capacity as the
21 Secretary of the California Natural Resources Agency.

22 **JURISDICTION AND VENUE**

23 This Court has jurisdiction over this action pursuant to the California Constitution, Article VI,
24 Section 10, which grants the superior courts “original jurisdiction in proceedings for extraordinary
25 relief in the nature of mandamus”

26 This Court has jurisdiction over all Respondents, because each Respondent is a citizen of
27 California.

28 Venue is proper in this Court, because Respondents exercise their authority in their official

1 capacities in this County by ordering that the beaches of Orange County be shut down.

2 **QUESTION PRESENTED**

3 The limited question presented here is whether Newsom abused his discretion by issuing a
4 directive closing all county and local beaches within Orange County, and whether the closure of
5 Orange County beaches violates the public’s state and federal constitutional rights of California
6 residents.

7 **TIMELINESS OF PETITION**

8 This Petition is filed within a twenty-one hours of the California Governor’s Office of
9 Emergency Services April 30, 2020 letter directing the closure of all Orange County beaches. The
10 urgency of resolving this issue expeditiously is demonstrated by the fact that the directive was to take
11 effect the next day, May 1, 2020, and the public will be deprived of the enjoyment and use of the
12 beaches in Orange County.

13 **IRREPARABLE INJURY/NECESSITY FOR RELIEF**

14 Petitioners have no plain, speedy and adequate remedy at law, other than the relief sought in
15 this request.

16 Petitioners’ irreparable injury is founded on the fundamental principle that the public has a
17 constitutionally guaranteed right to access the beaches of Orange County through their rights under
18 the California Constitution and the United States Constitution. In seeking to deny millions of citizens
19 access to the beaches of Orange County and force them to remain in their homes but for what the
20 government deems “essential activities,” Newsom has committed a grave abuse of his power that must
21 be immediately addressed to avoid the future application of such abuses on the same or greater scale.

22 Should this Court find that the government is issuing orders without a legitimate public
23 purpose, in an abusive manner, and in violation of the California and United States Constitution, this
24 Court’s order staying such appropriation will end such abuses and prevent future abuses.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, Petitioners pray that this Court:

27 (a) Issue an order to show cause why Petitioners’ Petition for Writ of Mandate, which
28 prohibits Respondents Governor Newsom, Attorney General Becerra, Director Ghilarducci and

1 Secretary Crawford from mandating that all Orange County beaches be indefinitely closed, should not
2 be granted, issue the interim stay relief requested herein prohibiting Respondents Governor Newsom,
3 Attorney General Becerra, Director Ghilarducci and Secretary Crawford from mandating that all
4 Orange County beaches be closed pending the Court's determination on the merits, and hold a hearing
5 and decide the matter not later than May 7, 2020; or,

6 (b) Grant the Petitioners' Petition for Peremptory Writ of Mandate without a hearing,
7 prohibiting Respondents Governor Newsom, Attorney General Becerra, and Directors Ghilarducci and
8 Secretary Crawford from mandating that all Orange County beaches be closed as fundamentally
9 inconsistent and in conflict with the California and United States Constitutions;

10 (c) For attorneys' fees and costs pursuant to Code Civ. Proc., § 1021.5;

11 (d) For costs of suit incurred herein; and

12 (e) For such other and further relief as the Court deems just and proper.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Freedom of movement is a fundamental right, and its exercise may be restricted only where
3 necessary to further the most compelling state interest. (*People v. McKelvy* (1972) 23 Cal.App.3d
4 1027.)

5 **STATEMENT OF FACTS**

6 **A. History of State of Emergency for Coronavirus**

7 On March 13, 2020, President Donald J. Trump proclaimed a National State of Emergency as
8 a result of the threat of the emergence of a novel coronavirus, COVID-19.¹ Since the initial outbreak
9 of COVID-19 in the United States in February and March 2020, the federal government’s projections
10 of the anticipated national death toll related to the virus has decreased substantially, by an order of
11 magnitude. Despite such revisions, Respondents have increasingly restricted—where not outright
12 banned—Californians’ engagement in constitutionally-protected activities.²

13 On March 4, 2020, Newsom proclaimed a State of Emergency as a result of the threat of
14 COVID-19.³ On March 19, 2020, Newsom issued Executive Order N-33-20 in which he ordered “all
15 residents are directed to immediately heed the current State public health directives.”⁴ (also referenced
16 as “Stay Home Order”). The state public health directive requires “all individuals living in the State of
17 California to stay home or at their place of residence except as needed to maintain continuity of
18 operations of the federal critical infrastructure sectors”⁵ The public health directive provides that

19 _____
20 ¹ As of the date of this filing, the Proclamation of a National Emergency can be found online at:
21 [https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-
concerning-novel-coronavirus-disease-covid-19-outbreak/](https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/).

22 ² See, e.g., [https://www.usatoday.com/story/news/investigations/2020/04/09/coronavirus-deaths-u-s-
could-closer-60-k-new-model-shows/5122467002/](https://www.usatoday.com/story/news/investigations/2020/04/09/coronavirus-deaths-u-s-could-closer-60-k-new-model-shows/5122467002/)

24 ³ As of the date of this filing, the Proclamation of a State of Emergency can be found online at:
25 <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

26 ⁴ As of the date of this filing, Executive Order N-33-20 can be found online at:
27 [https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-
HEALTH-ORDER.pdf](https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf).

28 ⁵The State Public Health Directive was included in the text of Executive Order N-33-20.

1 its directives “shall stay in effect until further notice.”⁶

2 **B. Media Releases Misleading Photographs of a Supposedly Crowded Newport Beach**

3 On April 25-26, a string of newspapers published similar articles, alleging that Southern
4 California beaches were packed full of people completely flouting CDC guidelines.⁷ Photographs
5 taken from a ground level viewpoint, seemingly showing beachgoers tightly packed together on
6 Newport Beach, were published in tandem.⁸

7 On April 28, the Newport Beach City Mayor, William O’Neill, showed several aerial
8 photographs taken on the same day that the newspaper photographs were taken.⁹ The aerial
9 photographs showed far more space between beachgoers than the latter implied. The mayor also
10 showed testimonials from firemen and law enforcement, expressing their praise at those on Newport
11 and Huntington Beach for abiding by guidelines.^{10 11} The mayor also showed statistics comparing
12 peak crowds at Newport Beach on July 4, 2019, with the number of people on the beaches on April
13 25, 2020, the day that was the subject of the aforementioned articles.¹² The latter was more than three
14 times smaller than the former.¹³

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17 ⁶ *Id.*

18 ⁷ See e.g., <https://www.ocregister.com/2020/04/25/eager-early-risers-hit-the-beach-in-san-clemente-as-closure-lifts/>; and <https://www.mercurynews.com/2020/04/26/eager-early-risers-hit-the-beach-in-san-clemente-as-closure-lifts/>.

20 ⁸ See, headline photograph at *supra*, n. 10, 11.

21 ⁹ Available as of April 30, 2020 at 16:10-16:20,
22 http://newportbeach.granicus.com/MediaPlayer.php?view_id=44&clip_id=3477.

23 ¹⁰ *Id* at 16:17-29.

24 ¹¹ See *Official Statement of Newport Police Chief Jon Lewis*, accessible as of May 1, 2020 at:
25 <https://www.newportbeachca.gov/Home/Components/News/News/38170/2720>.

26 ¹²*Id.* at 15:01-29.

27 ¹³ *Id.*

1 The mayor also showed a comparison of the per-capita number of COVID-19 cases in
2 surrounding beach communities that had closed their public beaches versus the ones that had stayed
3 open, such as Newport Beach.¹⁴ The cities with closed beaches—Malibu, Manhattan Beach, Santa
4 Monica, Redondo Beach, Venice Beach, Long Beach, Hermosa Beach, Marina Del Ray—had higher
5 confirmed COVID-19 cases (all more than 116 per 100,000, some more than 200 per 100,000) than
6 the ones with open beaches—Dana Point, 68.22 per 100,000, San Clemente, 68.80 per 100,000,
7 Huntington Beach, 88.93 per 100,000, Newport Beach, 107.82 per 100,000.¹⁵

8 **C. Newsom Reacts to the Misleading Photographs with Restrictive Measures on**
9 **Public Beaches**

10 On the evening of April 29, 2020, a memorandum—stating that Newsom would shut down all
11 state beaches and state parks throughout the entire state of California—was sent to all the police chiefs
12 in California, and subsequently leaked to the media. Eric Nunez, president of the California Police
13 Chiefs Association, said it was sent to give chiefs time to plan ahead of Newsom’s expected
14 announcement April 30.¹⁶

15 On information and belief, Newsom’s office did not send a similar memo to a single mayor,
16 city council member or supervisor of a California city, township, or municipality. The communique
17 effectively bypassed all local authorities. It reached out to local law enforcement only to ready a
18 closure of public spaces while not conferring with or obtaining the blessing of local authorities.

19 On April 30, 2020, Newsom stated that he was unaware of the memorandum, and claimed that
20 he had “never saw it.”¹⁷ The same day, Newsom ordered that all beaches in Orange County be shut
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23 ¹⁴ *Id.* 18:28-19:57.

24 ¹⁵ *Id.*

25 ¹⁶ This article was accessible, as of April 30, 2020, at: [https://www.kpbs.org/news/2020/apr/29/gov-
26 newsom-order-all-beaches-closed-memo-police-ch/](https://www.kpbs.org/news/2020/apr/29/gov-newsom-order-all-beaches-closed-memo-police-ch/).

27 ¹⁷ Available as of April 30, 2020 at: [https://www.cnn.com/travel/article/california-newsom-close-
28 beaches-parks/index.html](https://www.cnn.com/travel/article/california-newsom-close-beaches-parks/index.html).

1 down, banned to the public.¹⁸ Beaches in other coastal communities that have chosen to allow them to
2 stay open, were not similarly ordered to be shut down.

3
4 **D. Four Separate Antibody Studies Evince a COVID-19 Death Rate More**
5 **Comparable to the Common Flue than the 1918-1919 Spanish Influenza**

6 On April 27, 2020, a revised study released by a team at Stanford University estimated that,
7 based on antibody tests of 3,300 people, as much as 4.16% of Santa Clara County's population
8 (81,000 people), had already contracted COVID-19 by April 3 and 4, 2020.¹⁹ Santa Clara had 39
9 deaths as of April 4, 2020²⁰ out of a county population of 1,927,852.²¹ This means that the death rate
10 of those who had COVID-19 is .048%.

11 On April 10, 2020, Los Angeles County had 8,430 confirmed cases 241 deaths;²² on April 11,
12 2020, Los Angeles County had 8,873 cases and 265 deaths, for an approximate death rate of 2.98
13 percent.²³ On April 20, 2020, the preliminary results of a collaborative antibody study done between
14 the University of South California and the Public Health Department of Los Angeles County were
15 released. Based on 863 tests, researchers estimated that as many as 5.6 percent of the L.A. County's
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18 ¹⁸ See, *supra*, n. 20.

19 ¹⁹ As of May 1, 2020, accessible at:
20 <https://www.medrxiv.org/content/10.1101/2020.04.14.20062463v2.full.pdf>.

21 ²⁰ As of May 1, 2020, accessible at: [https://www.santaclaraca.gov/i-want-to/stay-](https://www.santaclaraca.gov/i-want-to/stay-informed/newsroom/coronavirus-updates/archived-covid-19-news-updates)
22 [informed/newsroom/coronavirus-updates/archived-covid-19-news-updates](https://www.santaclaraca.gov/i-want-to/stay-informed/newsroom/coronavirus-updates/archived-covid-19-news-updates).

23 ²¹ <https://www.census.gov/quickfacts/fact/table/santaclaracountycalifornia/PST045219>

24 ²² As of May 1, 2020, accessible at:
25 [http://publichealth.lacounty.gov/phcommon/public/media/mediapubdetail.cfm?unit=media&ou=ph&p](http://publichealth.lacounty.gov/phcommon/public/media/mediapubdetail.cfm?unit=media&ou=ph&pro=media&prid=2309)
26 [rog=media&prid=2309](http://publichealth.lacounty.gov/phcommon/public/media/mediapubdetail.cfm?unit=media&ou=ph&pro=media&prid=2309).

27 ²³ As of May 1, 2020, accessible at:
28 [http://publichealth.lacounty.gov/phcommon/public/media/mediapubdetail.cfm?unit=media&ou=ph&p](http://publichealth.lacounty.gov/phcommon/public/media/mediapubdetail.cfm?unit=media&ou=ph&pro=media&prid=2311)
[rog=media&prid=2311](http://publichealth.lacounty.gov/phcommon/public/media/mediapubdetail.cfm?unit=media&ou=ph&pro=media&prid=2311).

1 population, or 442,000, already had COVID-19 on April 10 and 11.²⁴

2 A similar antibody test in and by New York City showed that 21 percent of the population
3 (1,763,737) were infected with COVID-19.²⁵ With the current number of confirmed deaths (12,571),²⁶
4 the putative death rate is 0.71 percent.

5 A similar antibody study by Miami-Dade County told a similar story: the confirmed number of
6 deaths (1,268)²⁷ divided by the estimated number of infections (221,000)²⁸ gave a putative death rate
7 of .57 percent. Each of these studies indicates that the COVID-19 mortality rate falls significantly
8 short of those associated with other epidemics, including the 1917-1918 Spanish Flu, believed to have
9 caused at least 2.5 percent of the infected to die.²⁹

10 **E. Orange County's COVID-19 Actual Death Rate is Five Times Lower than the**
11 **California Death Rate**

12 As of April 30, 2020, there were a total of 60,057 deaths in the United States³⁰ out of a total
13 population of 328,239,523.³¹ Based on these numbers, the United States' actual death rate due to
14 COVID-19 is approximately .018 percent (or 18 for every 100,000).

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16 ²⁴ As of May 1, 2020, accessible at:
17 <http://www.publichealth.lacounty.gov/phcommon/public/media/mediapubhpdetail.cfm?prid=2328>.

18 ²⁵ As of May 1, 2020, accessible at: <https://www.nytimes.com/2020/04/23/nyregion/coronavirus-antibodies-test-ny.html>. The estimated population of NYC is 8,398,748 as of July 1, 2018 per
19 <https://www.census.gov/quickfacts/newyorkcitynewyork>.

20 ²⁶ As of May 1, 2020, accessible at: <https://www1.nyc.gov/site/doh/covid/covid-19-data.page>.

21 ²⁷ As of May 1, 2020, accessible at:
22 <https://www.miamiherald.com/news/coronavirus/article242395581.html>.

23 ²⁸ As of May 1, 2020, accessible at: [https://www.miamidade.gov/releases/2020-04-24-sample-testing-
24 results.asp](https://www.miamidade.gov/releases/2020-04-24-sample-testing-results.asp).

25 ²⁹ As of May 1, 2020, accessible at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3291398/>.

26 ³⁰ As of April 30, 2020, accessible at: [https://www.cdc.gov/coronavirus/2019-ncov/cases-
27 updates/cases-in-us.html](https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html)

28 ³¹ <https://www.census.gov/quickfacts/fact/table/US/PST045219>

1 As of April 30, 2020, there were a total of 2,163 deaths in California³² out of a total population
2 of 39,512,223.³³ Based on these numbers, the California's actual death rate due to COVID-19 is
3 approximately .005 percent (or 5 for every 100,000).

4 As of April 30, 2020, there were a total of 44 deaths in Orange County³⁴ out of a total
5 population of 3,175,692.³⁵ ³⁶ Based on these numbers, the Orange County's actual death rate as a
6 result of COVID-19 is approximately .001 percent (or 1 for every 100,000).

7 **F. The Closure of Public Beaches and Parks has no Logical Connection to the**
8 **Purpose of Granting the Governor Emergency Power to Suppress Transmission**
9 **and Death from COVID-19**

10 Studies and health data show that the closure of public beaches would not only be of no benefit
11 to preventing the transmission of COVID-19 or death from it, it could actually be detrimental to such
12 efforts.

13 First, open air and sunlight (whether the mechanism of action is UV radiation or thermal
14 energy) reduce the likelihood of transmission; the open air seemingly dissipates viruses to a negligible
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22 ³² As of April 30, 2020, accessible at:

23 <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx#COVID-19%20by%20the%20Numbers>.

24 ³³ <https://www.census.gov/quickfacts/CA>

25 ³⁴ As of April 30, 2020, accessible at: <https://orangecountycovid19.com/>

26 ³⁵ <https://www.census.gov/quickfacts/fact/table/orangecountycalifornia/PST045219>

27 ³⁶ <https://www.census.gov/quickfacts/fact/table/US/PST045219>

1 amount,³⁷ while sunlight lessens the lifetime of an infectious, viral particle.^{38 39} A study, conducted by
2 Chinese scientists on COVID-19 clusters in Wuhan, showed that outdoor transmissions were few and
3 rare.⁴⁰ A study on the physical-chemical structure of the SARS virus, a virus in the same family of
4 coronaviruses as COVID-19 virus, showed that prolonged exposure to UV radiation resulted in the
5 destruction of viral particles.⁴¹ A Department of Homeland Security official revealed that the
6 preliminary results from a study showed that sunlight and high temperatures could destroy a COVID-
7 19 viral particle within minutes.⁴²

8 Second, COVID-19 seems to most severely affect those with underlying medical issues. The
9 lack of access to fresh air, sunlight, exercise and social companionship (even from six feet away) can
10 be detrimental, if not downright deadly, to the physical and psychological health of people.⁴³
11 Substance abuse relapse, lower immune system response, and higher risks for other medical
12 conditions leaves one more vulnerable to COVID-19 transmission, infection, and death.⁴⁴

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14 ³⁷ As of May 1, 2020, accessible at:
15 <https://www.medrxiv.org/content/10.1101/2020.04.04.20053058v1>.

16 ³⁸ As of May 1, 2020, accessible at:
17 <https://www.sciencedirect.com/science/article/pii/S016609340400179X> (similar coronavirus, the one
18 that causes the SARS outbreak, is vulnerable to UV radiation).

19 ³⁹ As of May 1, 2020, accessible at: <https://www.newsweek.com/sunlight-kills-coronavirus-scientist-1500012>.

20 ⁴⁰ *See, supra*, n.35.

21 ⁴¹ *See, supra*, n.36.

22 ⁴² As of May 1, 2020, accessible at: <https://www.reuters.com/article/us-health-coronavirus-trump/sunlight-heat-and-humidity-weaken-coronavirus-u-s-official-says-idUSKCN2253SA>.

23 ⁴³ Newport Beach City Mayor describing discussions with doctors at Hoag Hospital about observing
24 increase in at 11:55-12:10, available as of May 1, 2020 at:
25 http://newportbeach.granicus.com/MediaPlayer.php?view_id=44&clip_id=3477.

26 ⁴⁴ As of May 1, 2020, accessible at: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html>.

1 Third, Southern California cities with closed beaches—Malibu, Manhattan Beach, Santa
2 Monica, Redondo Beach, Venice Beach, Long Beach, Hermosa Beach, Marina Del Ray—had *higher*
3 confirmed COVID-19 cases (all more than 116 per 100,000, some more than 200 per 100,000) than
4 the ones with open beaches—Dana Point, 68.22 per 100,000, San Clemente, 68.80 per 100,000,
5 Huntington Beach, 88.93 per 100,000, Newport Beach, 107.82 per 100,000.⁴⁵

6 Finally, official health bodies do not recommend the closure of public spaces and or the
7 implementation of major, internal travel restrictions. For example, the CDC’s official mitigation
8 guidelines for COVID-19 make no mention of closing public parks or breaches.⁴⁶ WHO and European
9 CDC guidelines also advise against “internal travel restrictions” during a pandemic because they have
10 little effect on reducing transmission, while imposing huge social and economic costs.⁴⁷

11 ARGUMENT

12 A. The Directive Closing All Orange County Beaches is a Clear Abuse of Discretion 13 by Newsom

14 Orange County has a population of over 3.1 million individuals. Despite the millions of people
15 residing in the county, Orange County has done an extraordinary job in controlling and mitigating the
16 spread of the coronavirus. As of April 30, 2020, 44 individuals have died from the coronavirus. This
17 low death rate was accomplished at the same time that local and county government balanced the need
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19 _____
20 ⁴⁵ See chart shown by Newport Beach City Mayor, available as of May 1, 2020 at 18:28-19:57,
http://newportbeach.granicus.com/MediaPlayer.php?view_id=44&clip_id=3477.

21 ⁴⁶ As of May 1, 2020, accessible at: [https://www.cdc.gov/coronavirus/2019-
22 ncov/downloads/community-mitigation-strategy.pdf](https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf).

23 ⁴⁷ “There is limited evidence for the effectiveness of internal travel restrictions, and it has legal,
24 ethical and economic implications. Although 37% of national pandemic preparedness plans of
25 Member States have travel restriction plans as a component of NPIs (65), the acceptability is still
26 undetermined.” World Health Organization, *Non-pharmaceutical public health measures for
27 mitigating the risk and impact of epidemic and pandemic influenza*, at p. 71, accessible as of May 1,
28 2020 at: <https://apps.who.int/iris/bitstream/handle/10665/329438/9789241516839-eng.pdf?ua=1>; see
also European Centre for Disease Prevention and Control, *Public Health Measures for Influenza
Pandemics*, p. 9, § 12 (“Internal travel restrictions [have] minor delaying effect[s and] [m]assive
[costs and risks], including social disruption.”).

1 to protect the community from the virus while maximizing individual liberties to engage in critical
2 recreational activities, such as enjoying the beach while practicing social distancing.

3 On April 30, 2020, Newsom directed his Office of Emergency Services to issue a directive
4 closing all beaches in Orange County, including county and city beaches (the “Beach Closure
5 Directive”). This directive was based on a false media narrative that individuals were not practicing
6 social distancing. In reality, the vast majority individuals were behaving responsibly and heeding
7 social distancing protocols as evidenced by the statement issued by the Police and Fire Chief of
8 Newport Beach. (Exhibit 3.) The directive was also devoid of any scientific data to support the
9 directive to shut down all beaches in direct contradiction to recent policy positions adopted by county
10 and local government to continue the operation of Orange County beaches in a safe manner.

11 “Neither the separation of powers doctrine nor the political question doctrine precludes the
12 trial court from exercising its power under Code of Civil Procedure section 1085 to correct abuses of
13 discretion by public officers like the Governor.” (*National Tax-Limitation Com. v. Schwarzenegger*
14 (2003) 113 Cal.App.4th 1266, 1271.) “In addition, the Governor is not immune from a properly issued
15 writ of mandate under the immunity provision in the Act (§ 8655).” (*Ibid*)

16 **1. No Legal Authority Has Been Asserted To Close Orange County Beaches**

17
18 Here, there is no question the Beach Closure Directive constitutes a clear abuse of discretion
19 by Newsom. First, the Beach Closure Directive does not contain any legal authority authorizing the
20 state to close county and city beaches within Orange County. Instead the letter references Newsom’s
21 March 19, 2020 Executive Order (N-33-20) directing all residents to *heed* current State public health
22 directives. The plain meaning of the term “heed” means to “pay attention to.” It does not compel
23 compliance with any public health orders.

24 The letter then states that “beaches operated by local governments in Orange County are
25 directed to institute full closure starting tomorrow, May 1.” The letter cites no authority for this
26 directive and Petitioners contend that the Newsom lacks the authority to order such a directive. For the
27 reasons stated below, the Beach Closure Directive impinges on substantial state and federal
28 Constitutional rights citizens have to freely enjoy California beaches.

1 **2. There Is No Scientific Rational Basis For Closing All Orange County**
2 **Beaches**

3 The Beach Closure Directive also lacks a scientific rational basis for closing the beaches. The
4 Centers for Disease Control and Prevention (“CDC”) issued guidelines to control the spread of the
5 coronavirus, which call for limiting face-to-face contact with other by social distancing.⁴⁸ This
6 involves staying at least 6 feet away from other people and not gathering in groups. The beach is a
7 vast open space allowing individuals to easily social distance themselves from others. The evidence
8 submitted by local authorities supports this fact. (Exhibit 3.)

9 Additionally, there is now confirmed scientific evidence that the coronavirus dies at a rapid
10 pace when exposed to sunlight. Bill Bryan, the head of the Science and Technology Directorate at the
11 Department of Homeland Security released the results of a study performed in his laboratory and
12 confirmed that the “Coronavirus dies at a much more rapid pace when exposed to sunlight and
13 humidity...The virus dies the quickest in direct sunlight.”⁴⁹ This scientific evidence suggests that
14 beaches may in fact be one of the safest places to visit during given its exposure to sunlight.

15 **3. Newsom Is Retaliating Against Orange County for Publicly Expressing a**
16 **Desire to Reopen California**

17 Petitioners are elected officials of several cities within Orange County. Local officials have
18 been closely monitoring the public health data related to the coronavirus and recently expressed
19 opinions that the data no longer supports keeping business closed and individuals confined to their
20 homes. The Orange County Board of Supervisors voted on April 28, 2020 to begin reopening business
21 activity throughout the county. Petitioners contend that the Beach Closure Directive was issued in
22 direct relation for the Orange County vote to begin reopening business activity. This is evidenced by
23 the fact that Orange County was the sole jurisdiction targeted by Newsom and directed to close it
24 beaches.

25 _____
26 ⁴⁸ The CDC guidelines can be viewed on the following webpage:
<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>

27 ⁴⁹ A copy of Mr. Bryan’s remarks can be viewed at the following webpage:
28 <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-31/>

1 Newsom’s retaliatory actions against Orange County represents a clear abuse of power.
2 Without any legal authority to compel the closure of Orange County beaches, the Court must find the
3 Beach Closure Directive to be an overbroad and abusive use of Newsom’s authority and render it null
4 and void.

5 **B. California Constitution Guarantees Public Access to the Beaches of Orange County**

6 Californians have a state constitutional interest in the use and enjoyment of the coastline.
7 Courts have recognized the California Constitution expresses a strong public policy of encouraging
8 public use of shoreline recreational areas. (*Gion v. Santa Cruz* (1970) 2 Cal.3d 29, 42.) There can be
9 no greater recreational use of the California shoreline than the enjoyment of its beaches.

10 California Constitution Art. X, § 4 states:

11 No individual, partnership, or corporation, claiming or possessing the
12 frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable
13 water in this State, shall be permitted to exclude the right of way to such
14 water whenever it is required for any public purpose, nor to destroy or
15 obstruct the free navigation of such water; and the Legislature shall enact
16 such laws as will give the most liberal construction to this provision, so
17 that access to the navigable waters of this State shall be always attainable
18 for the people thereof.

19 The last sentence of Section 4 provides for the explicit right that the navigable waters of
20 California, including the beaches, *shall* always be attainable for the people. Newsom’s order forcing
21 the closure of Orange County beach is in direct contradiction with Section 4 of the California
22 Constitution.

23 Additionally, California Constitution Art. X, § 5 provides:

24 The use of all water now appropriated, or that may hereafter be
25 appropriated, for sale, rental, or distribution, is hereby declared to be a
26 public use, and subject to the regulation and control of the State, in the
27 manner to be prescribed by law.

28 Again, the California Constitution express a clear desire to make all water within California a public
use. Together, these provisions make clear that the California Constitution affords the public right of
access the coastline, and requires that the public be afforded liberal access to its use.

1 Furthermore, in *Gion v. Santa Cruz* (1970) 2 Cal.3d 29, 43, the California Supreme Court has
2 acknowledged several legislative enactments that indicate the strong public policy in favor of
3 according public access to the coast, including (1) article I, section 25 of the California Constitution
4 (guaranteeing the right to fish); (2) Government Code sections 54090- 54093 (relating to
5 discrimination in beach access); (3) Government Code sections 39933- 39937 (implementing Cal.
6 Const., art. XV, § 2, and requiring municipalities to maintain access to navigable waters); (4) Fish and
7 Game Code section 6511 and Public Resources Code section 6008 (restrictions on sales and leases of
8 public lands in Humboldt Bay in order to preserve public access); (5) Public Resources Code section
9 6210.4 (requiring the state to reserve convenient access to navigable waters in connection with the
10 sale or other disposition of shoreline lands); and (6) Public Resources Code section 6323 (forbidding
11 structures on artificially accreted lands so that such accretions will remain an unobstructed and open
12 beach).

13 Newsom’s order closing the beaches of Orange County runs in stark contrast to the California
14 Constitution and legislative enactments favoring public access to the coastline.

15 **C. Access to Orange County Beaches is Protected by the Right to Liberty Clause in**
16 **the California Constitution**

17 All Californians “are by nature free and independent and have inalienable rights. Among these
18 are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and
19 pursuing and obtaining safety, happiness, and privacy.” (Cal. Const. art. 1, § 1.) One of the most
20 fundamental sources of happiness to California residents is access to our beautiful coastline and
21 beaches.

22 Understanding the basic fundamental right of liberty, California courts have held that Public
23 Health Officials’ authority is limited. Before exercising their full powers to quarantine, there must be
24 “reasonable grounds [] to support the belief that the person so held is infected.” (*Ex parte Martin*
25 (1948) 83 Cal.App.2d 164.) Public Health Officials must be able to show “probable cause to believe
26 the person so held has an infectious disease ...” (*Ibid.*)

27 In a case that is somewhat analogous to what Californians are facing with the coronavirus
28 pandemic of 2020, California courts found that Public Health Officials could not quarantine 12 blocks

1 of San Francisco Chinatown because of nine deaths due to bubonic plague. (*See Jew Ho v. Williamson*
2 (C.C. Cal. 1900) 103 F. 10); (*Wong Wai v. Williamson* (C.C. Cal. 1900) 103 F. 1.) These courts found
3 it “purely arbitrary, unreasonable, unwarranted, wrongful, and oppressive interference with the
4 personal liberty of complainant” who had “never had or contracted said bubonic plague; that he has
5 never been at any time exposed to the danger of contracting it, and has never been in any locality
6 where said bubonic plague, or any germs of bacteria thereof, has or have existed.” (*Jew Ho*, 103 F. at
7 10.)

8 In *Jew Ho* and *Wong Wai*, the courts found that there were more than 15,000 people living in
9 the twelve blocks of San Francisco Chinatown who were to be quarantined. The courts found it
10 unreasonable to shut down the ability of over 15,000 people to make a living because of nine deaths.
11 This was one death for every 1,666 inhabitants of Chinatown. Orange County has a population of
12 approximately 3.1 million individuals and as of April 30, 2020 a total of 44 coronavirus deaths. That
13 is one death for every 70,464 inhabitants.

14 California courts have found that “a mere suspicion [of a contagious disease], unsupported by
15 facts giving rise to reasonable or probable cause, will afford no justification at all for depriving
16 persons of their liberty and subjecting them to virtual imprisonment under a purported order of
17 quarantine.” (*Ex parte Arta* (1921) 52 Cal. App. 380, 383.)

18 Newsom has deprived all Orange County residents of access to the beaches and a source of
19 happiness without sufficient justification and, therefore, violated the California Constitutional liberty
20 rights.

21 **D. The Order as Applied in the April 30, 2020 Letter Closing all Beaches in Orange**
22 **County Violate Petitioners’ Due Process Rights Under the Fifth and Fourteenth**
23 **Amendment**

24 The Orders and Respondents’ extension thereof purportedly closing all Orange County
25 beaches, even those operated by local governments, violates Petitioners’ substantive due process
26 rights secured by the Fourteenth Amendment to the U.S. Constitution. Under the Due Process Clause
27 of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without
28 due process of law.” The fundamental liberties protected by this Clause include most of the rights

1 enumerated in the Bill of Rights. (See *Duncan v. Louisiana* (1968) 391 U.S. 145, 147–149.) In
2 addition, these liberties extend to certain personal choices central to individual dignity and autonomy,
3 including intimate choices that define personal identity and beliefs. (See, e.g., *Eisenstadt v. Baird*
4 (1972) 405 U.S. 438, 453; *Griswold v. Connecticut* (1965) 381 U.S. 479, 484–486.)

5 Petitioners’ rights to freedom of assembly and travel are fundamental rights protected by the
6 U.S. Constitution. (See, e.g., *Aptheker v. Secretary of State* (1964) 378 U.S. 500, 520; *Kent v. Dulles*
7 (1958) 357 U.S. 116, 127.) When a government practice restricts fundamental rights such as the right
8 to travel, it is subject to “strict scrutiny” and may be justified only if it furthers a compelling
9 government purpose, and, even then, only if no less restrictive alternative is available. (See, e.g.,
10 *Memorial Hospital v. Maricopa County* (1974) 415 U.S. 250, 257-258; *Dunn v. Blumstein* (1972) 405
11 U.S. 330, 339-341; *Shapiro v. Thompson* (1969) 394 U.S. 618, 89; *Maher v. Roe* (1977) 432 U.S. 464,
12 488.)

13 “The right to travel is a part of the liberty of which the citizen cannot be deprived without the
14 due process of law under the Fifth Amendment.” (*Kent v. Dulles* (1958) 357 U.S. 116, 127.) Courts
15 have found that “[f]reedom of movement is kin to the right of assembly and to the right of association.
16 These rights may not be abridged. (*Aptheker v. Secretary of State* (1964) 378 U.S. 500, 520.) The
17 Supreme Court has found that this right to travel includes in state travel. (See, e.g., *Kent v. Dulles, supra*,
18 357 U.S. at 126 [“Freedom of movement across frontiers in either direction, and inside frontiers as well,
19 was a part of our heritage.”].)

20 The reason that the right to travel is fundamental is because “[f]reedom of movement, at home
21 and abroad, is important for job and business opportunities – for cultural, political, and social activities
22 – for all the commingling which gregarious man enjoys.” (*Aptheker*, 378 U.S. at 519-520.) Even though
23 we are in a state of emergency and people may abuse the right to travel, citizens do not lose their
24 Constitutional rights. (See *Aptheker*, 378 U.S. at 520 [“Those with the right of free movement use it at
25 times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our
26 faith in them, and against restraint, knowing that the risk of abusing liberty so as to give rise to
27 punishable conduct is part of the price we pay for this free society.”].)

1 As such, strict scrutiny applies to Petitioners’ claims because the Order as extended by the
2 April 30, 2020, letter requiring the closure of all beaches in Orange County, entirely prohibits
3 Petitioners from traveling to, from, or along the beach, and it precludes fishing – an essential food
4 source for some Californians—assembling, visiting, recreating, and exercising on the beach, all
5 because in the Respondents’ view, unsupported by science or data, these actions are not deemed
6 essential. Thus, it prevents Petitioners from using the beach for social and cultural activities, economic
7 activities, and for commingling, thereby impinging on the Petitioners fundamental right to travel.

8 Respondents’ mandates are not “narrowly tailored” to further any compelling governmental
9 interest. Respondents have granted numerous special exemptions to their bans on public gatherings,
10 including for purportedly “essential” businesses and activities, provided that social distancing
11 practices are observed. Since these gatherings are be permitted, there can be no doubt that
12 Respondents may, and therefore must, permit Petitioners to engage in equivalent constitutionally-
13 protected activities, provided that Petitioners also adhere to the social distancing guidelines.

14 By ordering a full closure of the beaches in Orange County, as opposed to ordering that
15 specific guidelines be adhered to while individuals visit, travel to, and travel along the beach, the
16 Respondents have failed to narrowly tailor the order as applied by the letter requiring the beach
17 closure. Respondents could have ordered individuals to maintain social distancing while at the beach,
18 or restricted groups to family members or those cohabitating who are already exposed to one another
19 on a frequent basis and in a confined manner.

20 Ordering an open-ended, full closure of the beaches in Orange County was the most restrictive
21 option available to Respondents – if indeed it were an option at all. Respondents could have ordered a
22 specific beach closed for a certain time period or during holiday weekends. They could have closed
23 public parking lots and street parking to non-county or city residents—a step some municipalities in
24 Orange County had already taken. Instead, Respondents used a sledgehammer to crack a mythical nut.

25 As Newsom aptly stated, “[a]s Californians, respect and reverence for our beaches is in our
26 DNA, so much so that we enshrined public beach access into our state Constitution. I’ve long fought
27 to protect these public treasures...to ensure any person can experience their beauty.”⁵⁰ No longer, it

28 _____
⁵⁰ <https://www.latimes.com/california/story/2019-10-09/hollister-ranch-beach-access-newsom>

1 seems; in the wave of sudden, ad hoc rulemaking free of any due process or weighing of public rights,
2 Californians’ constitutional rights increasingly are among the mortality statistics of the coronavirus.

3 **E. The Order as Applied in the April 30, 2020 Letter Closing all Beaches in Orange**
4 **County Violate the Equal Protection Clause of the Fourteenth Amendment.**

5 The Fourteenth Amendment of the Constitution provides that “[n]o State shall . . . deny to any
6 person within its jurisdiction the equal protection of the laws.” (U.S. Const. amend. XIV, § 1.) Equal
7 protection requires the state to govern impartially—not draw arbitrary distinctions between individuals
8 based solely on differences that are irrelevant to a legitimate governmental objection. (*City of Cleburne,*
9 *Tex. v. Cleburne Living Ctr.* (1985) 473 U.S. 432, 446.) In other words, persons similarly situated must
10 be similarly treated.

11 The Order and Respondents’ application of it through the April 30, 2020 letter requiring beach
12 closures in Orange County violate the Fourteenth Amendment, both facially and as-applied to
13 Petitioners.

14 Respondents have intentionally and arbitrarily singled out Orange County beaches for
15 complete state government mandated closure, thereby depriving the Petitioners, residents of Orange
16 County, and all Californians, access to a unique and valued place for travel, recreation, assembly and
17 leisure. In line with the thinking of their previous order, they have in essence deemed the use of the
18 Orange County beaches a non-essential activity.

19 Respondents failed, however, to make this designation for the beaches of any other county in
20 the state. Thus, those counties not subject to the mandated closure are permitted to continue using
21 their beaches for exercise, leisure (including fishing), travel, and assembly at their discretion, so long
22 as certain mitigation tactics such as social distancing are employed. As a result, every single
23 Californian who visited the beach in Orange County on April 25 can visit a beach on May 2 –so long
24 as the beach is not located in Orange County. Singling out Orange County in this manner is arbitrary
25 and irrational on its face, and will likely serve no purpose other than to deprive Orange County
26 residents of their rights.

27 Further, Respondents’ actions confer the benefit of continued beach access on every other
28 county in the state, while denying this very benefit to the residents of Orange County and its inland

1 counties. This line in the sand around Orange County will only drive people who can afford to visit
2 beaches in other counties, and deprive those who cannot afford the luxury of traveling a great distance
3 to visit the beach the constitutionally-protected right to assemble, recreate, and fish there.

4 Strict scrutiny under the Equal Protection Clause applies where, as here, the classification
5 impinges on a fundamental right, including the right to assembly and the right to travel, among others.
6 (*Maynard v. U.S. Dist. Court for the Cent. Dist. of California* (C.D. Cal. 1988) 701 F.Supp. 738, 742
7 [“When a law disadvantages a suspect class or impinges upon a ‘fundamental right,’ the court will
8 examine the law by applying a strict scrutiny standard”], *aff’d sub nom. Maynard v. U.S. Dist. Court*
9 *for Cent. Dist. Of California* (9th Cir. 1990) 915 F.2d 1581.) Under strict scrutiny review, the law may
10 be justified only if it furthers a compelling government purpose, and, even then, only if no less
11 restrictive alternative is available. (See, e.g., *Memorial Hospital*, 415 U.S. at 257-258.)

12 Respondents cannot satisfy strict scrutiny; their arbitrary classifications are not narrowly
13 tailored measures because Respondents have granted numerous special exemptions to their bans on
14 public gatherings, including for purportedly “essential” businesses and activities, provided that social
15 distancing practices are observed. Since these gatherings may be permitted, there can be no doubt that
16 Respondents must permit Petitioners to engage in equivalent constitutionally protected activities at
17 Orange County beaches, provided that Petitioners also adhere to the social distancing guidelines and
18 other reasonable measures. Respondents actions in mandating a full beach closure, as opposed to
19 requiring mitigating steps short of a full closure, is a broad approach.

20 Further, as indicated above, Respondents could have taken less restrictive actions to address
21 any concerns about the use of Orange County beaches, such as limiting parking lot and street parking
22 availability, requiring that only families or people that cohabitate gather together on the beaches, or
23 limiting the type of activities that take place there.

24 **F. The Order as Applied in the April 30, 2020 Letter Closing All Beaches in Orange**
25 **County Violates the Right to Travel**

26 While not explicitly defined in the U.S. Constitution, the Supreme Court has “acknowledged
27 that certain unarticulated rights are implicit in enumerated guarantees. ... Yet these important but
28 unarticulated rights [association, privacy, presumed innocent, etc.] have nonetheless been found to

1 share constitutional protection in common with explicit guarantees.” (*Richmond Newspapers, Inc. v.*
2 *Virginia* (1980) 448 U.S. 555, 579-580.) Courts have found that “[f]reedom of movement is kin to the
3 right of assembly and to the right of association. These rights may not be abridged. (*Aptheker v.*
4 *Secretary of State, supra*, 378 U.S. at p. 520.)

5 Our highest court has also held that the “right to travel is a part of the liberty of which the
6 citizen cannot be deprived without the due process of law under the Fifth Amendment.” (*Kent v.*
7 *Dulles* (1958) 357 U.S. 116, 126.)

8 The reason that the right to travel is fundamental is because “[f]reedom of movement...is
9 important for job and business opportunities – for cultural, political, and social activities – for all the
10 commingling which gregarious man enjoys.” (*Aptheker*, 378 U.S. at p. 519-520.)

11 The Court further found that “It may be as close to the heart of the individual as choice of what
12 he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.” (*Kent*, 357 U.S. at
13 p. 126.) They have also ruled that the “right to travel is an unconditional personal right, a right whose
14 exercise may not be conditioned.” (*Dunn v. Blumstein* (1972) 405 U.S. 330, 341.)

15 Even though we are in a state of emergency and people may abuse the right to travel, citizens
16 do not lose their Constitutional rights. (See *Aptheker*, 378 U.S. at p. 520 [“Those with the right of free
17 movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We
18 nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberty so
19 as to give rise to punishable conduct is part of the price we pay for this free society.”].)

20 In this instance, there can be no question that the Respondents’ Order requiring “all individuals
21 living in the State of California to stay home” and Respondents’ April 30, 2020 letter mandating the
22 immediate and indefinite closure of all Orange County beaches has denied the citizens of Orange
23 County, the citizens of its inland and contiguous counties, and the citizens of the State as a whole the
24 right to travel to, travel from, and travel along the beaches of Orange County.

25 As explained above, the right to travel is in part important because it allows for cultural and
26 social activities, and commingling. It is also important for economic reasons and livelihood, including
27 fishing. By necessary extension, the right to travel would be rendered useless if citizens are not free to
28

1 travel *somewhere*. By denying citizens the right to travel to, travel from, and travel along the beach,
2 the Order and Letter closing the beaches runs afoul of the constitutionally enshrined right to travel.

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

12 In this instance, the burden imposed by mandating full closure of the beaches is not necessary
13 to serve the purported interest of combating the virus, as there are lesser measures that can be taken to
14 achieve the same goal. Instead of mandating a full closure, the Respondents could have mandated
15 social distancing and local enforcement thereof. They could have restricted groups to those that
16 cohabitate and are thus already exposed to each other. They could also impose restrictions on anyone
17 who has shown symptoms or been around anyone showing symptoms from traveling to the beach, or
18 closed parking lots and street parking near the beach to prevent crowds. Instead, Respondents entirely
19 cleared the beach and denied everyone access.

20 The means chosen also impose an unnecessarily burden on the citizens and Petitioners. As
21 stated above, there are various other measures that could be taken that would result in a lesser burden
22 on Petitioners and the citizens of the county, but Respondents chose the most drastic and burdensome
23 remedy that exists.

24 Respondents have violated the Petitioners and the citizens right to travel to, from and along the
25 beach, and their violation is unduly burdensome, broadly tailored, and unnecessary.

26 **G. The Order Violates the Constitutional Right of Assembly**

27 "The right of free speech, the right to teach, and the right of assembly are, of course,
28 fundamental rights." (*Whitney v. California* (1927) 274 U.S. 357, 373.) The First Amendment of the

1 Constitution protects the “right of the people peaceably to assemble.” The Freedom of Assembly
2 Clause was incorporated against the states in *De Jonge v. Oregon* (1937) 299 U.S. 353. The California
3 Constitution also protects the right to freely assemble. (See, e.g., Cal. Const. Art. 1, § 3; *People v.*
4 *Chambers* (1937) 22 Cal.App.2d 687, 706 [“laws should not infringe upon our guaranteed freedom of
5 speech and lawful assembly.”].)

6 When a government practice restricts fundamental rights, it is subject to strict scrutiny, and
7 may be justified only if it furthers a compelling government purpose and, even then, only if no less
8 restrictive alternative is available. (See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez* (1973) 411
9 U.S. 1, 16-17; *Dunn v. Blumstein, supra*, 405 U.S. at p. 330.)

10 The Orders and Respondents’ extension thereof by way of their April 30, 2020 letter to the
11 Orange County Board of Supervisors and Police Chiefs violates the First Amendment, both facially
12 and as-applied to Petitioners. By denying Petitioners and the citizens of California the right to
13 peaceably assemble on the beaches of Orange County, whether to protest or otherwise express
14 themselves, Respondents are in violation of the Freedom of Assembly Clause. It is a crystal clear,
15 blanket prohibition against gathering on any beach in Orange County.

16 The Respondents’ various orders restricting the rights of Petitioners and other citizens have
17 been in place for 43 days. Undoubtedly, Californians are starting to tire of these restrictions, and they
18 are exercising their rights to gather in public to express their desire to return to normal life. This is
19 especially true in Orange County, which has been subject to unrelenting extreme state restrictions
20 despite the fact that the impacts of COVID-19 have been well beneath government projections and
21 vastly lower than other nearby counties, much less other U.S. states and other countries.

22 With their infringement of Petitioners’ First Amendment rights, Respondents cannot meet the
23 no-less restrictive- alternative test. The CDC’s social distancing guidelines are appropriate to limit the
24 spread of COVID-19. Alternative measures, such as requiring masks when assembling in groups that
25 do not cohabit, closing beach and nearby street parking, and restricting ride-share operations could
26 have been employed. Instead, Respondents employed the most drastic tactic available – a complete
27 shutdown. Clearly, less restrictive alternatives existed.

28

1 Further, these actions were not necessary. This is evidenced by the fact that Orange County,
2 which has less restrictive but reasonable mitigation measures in place, has suffered a lesser impact
3 from the virus than a contiguous county, Los Angeles: Los Angeles County 23,233 cases, 1,119
4 deaths versus Orange County's 2,393 cases, 45 deaths as of 4/30/2020.

5 Our beaches have remained open, allowing residents the opportunity to exercise, recreate, fish
6 to provide food for their families. These are human rights and civil rights. As such, a total shutdown
7 of the beach was not necessary to mitigate the spread of the virus. The fact that these measures were
8 not necessary is further evidenced by the fact that Orange County—and Orange County alone—was
9 targeted for a beach shutdown. If such an action were indeed necessary to combat COVID-19, surely
10 it would have been imposed statewide.

11 Imposing a highly restrictive and unnecessary ban on beach access in only one county in the
12 state violates Petitioners' Constitutional right to peaceably assemble.

13 CONCLUSION

14 For the reasons stated above, this Court should immediately enter a stay to the Beach
15 Closure Directive, together with such other and further relief as this Court deems just and proper.

16 Respectfully submitted,

17 Date: May 1, 2020

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