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Attorneys for Petitioners ALAMEDA COUNTY COMMITTEE OF OPEN GOVERNMENT and CHILDREN'S HEALTH DEFENSE, CALIFORNIA CHAPTER

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

ALAMEDA COUNTY COMMITTEE OF OPEN GOVERNMENT, an unincorporated association, on its own and on behalf of its members; **CHILDREN'S HEALTH DEFENSE-CALIFORNIA CHAPTER,** a California 501(c)(3) non-profit corporation, on its own and on behalf of its members, and **MARY CATHERINE BALDI**, an individual.

Petitioners,

vs.

COUNTY OF ALAMEDA; ALAMEDA COUNTY BOARD OF SUPERVISORS,

Respondents.

Case No.: 23CV028241

EX PARTE APPLICATION FOR ALTERNATIVE WRIT OF MANDATE; MEMORANDUM IN SUPPORT

Code of Civil Proc., §§ 1085, 1094.5, 1087, 1107

[*Verified Petition for Alternative Writ and Complaint for Declaratory and Injunctive Relief; and [Proposed] Order filed concurrently herewith]*

RESERVATION NO:
Dept.:
Date:
Time:

Assigned for All Purposes to:
Judge:
Dept.:

Petitioners Alameda County Committee of Open Government and Children's Health Defense, California Chapter, hereby apply ex parte, pursuant to Code of Civil Procedure sections 1087 and 1107, for an alternative writ of mandate directing Respondent Alameda County Board of Supervisors, and each of them, to hold a public hearing to review the local conditions in order to determine whether the local emergency and local health emergency that have been declared in the County should be terminated or to show cause in this Court why it has refused to do so.

The application for alternative writ is based on this Application, the concurrently filed Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief; the accompanying Memorandum of Support; and such other papers, evidence, and argument as may be presented at the hearing.

Wherefore, Petitioners hereby request that this Court issue an alternative writ ordering Respondents to perform the required emergency conditions review hearings, or to show cause before this Court on a date designated by the Court why Respondents refuse to do so.

Dated: February 21, 2023

FACTS LAW TRUTH JUSTICE
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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

By this Application for Alternative Writ of Mandate ("Application"), Petitioners respectfully ask this Court to issue an alternative writ of mandate commanding Respondents to either (a) satisfy their clear, affirmative ministerial duties and statutory obligations as the governing body of Alameda County (the "County") to: i) review, at a properly noticed regular or special meeting open to the public, the local conditions within the County, and make a determination, as a board, whether such local conditions justify the ongoing declarations of local emergency and local health emergencies declared in March 2020 (collectively, the "Emergencies") and ii) terminate them if conditions no longer warrant maintaining them; or (b) show cause why they refuse to do so.

Respondents have kept County residents, including Petitioners, under-declared Emergencies for nearly three years without any public and open review of the local conditions or any vote by the Respondents to maintain them, despite having a clear statutory obligation to review local conditions and terminate declared local emergencies "at the earliest possible date" conditions warrant. (*See* Gov. Code § 8630 (d); Health & Safety Code §101080). Respondents' obligation is not a discretionary matter. The California Emergency Services Act ("CESA"), enacted by the Legislature for these very times of declared emergencies, states that the governing body of a locality "**shall** proclaim the termination of the local emergency at the earliest possible date that conditions warrant." (Gov. Code §8630(d) [emphasis added]). Respondents have ignored these statutory obligations since March 2020.

Even more alarming, Respondents have repeatedly admitted to County residents that they have: (a) delegated these statutory duties to review local conditions and to determine as the "governing body," whether such conditions warrant maintaining the Emergencies to their health officer, Nicolas Moss ("Health Officer") and/or his immediate supervisor, Collen Chawla, Director of Health Services, ("Director"), as well as other unidentified health officers in six neighboring jursidictions; and (b) engaged in secret, non-public serial meetings to make determinations regarding the Emergencies while preventing meaningful public participation regarding the Emergencies, in direct violation of California's Open Meeting Law, the Ralph M. Brown Act (*See* Gov. Code section 54953 *et seq*.) (hereinafter, the "Brown Act").

Respondents have a clear, present, ministerial, and mandatory duty to review local conditions and vote to terminate the Emergencies "at the earliest possible date that conditions warrant the termination" under both California Health & Safety Code, section 101080, and Government Code section 8630(d) (together, the "Emergency Laws").

Although Governor Newsom, in his initial March 4, 2020 proclamation of a state-wide state of emergency (the "Proclamation"), temporarily suspended the automatic 30 and 60 day intervals in which local governing bodies must review local conditions of emergency, this Proclamation did not – and could not – remove a local governing body's affirmative, mandatory duty to both review local conditions and/or terminate the Emergencies at the earliest possible dates. In fact, the Proclamation itself indicates that the local governing body retains this duty to determine whether to terminate its respective local emergency (Governor's Proclamation, attached to Petition as **Exhibit "A"**, ¶¶ 7-8). Respondents failure to perform these statutory obligations is a violation of these Emergency Laws.

Respondents' delegation to their Health Officer and/or other unelected health officials of Respondents' quasi-legislative authority to review local conditions and terminate local emergencies when conditions warrant also violates the California Constitution's Separation of Powers, and conflicts with long-standing principles of non-delegation. (Cal. Const., art III § 3; *Carson Mobilehome Park Owners' Assn v. City of Carson* (1983) 35 Cal.3d 184, 190). Determining whether conditions warrant continuing a local emergency is a fundamental local policy decision that cannot be delegated to any other branch of government, including unelected health officials from the executive branch. Moreover, even if Respondents had discretionary authority to determine when to end the Emergencies – which they do not per the terms of the Emergency Laws – Respondents have engaged in arbitrary and capricious decision-making, by first declaring these Emergencies when the "emergency" conditions as defined in the applicable statutory provision did not exist to justify them, -and then continuing them for reasons not permitted under the applicable statutory provisions, such as to continue to receive substantial COVID-19 relief funds for purposes outside of any actual emergency needs.

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Respondent Board of Supervisors is also the legislative body of the County with clear statutory duties under the Brown Act to ensure that the "people's business" is conducted at public and open meetings, and not secretly behind closed doors. (Gov. Code § 54950 *et. seq*). The need to maintain or terminate declarations of emergency, such as the Emergencies, under which numerous unprecedent and devastating public "health" orders have been issued and/or are still being maintained is clearly of great public concern and therefore the "people's business" under the Brown Act. Respondents' actions in holding serial non-public meetings and communications with their Health Officer and other health officials and making decisions about whether to maintain or terminate the Emergencies in these secret meetings are clear and ongoing violations of this Act.

A state of emergency, by definition, cannot last forever, and the dangers **to Petitioners and other County residents** of keeping the County under these Emergencies cannot be overstated. Over the last nearly three years, the state and local declarations of emergency have been used to impose unprecedented restrictions on individual autonomy and deprive residents of fundamental, Constitutional protections, many without any rational or scientific basis or risk/benefit assessment nor any demonstrated actual emergency conditions in the County. These restrictions have devastated millions of Californians, including residents of this County, physically, psychologically, cognitively, and financially. Failing to order Respondents to review local conditions at an open and public Board meeting and, if conditions warrant, to terminate these Emergencies as required by law, will allow Respondents to declare emergencies as a matter of convenience, re-institute onerous restrictions at-will, and deny the public the right to "retain control over the instruments they have created." (Govt. Code § 54950). For these reasons, among others, Petitioners ask this Court to grant this Application.

II. PROCEDURAL POSTURE

A. Notice of Violations

On August 19, 2022, Petitioner ACCOG sent Respondents a notice regarding their various Brown Act violations related to Respondents' failure to hold public meetings regarding the Emergencies and comply with their statutory obligations under the Emergency Laws. County counsel for Respondents replied on September 16, 2022, indicating Respondents' "unconditional commitment" to complying with their obligations under the Brown Act. However, Respondents did not comply with their

obligations under the Brown Act or their statutory obligations under the Emergency Laws. On November 9, 2022 Petitioners sent a Notice of Liability letter, again informing Respondents about their violations of both the Brown Act and the Emergency Laws. Respondents did not respond to this notice and the violations of the unconditional commitment continue. Concurrent with this Application, Petitioners have now filed their Petition for Writ of Administrative or Traditional Mandate and Complaint for Declaratory and Injunctive Relief ("Petition") in order to compel Respondents to: a) hold a properly noticed open and public meeting to review local conditions in the County b) terminate the Emergencies if local conditions warrant, and c) cease holding secret, non-public meetings about the Emergencies and interfering with public participation regarding the Emergencies in violation of the Brown Act.

B. Notice of Ex Parte Application

No notice of this Ex Parte Application has been given because no date has been set for hearing on the Application. Notice of the date and time for hearing, once such date and time is set by this Court, will be provided to Respondents pursuant to the Code of Civil Procedure.

Further, this Court may act without Notice to Respondents. Section 1107 of the *Code of Civil Procedure*, which contains general provisions regarding applications for all types of prerogative writs, states in part: "The court in which the application is filed, in its discretion and for good cause, may grant the application ex parte, without notice or service of the application as herein provided." Accordingly, the Court may issue an *alternative* writ ex parte. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1246).

III. LEGAL ARGUMENT

Mandamus is a remedial writ used to correct those acts and decisions of agencies which are in violation of the law and no other adequate remedy is provided, and may be used not only to compel action which was refused in violation of the law, but also to annul or restrain action taken which is in violation of the law. (*Wilson v. Los Angeles County Civil Service Cmm'n* (1951) 103 Cal. App. 2d 426, 430; Code Civ. Proc. §§ 1085, 1086, 1094.5). Generally, a writ of mandate must issue where there is not other plain, speedy, and adequate remedy and where the petitioner has a clear and beneficial right to performance. Where a petition alleges a purely legal question, the Court exercises its independent

judgment as to the legal question presented. (*McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, 1584). The court will issue an *alternative* writ, as requested here, when the petition sufficiently alleges a cause of action which, if proven, could lead to the issuance of a final or peremptory writ. (*Joerger v. Superior Court* (1934) 2 Cal.App.2d 360, 363, 37 P.2d 1084.) Administrative proceedings should be completed before the issuance of a judicial writ. (*McPheeters v. Board of Medical Examiners* (1947) 82 Cal.App.2d 709, 717, 187 P.2d 116.) The writ is not a final court adjudication but is merely an order for the agency to show cause or, in the "alternative," to comply. The agency is placed on notice that petitioners have made a sufficient showing to cast doubt upon the validity of its decision or actions. Although it may be expected that the agency will file an answer to the writ, compliance is among the acceptable responses (§§ 1087, 1089, 1104, 1109), and it terminates the litigation. (*George v. Beaty* (1927) 85 Cal.App. 525, 529, 260 P. 386.). Here, Petitioners have made the sufficient showing to issue an alternative writ.

An alternative writ and subsequent wirt of mandamus should issue here. Respondents have clear, affirmative, ministerial duties under both the Health & Safety and Government Codes to review local conditions to determine whether the conditions warrant declarations of a local or local health emergency – and to terminate any local emergencies at the earliest possible date that conditions warrant. (Gov. Code § 8630(d); Health & Safety § 101080). Respondents also have a legal duty to hold open and public meetings on the Emergencies, which are the "people's business," and not conduct serial meetings behind closed doors with health officers or any other officials in order to make secret decisions affecting the people's business. (Govt. Code § 54950 *et. seq*.)

Petitioners and Petitioners' members are citizens, taxpayers, and residents of the County who have been directly impacted by Respondents' failure to satisfy their duties and obligations under these laws. Petitioners are also under constant threat of repeated harms due to the unprecedented restrictions mandated and enabled under the Emergencies, that are either ongoing or capable of repetition at any time until the Emergencies are terminated, and Respondents' legal duties clarified. (*See Roman Catholic Diocese v. Cuomo* (2020) 141 S.Ct. 63, 68 [holding that the lifting of restrictions did not moot the application because "the applicants remain under a constant threat that those restrictions may be reinstated"]). Each of these Petitioners and their members have a clear, present and beneficial right to

have Respondents' unlawful actions restrained and the laws followed, and do not have any other plain, speedy, and adequate remedy.

A. Respondents Have a Mandatory Duty to Review Local Conditions and to Terminate the Emergencies if Conditions Warrant.

Local boards of supervisors are the governing bodies of California counties.[1] A board of supervisors' decision-making can be, at various times, quasi-legislative, quasi-adjudicative, or even quasi-judicial in nature.[2] (Gov. Code, §§ 25000 *et seq*.) A local state of emergency declared under Government Code, section 8630, (1) may be proclaimed only by the governing body of a city, county, or city and county, or by an official designated by ordinance adopted by the governing body; (2) shall not remain in effect for a period in excess of seven days unless ratified by the governing body; (3) shall be reviewed by the local governing body at least once every 60 days until terminated to determine the need for continuing the local emergency; and (3) **shall** be terminated by the local governing body at the earliest possible date that conditions warrant. [Emphasis added]. A local health emergency declared under Health & Safety Code section 101080 can be declared "[w]henever there is an imminent and proximate threat of the introduction of any contagious, infectious, or communicable disease," but a local board of supervisors "shall" review the need for continuing such local health emergency every 30 days and "**shall** proclaim the termination of the local health emergency at the earliest possible date that conditions warrant the termination." (Health & Safety Code §101080 [emphasis added]). A "local emergency" exists where conditions "are or are likely to be beyond the control of the services, personnel, equipment, and facilities of that political subdivision **and** require the combined forces of other political subdivisions to combat." (Gov. Code § 8558(c) [emphasis added]).

Respondents have failed to satisfy their statutory obligations and ministerial duties as governing authority in the County under these applicable sections in several ways. First, Respondents have refused to **review local conditions themselves**, and have instead abdicated and delegated this statutory obligation to their Health Officer and other health officers in other jurisdictions, along with the determination of whether to maintain or terminate the Emergencies after such review. Although the

[1] *See* California State Association of Counties, https://www.counties.org/post/board-supervisors [last visited April 26, 2022].

[2] *Id*.

Governor's Proclamation may have temporarily suspended the automatic and fixed 30 and 60-day review periods, the Proclamation explicitly states that it is the local governing authority that retains the legal obligation to terminate its respective local emergency. (Petitioner's Petition, **Exhibit "A"**, ¶¶ 7-8). Clearly, a governing body cannot exercise its authority to terminate a local emergency without first reviewing the local conditions to determine whether such conditions warrant the termination.

Second, Respondents have **failed to terminate** the Emergencies at the "earliest date" that conditions have warranted. (Gov. Code §8630(d); Health & Safety § 101080). Conditions in the County warranting a local state of emergency or local health emergency have not existed for a very long time (if ever). There has been **zero** coordination of emergency services, personnel, equipment, or facilities in and between counties since the inception of the "pandemic." Respondents have not combined forces with other political subdivisions to combat conditions of extreme peril or great danger posed by COVID-19 in the County, or entered into "Mutual Aid" agreements with other counties or states to assist the County with its response to COVID-19. Accordingly, a "local emergency" does not, objectively, exist in the County under the CESA's own definition. (Gov. Code § 8558(c)). Similarly, as the County residents have now endured almost three years of this prolonged COVID-19 "crisis," it can hardly be said that there is still an "imminent and proximate threat of the introduction" of an infectious or contagious disease in the County, as required by Health & Safety Code section 101080.

An "emergency" cannot last forever without losing the very meaning of the term. Indeed, when a "statute speaks of an emergency affecting the public health or safety, the vital element is not official prescience or its lack but rather **the acuteness of the threat** to the public interest." (*Malibu W. Swimming Club v. Flournoy* (1976) 60 Cal.App.3d 161, 166) [emphasis added]. An "emergency," therefore, implies that a "sudden or unexpected necessity requires speedy action." (*Los Angeles Dredging Co. v. Long Beach* (1930) 210 Cal. 348, 356). We are now close to three years after the initial declaration of the Emergencies, with schools and businesses fully operational and County hospitals not overwhelmed with COVID-19 patients. We are far past the "acuteness" stage of any "emergency" due to COVID-19. Once local conditions, such as the ones described above, no longer warrant continuing the Emergencies, the applicable law compels Respondents – and similarly-situated county boards of supervisors – to terminate them. (Gov. Code § 8630(d); Health & Safety §101080). **This is not discretionary**. The Codes state

that the board "shall" terminate the Emergencies at the "earliest date" conditions warrant, and the Government Code itself indicates that "shall" means mandatory and not discretionary. (Gov. Code § 8630; Health & Safety § 101080; Gov. Code §14; *see also e.g., Lazon v. County of Riverside* (2006) 140 Cal.App.4th 453, 460 [explaining that the word "shall" indicates a mandatory or ministerial duty]). While the Legislature may have granted certain specified powers under CESA to local governing bodies to act in times of acute crisis, this cannot be interpreted to justify the unlawful prolonging of declared local states of emergency so that governing bodies can bypass the protections guaranteed by a representative government.

Respondents have an affirmative legal obligation to review conditions and terminate the Emergencies *themselves* at the earliest possible date conditions warrant, and these conditions have existed for months – if not years. Petitioners' writ must issue and Respondents must be ordered to perform their statutory obligations under the laws enacted for these very times of emergency.

B. <u>Respondents' Delegation of Their Legal Duties to the Health Officer and Others Outside the County Violates Separation of Powers and the Non-Delegation Doctrine.</u>

Respondents have also exceeded their authority and/or abused their discretion as a local governing authority with quasi-legislative powers by improperly delegating these powers to their Health Officer and other health officials within the County and/or in neighboring jurisdictions under the Seven County Pact. Under Article III, Section 3 of the California Constitution, "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." A health officer of a county or state health agency, is part of the administrative/executive branch, and may not exercise powers given expressly to Respondent Board as the quasi-legislative authority of the County by statute. Nor may Respondent Board delegate them. When the state Legislature has spoken on a particular issue, local governments are not at liberty to take a conflicting course of action. (*Costa Mesa City Employees Assn. v. City of Costa Mesa* (2002) 209 Cal.App.4th 298, 310). The Legislature has imposed the duty to review any local emergencies on the **governing body of the county**, here, the Respondents, in both the Health and Safety and Government Code. These duties cannot be delegated to another branch of

government, including, but not limited to, the Health Officer or any other health officer within or outside of the County, and any steps taken that conflict with or undermine the Legislature's action are unlawful and invalid.

Indeed, the non-delegation doctrine provides that "an unconstitutional delegation of legislative power occurs when the Legislature confers upon an administrative agency unrestricted authority to make fundamental policy decisions." (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619). An unconstitutional delegation of legislative authority occurs when a legislative body: (a) leaves the resolution of fundamental policy issues to others, or (b) fails to provide adequate direction for the implementation of that policy. (*See Carson Mobilehome Park Owners' Ass'n v. City of Carson* (1983) 35 Cal. 3d 184, 190). Underlying this doctrine is the belief that the legislative branch is the most representative organ of government and should, therefore, settle controverted issues of policy. (*Clean Air Constituency v. State Air Resources Bd.* (1974) 11 Cal.3d 801, 817). Indeed, courts have long recognized that "truly fundamental issues should be resolved by the Legislature" and not by the executive or judicial branches. (*Wilke v. Holzheise, Inc. v. Dep't of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 366).

As admitted in numerous Board meetings, Respondents abdicated and delegated all of their quasi-legislative authority to review and make any decision to renew or terminate the Emergencies to their Health Officer as well as their Director of Health Services and other health officials outside of the County pursuant to the Seven County Pact.[3] Determining whether local conditions in a particular county warrant the continuation of declared local states of emergency is a *fundamental policy decision* statutorily reserved for the local governing body of the relevant county. A primary reason to have local county boards of supervisors is to put decision-making authority in the hands of local governing

[3]*See e.g.* https://alamedacounty.granicus.com/player/clip/7854?&redirect=true&h=b75bb1ac4a3cfeb08c30a01d19f4bf66, statement on the record by Supervisor Miley made at Respondents' August 9, 2022 regular Board meeting, following citizen requests that Respondents' perform their statutory obligations regarding the ongoing prolonged Emergencies: "I just wanted to speak, after listening to the speakers, that I just want to say, you know, Colleen Chawla who was hired by the board of supervisors to head up our Healthcare Services Agency, she…I think I speak for the entire board…she has the full confidence of the board and she hires the Health officer, and we have concurred with that. We have confidence in the health officer. And the work that the health officer is doing is in alignment with the other counties in the Bay Area, so when our health officers and the counties and the state ***feel that the public health emergency is over, it will be over [emphasis added]*** and until that time, life is going on, people are going on with their lives, but until our professionals ***say*** the emergency is over, I don't think the board of supervisors is going to second guess them."

bodies, which are far more familiar with the unique local conditions affecting the citizens within these respective counties. Respondents' decision to abdicate their own responsibilities to their constituents unlawfully delegated all of this authority, allowing the unelected Health Officer and other health officials to be the sole decision-makers regarding this fundamental *policy decision* that will uniquely affect County residents who did not choose these officials to represent their interests. Further, Respondents delegated their authority to these health officials without any – let alone adequate – directions. Therefore, Respondents' actions violate the non-delegation doctrine.

C. Respondents' Failure to Properly Review Local Conditions and Terminate the Emergencies to Continue Getting Relief Funds Was Arbitrary and Capricious Decision-Making.

Even assuming Respondents have discretionary authority to determine when to end the Emergencies – which they do not – Respondents were still obligated to follow a reasoned decision-making process that considered all relevant factors and evidence relating to their declarations and continuations of the Emergencies that was not arbitrary and capricious. Here, Respondents acted arbitrarily and capriciously, and abused their discretion, by engaging in the actions alleged above, including but not limited to (1) failing to cite any local medical or scientific authority, studies or data to justify their declarations and continuations of the Emergencies; (2) failing to take into consideration, *ab initio,* the fiscal, physical, psychological, or financial impact of the declarations of Emergencies on County residents; (3) failing to take into consideration the evolving fiscal, physical, psychological, and financial impact of the continuations of Emergencies since the time of the initial declarations thirty-five months ago; (4) failing to review local conditions justifying continued declaration of the Emergencies and/or (5) failing to consider alternative, lesser-restrictive, and actually-effective means for responding to COVID-19 since declaration of the Emergencies. Instead, Respondents decided in advance to declare the Emergencies in response to a potential threat without any local data or evidence in support of the conditions required legally, and then voted to make that happen.

Furthermore, since that time, Respondents have maintained the declarations of the Emergencies largely to maintain access to federal COVID relief funds, and have failed to perform any review of local conditions to determine whether the continuance of the Emergencies remains warranted. The

desire to financially benefit from the Emergencies – or to keep them in place for political power, flexibility, convenience, or even readiness for any future imagined variant outbreak – is not permissible pursuant to applicable legal authority. Respondents are legally **required** to terminate the Emergencies as soon as local conditions no longer warrant a declaration of such. There are no other reasons – no matter how, purportedly, forward-thinking, savvy, or altruistic – allowed.

Respondents may believe that continuing the Emergencies is harmless because County residents, including Petitioners, are not currently living under the more onerous masking, testing, business or school closures, or vaccination restrictions previously imposed during earlier stages of the Emergencies. However, by keeping the Emergencies in place despite local conditions no longer warranting them, Petitioners and other County residents are under constant threat that these restrictions may be reinstated at any time, completely upending their personal, professional, and everyday life. (*See Roman Catholic Diocese v. Cuomo* (2020) 141 S.Ct. 63, 68). In addition, numerous onerous restrictions or policies remain that are negatively impacting Petitioners' members, including masking and social distancing requirements in County facilities, eviction moratoriums, and community college vaccination requirements that all stem from, or are in place, because of the prolonged continuation of the Emergencies.

Granting Petitioners' Application for Alternative Writ will not prevent Respondents from continuing the current emergency if conditions so warrant after public hearing, or declaring emergencies in the future, should local conditions arise warranting the same. However, Government Code, section 8630, and Health & Safety Code, section 101080, both require termination of the existing Emergencies at the "earliest time" conditions no longer require them, and all data indicate that time is **now**.

D. Respondents' Non-Public Meetings and Failure to Allow Public Participation Violate the Brown Act

Under California's Ralph M. Brown Act, also known as the California Open Meeting Law, the California Legislature found and declared that the public commissions, boards, and other public agencies in the State **exist to aid in the conduct of the people's business**, and that the citizens of California do not yield their authority to the agencies that serve them, nor do they give these public servants the right to decide what is good for the people to know and what is not good for them to know. (Gov. Code §

54950) (emphasis added). The Brown Act requires that the people must remain informed as well as be given the opportunity to participate in matters of public interest, so that they may retain control over the instruments they have created. (Gov. Code § 54950).

The central provison of the Brown Act requires that all "meetings" of a legislative body be open and public. (Gov. Code § 54952.2). With limited exceptions, the Brown Act requires all county board of supervisors meetings to be open and public and all discussion items properly agendized and publicly noticed for hearing. (*See* Gov. Code, §§ 54952, 54953.3, 54954, *et seq*.) Individual board members have no power to act for the county merely because they are members of the board of supervisors; rather, meetings of the board of supervisors are subject to the restrictions and requirements of the Brown Act. (*Ibid.*) Under the Brown Act, a meeting is "any congregatation of a majority of members of a legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legsislative body or the local agency to which it pertains." (Gov. Code § 54952.2). If a majority of members are in the same room and *merely listen* to a discussion of county business, they will be participating in a Brown Act meeting that requires notice, an agenda, and a period of public comment. In addition, pre-meetings, post-meetings, and "serial" meetings, where members of the legislative body engage in the deliberative process through a series of communications such as through chain or hub and spoke type arrangements, whether in person or via technology (emails, texts, phone, through staff, etc.) are also violations of the Act. (Govt. Code § 54952.2(b); *see also Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 376 [deliberative actions also include "informal sessions at which a legislative body commits itself collectively to a particular future decision concerning the public business."]; *Page v. Mira Costa Cmty. Coll Dist*. (2009) 180 Cal App. 4th 471, 502 ("'Deliberation' refers to not only collective decision-making, but also collective acquisition and exchange of facts preliminary to the ultimate decision."]).

The Brown Act also mandates that agendas for regular meetings allow for two types of public comment periods. The first is a general audience public comment period, where members of the public can comment on any item of interest that is within the subject matter jurisdiction of the local agency. The second is a specific comment period pertaining to items placed on the agenda. The Brown Act requires that the governing body allow these specific comment periods on agenda items to occur prior

to or during the governing body's consideration of that item (Gov. Code § 54954.3). The Brown Act also requires that agendas for special meetings also provide an opportunity for members of the public to address the body concerning any item listed on the agenda prior to the body's consideration of that item. (Gov. Code § 54954.3). While a governing body can adopt *reasonable* regulations limiting the total amount of time allocated to each person for public testimony (e.g. 3-5 minutes per speaker), it may not prohibit public comment/criticism of the policies, procedures, programs, or services of the agency or the acts or omissions of the governing body (Gov. Code § 54954.3(c)).

Here, in statements made at numerous Board meetings and as admitted in Board "consent calendar" agendas, Respondents have revealed that they have engaged in unlawful secret serial meetings regarding the Emergencies and consideration of the local conditions with the Health Officer and other health officials without putting these issues on the regular or special agenda. Indeed, not once have Respondents put this issue of whether to continue or terminate the Emergencies on the Board agenda as an itemized topic or allowed for meaningful comment on this issue of significant public concern. Instead, Respondents have indicated that they would let the Health Officer make the review of local conditions and determination of whether to terminate or maintain the Emergencies. The Health Officer, in turn, has also indicated that he would make his own decision in unison with the six other jurisdictions pursuant to the Seven County Pact. These deliberations and secret, non-public meetings and serial communications to determine the people's business, in addition to the numerous ways Respondents actively discouraged public participation on this critical issue, as further described in the Petition filed concurrently herewith, are violations of the Brown Act that must be remedied by this Court.

IV. CONCLUSION

Respondents failed to proceed in a manner required by law by: (a) refusing to review local conditions in the County at an open and public meeting, (b) refusing to terminate the Emergencies at the earliest date conditions warranted, and (c) delegating their quasi-legislative authority on this fundamental policy issue to unelected health officials including the Health Officer. Petitioners respectfully request that this Court grant Petitioners' Application and require Respondents to satisfy their obligations under Government Code, section 8630, and Health & Safety Code, section 101080, to review local conditions in a public and open meeting compliant with the requirements of the Brown Act,

and to terminate the Emergencies if conditions warrant; or in the alternative, to order Respondents to show cause why they should not be commanded by this Court to do so.

Respectfully submitted,

Dated: February 21, 2023

FACTS LAW TRUTH JUSTICE
LAW OFFICE OF NICOLE C. PEARSON

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