



Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: County of San Bernardino v. Gavin Newsom, et al., No. S266106
Letter in Support of Petitioner's Request for Peremptory Writ of Mandate

Honorable Justices:

On December 15, 2020, the Court ordered Respondents Gavin Newsom *et al.* to file a preliminary opposition to the County of San Bernardino's petition for a peremptory writ of mandate in the above-captioned action, an original proceeding that seeks to invalidate the indefinite "stay at home" orders California officials have issued since March 2020 in response to the COVID-19 pandemic. This request—and the speed with which it was issued—suggests that the Court may grant the County's petition in the first instance or order additional briefing and oral argument on the matter.

Pursuant to Cal. R. Ct. 8.500(g), the Goldwater Institute files this letter to urge the Court to grant the petition or issue an order to show cause on all the issues presented. The petition raises serious questions about the scope of the Respondents' authority to issue the stay at home orders and whether that authority violates the separation of powers. These are clearly "issues of sufficient public importance" that justify the Court's exercise of original jurisdiction. *Legislature v. Eu*, 54 Cal.3d 492, 500 (1991).

I. The *Amicus's* Interest in the Petition

The Goldwater Institute was founded in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom and constitutional protections through litigation, research, policy briefings and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases and files *amicus curiae* briefs that directly implicate its and its clients' objectives.

The Institute devotes substantial resources to defending constitutional principles. The Institute has appeared before this Court representing parties, *see, e.g., Renteria v. Superior Court (Cuellar)*, No. S243352 (Aug. 30, 2017), and as an *amicus*, *see, e.g., In re A.P.*, No. S233216 (Mar. 30, 2016), in cases where its and its supporters interest are involved. In particular, it has litigated and won cases in

California and other states involving the protection of private property rights, an issue that is directly relevant here because of the devastating effect Respondents' stay at home orders have had on such rights, especially the rights of small business owners who have been deemed "non-essential."

The Institute has been a leader in enforcing the constitutional separation of powers through litigation and advocacy. *See, e.g.,* Jon Riches & Timothy Sandefur, *Confronting the Administrative State*, Goldwater Institute, 2020.¹

II. The Petition raises serious questions about the scope and constitutionality of the executive branch's powers during a long-term emergency.

Last March, Governor Newsom took the unprecedented action of ordering all Californians, 40 million people, to stay inside their homes unless they left to perform an activity the executive branch had deemed "essential." This "stay at home" order—which had no parallel in California history—has been extended three times, each time indefinitely. The current order imposes the strictest conditions since the original one, with many businesses, schools and churches forced to close.

In issuing these orders, Respondents have relied primarily on the California Emergency Services Act (the "CESA"). The CESA gives the Governor the power to exercise certain state functions quickly during a condition of "extreme peril to the safety of persons and property within the state." Cal. Gov't Code § 8558(b). The Governor's express powers include spending money, something the Legislature typically does in the first instance. *Id.*, § 8566. The Governor can also seize private property or personnel to respond to the emergency, while paying the reasonable value for those things. *Id.*, § 8572. And he can "make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter." *Id.*, § 8567(a). These powers are not unlimited, but focus on the "fundamental role of government to provide broad state services in the event of emergencies resulting from conditions of disaster or of extreme peril to life, property, and the resources of the state." *Martin v. Municipal Court*, 148 Cal.App.3d 693, 696 (1983).

As San Bernardino County's petition points out, there is no language in the CESA that gives the Governor or other executive branch officials the power to order Californians to stay home unless they leave to do something the executive branch has deemed essential. Respondents acknowledge this, but argue that the CESA should be construed to give them this power because the Act says they can "make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter." Cal. Gov't Code § 8567(a).

Construing the CESA, or any law, to give executive branch officials such vast, and temporally indefinite, power violates the constitutional separation of powers. In California, as in all states, 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." Cal. Const., art. III, § 3. Although their duties occasionally overlap, each branch has core functions, with

¹ https://goldwaterinstitute.org/wp-content/uploads/2020/04/Confronting-the-Administrative-State_web.pdf

this Court long recognizing that “truly fundamental issues should be resolved by the Legislature” and not by the executive or judicial branches. *Wilke & Holzheiser, Inc. v. Dep’t of Alcoholic Beverage Control*, 65 Cal.2d 349, 369 (1966).

The non-delegation doctrine ensures that. It has a rich history in American law. James Madison explained early on that “[t]he accumulation of all powers legislative, executive and judiciary in the same hands ... may justly be pronounced the very definition of tyranny.” James Madison, *The Federalist* No. 47, 324 (J. Cooke ed. 1961). Of course, this does not “not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other.” *Id.* at 325. Thus, for example, “[o]nce it has established the law, the Legislature may delegate the authority to administer or apply the law.” *Wilkinson v. Madera Cmty. Hosp.*, 144 Cal.App.3d 436, 442 (1983). Nevertheless, the separation of powers and the delegation doctrine are premised on “the belief that the Legislature as the most representative organ of government should settle insofar as possible controverted issues of policy and that it must determine crucial issues whenever it has the time, information and competence to deal with them.” *Clean Air Constituency v. Air Res. Bd.*, 11 Cal.3d 801, 817 (1974).

These are not empty words. “Separation of powers protects liberty not only by creating checks and balances, but also by maintaining clear lines of political accountability.” *Steen v. App. Div. of Super. Ct.*, 59 Cal.4th 1045, 1060 (2014) (Liu, J., concurring). “The diffusion of power carries it with a diffusion of accountability.” *Ibid.* (citation omitted). This is exactly what has occurred during the pandemic. The first stay at home order was issued pursuant to the Governor’s emergency powers under the CESA, with the promise that the order was “not a permanent state” but a “moment in time” that would be lifted after a few weeks. *California Governor Orders All Residents to Stay Home*, N.Y. Times, Mar. 19, 2020.² The last two stay at home orders were not issued by the Governor, exercising his emergency powers, but by Erica Pan, an unelected, interim State Public Health Officer, purporting to exercise powers under the CESA and the Health and Safety Code, statutes that have never been used (or interpreted) this way.

A system that gives unelected—and temporary—executive branch officials the power to regulate private conduct across California for as long as those officials deem necessary cannot be squared with the separation of powers. *Cf. Lockyer v. City & Cnty. of San Francisco*, 33 Cal.4th 1055, 1068–69 (2004) (“When ... a duly enacted statute imposes a ministerial duty upon an executive official to follow the dictates of the statute in performing a mandated act, the official generally has no authority to disregard the statutory mandate based on the official’s own determination that the statute is unconstitutional.”). It is the role of the legislature, not the governor, to make the law.

Obviously there are cases in which an emergency is so drastic that the legislature cannot assemble or, for some other reason, the executive must take urgent action to restore peace after a disruption. But this cannot be a permanent state of affairs. It may be difficult to draw a precise line, but certainly nine months—during which time civil order has been effectively maintained—is sufficient time to allow for the restoration of the ordinary constitutional process. “Although efficiency and good government are laudable objectives, they must be pursued in conformity with our constitutional

² <https://www.nytimes.com/2020/03/19/world/coronavirus-update-cases.html>

structure.” *Steen*, 59 Cal.4th at 1060 (Liu, J., concurring). San Bernardino County’s petition seeks to uphold that structure. It should be granted.

III. The legal flaws with the stay at home orders have led to widespread defiance by law enforcement officials which undermines the rule of law.

In addition to the concerns addressed in the petition, the Governor’s stay at home orders implicate a serious and potentially more long-lasting problem: the orders are so extreme that many law enforcement officials, including the sheriffs of the state’s largest counties, have openly announced that they will not enforce these orders. While this choice may be understandable under the circumstances, it raises a significant concern that disregard for the law will, if left unaddressed, lead to a larger contempt for the rule of law itself throughout California.

It has long been recognized that a lack of congruence between a publicly announced rule and the actions of officials represents a breakdown in the legal system. *See, e.g.,* Lon L. Fuller, *The Morality of Law* 81-91 (rev. ed. 1969). The authors of *The Federalist* saw this as an important reason to avoid adopting laws that cannot, as a practical matter, be enforced. If public officials found themselves in a position where they were forced “by necessity” to disregard the laws they were charged with enforcing, the result would be a gradual diminishment in “that sacred reverence, which ought to be maintained in the breast of rulers towards the constitution,” and official defiance of the law—even if justified under the circumstances—would “form[] a precedent for other breaches, where the same plea of necessity does not exist at all.” Alexander Hamilton, *The Federalist* No. 25, *supra* at 163.

That is now happening in California. Due to the practical impossibility of actually compelling 40 million Californians to comply with the Governor’s orders, sheriffs in Riverside, San Bernardino, Orange, Los Angeles, and other counties have deemed them “flat-out ridiculous,” and refused to enforce them. Richard Allyn, *Which Southern California Sheriffs Are Defying New Stay-at-home Order*, CBS8, Dec. 7, 2020.³ Police chiefs in Redding,⁴ Chico,⁵ Sacramento, Stockton, Roseville, and elsewhere,⁶ have followed suit.

³ <https://www.cbs8.com/article/news/health/coronavirus/some-southern-california-sheriffs-defy-new-stay-at-home-order/509-3d51ce8b-a566-4fa5-9686-22dcaf2d32b5>

⁴ David Brenda & Damon Arthur, *As California Imposes COVID Curfew, Redding Police Chief Says He Will Not Enforce New Order*, Record Searchlight, Nov, 19, 2020, <https://www.redding.com/story/news/2020/11/19/redding-police-chief-says-he-not-enforce-california-covid-curfew/6348866002/>.

⁵ Austin Herbaugh, *COVID Curfew: Northstate Agencies Say They Won’t Enforce Newsom’s Order*, KRCR, Nov. 20, 2020, <https://krcrtv.com/news/local/chico-police-chief-department-will-not-enforce-overnight-curfew>.

⁶ *13 Law Enforcement Agencies That Refuse to Enforce California’s New Curfew and Why*, ABC10, Nov. 20, 2020, <https://www.abc10.com/article/news/health/coronavirus/eleven-law-enforcement-agencies-that-refuse-to-enforce-california-curfew-and-why/103-148e02b7-45fd-449b-a995-e251de5793b8>.

This is not sustainable. As Laurence Tribe puts it, “the codification of a truly empty promise, one whose vision is belied by the people’s day-to-day-experience, one that is utterly at variance with the substance of the law in which it is contained, can take an unacceptably high toll on confidence in the rule of law and in the integrity of the legal system as a whole.” *Abortion: The Clash of Absolutes* 73-74 (1992). Not only should public officials enforce the law as a matter of official obligation, and because their credibility as neutral enforcers of the law depends on their doing so, but official refusal to enforce the law creates a vague atmosphere in which the law might be enforced or not, depending on the *ad hoc* decisions of officers—which is a dangerous invitation to favoritism on the one hand and to “harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,” on the other. *People v. McKay*, 27 Cal.4th 601, 635 (2002) (Brown, J., dissenting) (citation omitted).

Whatever the merits of the stay at home orders, or of the public officials’ refusal to enforce them, the stability and consistency of the law requires that this Court take up this matter and determine whether the orders are lawful and sheriff and police officers obliged to enforce them—or whether they are unlawful and therefore impose no such obligation on law enforcement. What cannot be tolerated is for a persistent dichotomy between the officially pronounced rule and actual enforcement on the ground.

IV. This Court is best positioned to decide whether the indefinite stay at home orders are valid.

This Court typically does not exercise its original jurisdiction to hear mandamus proceedings. But it should here. After all, the Court “has repeatedly recognized the intervention of an appellate court may be required to consider instances of a grave nature or of significant legal impact, or to review questions of first impression and general importance to the bench and bar where general guidelines can be laid down for future cases.” *Anderson v. Super. Ct.*, 213 Cal.App.3d 1321, 1328 (1989) (citation omitted); *see also Eu*, 54 Cal.3d at 500 (exercising original jurisdiction over constitutional challenge to ballot measure because it “involves issues of sufficient public importance to justify departing from our usual course.”); *Raven v. Deukmejian*, 52 Cal.3d 336, 340 (1990) (exercising original jurisdiction over writ petition to determine constitutionality of 1990 ballot proposition). It is difficult to imagine an issue more important than the constitutionality of government orders that have made it illegal for millions of people to work, educate their children, and visit their families.

In fact, this Court is uniquely positioned to decide the important constitutional questions presented by San Bernardino County’s petition. In a famous 1977 article, Supreme Court Justice William Brennan said that “state courts no less than federal are and ought to be the guardians of our liberties.” *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). Others have echoed this thesis. *See, e.g., Goodwin Liu, State Courts and Constitutional Structure*, 128 Yale L.J. 1304, 1313-1314 (2019) (state constitutionalism is a “structural mechanism for American constitutional law to develop in a manner that accounts for ‘differences in culture, geography, and history.’” (citation omitted).)

California's Constitution, in fact, promises some of the nation's strongest protections for civil liberties, including "an express right to 'privacy'" that this Court has interpreted to "craft[] a privacy doctrine that has no equivalent in federal constitutional law." *Id.* at 1327 (citations omitted). That may be why this Court, in its only discussion of the CESA, said the statute "makes clear that in situations of 'extreme peril' to the public welfare the State may exercise its sovereign authority to the fullest extent possible *consistent with individual rights and liberties.*" *Macias v. State*, 10 Cal.4th 844, 854 (1995) (emphasis added). The stay at home orders, however, inherently intrude on personal privacy rights. This Court is the ultimate arbiter of California law and should review these unprecedented orders.

V. The Court should act now, before the next wave of lockdowns.

Time is of the essence. California's stay at home orders have been in place for more than nine months, with no end in sight. A democratic society cannot function this way. As the pandemic enters its second year, the constitutionality of the executive branch's exercise of indefinite and unlimited authority must be adjudicated. The stay at home orders are now closer to the "permanent" state that the Governor promised not to create last March. If left undisturbed, the exercise of such power will create a dangerous precedent, in which executive branch officials can assert virtually limitless and unchecked authority to control the economy and private behaviors based on an asserted need to protect the public health.

Therefore, the Goldwater Institute urges the Court to grant the County of San Bernardino's petition or issue an order to show cause on all issues presented.

Sincerely,

A handwritten signature in black ink, appearing to read 'Timothy Sandefur', with a stylized flourish at the end.

Timothy Sandefur (CA Bar # 224436)
Vice President of Litigation
Scharf-Norton Center for Constitutional Litigation
at the Goldwater Institute

DECLARATION OF SERVICE BY MAIL

I, Kris Schlott, declare as follows:

I am a resident of the State of Arizona, residing and employed in Phoenix, Arizona.

I am over the age of 18 years and am not a party to the above-entitled actions.

My business address is 500 E. Coronado Rd., Phoenix, Arizona 85004.

On December 31, 2020, true copies of Goldwater Institute's Letter in Support of Petitioner's Request for Peremptory Writ of Mandate were emailed and mailed postage prepaid via U.S. Postal Service to:

Jennifer Lynn Bursch
Cody James Bellmeyer
TYLER & BURSCH, LLP
25026 Las Brisas Road
Murrieta, CA 92562
jbursch@tylerbursch.com
cbellmeyer@tylerbursch.com

Attorney General – Sacramento Office
Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

Attorneys for Respondents

Nathan R. Klein
TYLER & BURSCH, LLP
24910 Las Brisas Road, #110
Murrieta, CA 92562
nklein@tylerbursch.com

Attorneys for Petitioners

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 31st day of December, 2020.



Kris Schlott, Paralegal