CASE NO. _____

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

_____

ORANGE COUNTY BOARD OF EDUCATION, CHILDREN'S HEALTH DEFENSE, and CHILDREN'S HEALTH DEFENSE-CALIFORNIA CHAPTER,

Petitioners,

vs.

GAVIN NEWSOM, in his official capacity as Governor of California,

Respondent.

_____

VERIFIED PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES

IMMEDIATE RELIEF REQUESTED
(*Palma* Notice Requested)

_____

MUSICK PEELER & GARRETT LLP *Scott J. Street (SBN 258962) s.street@musickpeeler.com 624 S. Grand Avenue, Suite 2000 Los Angeles, California 90017-3383 Telephone: (213) 629-7600	**KENNEDY & MADONNA, LLP** Robert F. Kennedy, Jr. (*pro hac vice* pending) 48 Dewitt Mills Road Hurley, New York 12443 Telephone: (914) 882-4789
TYLER & BURSCH, LLP *Robert H. Tyler (SBN 179572) rtyler@tylerbursch.com *Jennifer L. Bursch (SBN 245512) jbursch@tylerbursch.com 25026 Las Brisas Road Murrieta, California 92562 Telephone: (951) 600-2733	
Attorneys for Petitioners	

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court, rules 8.208, 8.490(i), 8.494(c), 8.496(c), or 8.498(d)

Supreme Court Case Caption:

ORANGE COUNTY BOARD OF EDUCATION, CHILDREN'S HEALTH DEFENSE, and CHILDREN'S HEALTH DEFENSE-CALIFORNIA CHAPTER,

Petitioners,

vs.

GAVIN NEWSOM, in his official capacity as Governor of California,

Respondent.

Please check here if applicable:

☒ There are no interested entities or persons to list in this Certificate as defined in the California Rules of Court.

Dated: August 10, 2021

Robert H. Tyler
Jennifer L. Bursch
Tyler & Bursch, LLP
Attorneys for Petitioners Orange County Board of Education, Children's Health Defense and Children's Health Defense-California Chapter

Scott J. Street
Musick, Peeler & Garrett LLP
Attorneys for Petitioner Orange County Board of Education

TABLE OF CONTENTS

VERIFIED PETITION WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES 8

I. INTRODUCTION 8

II. PETITION 10

III. PRAYER FOR RELIEF 17

IV. VERIFICATION 19

V. CONCLUSION 20

VI. ARGUMENT 21

A. HAVING DETERMINED THAT CALIFORNIANS SLOWED THE SPREAD OF COVID-19 AND SAVED THE HEALTH CARE SYSTEM, THE GOVERNOR MUST TERMINATE THE STATE OF EMERGENCY. 21

B. INTERPRETING THE EMERGENCY SERVICES ACT TO LET THE GOVERNOR TO KEEP AN EMERGENCY IN PLACE INDEFINITELY, FOR "FLEXIBILITY," WOULD ELIMINATE THE ACT'S ONLY SAFEGUARD AND RENDER IT UNCONSTITUTIONAL 24

C. THE COURT CAN ORDER THE GOVERNOR TO TERMINATE THE EMERGENCY AND IT SHOULD EXERCISE ITS ORIGINAL JURISDICTION TO DO SO. 29

D. GIVEN THE EXIGENCY AND THE IMPORTANCE OF THESE ISSUES. IMMEDIATE RELIEF IS WARRANTED. 33

VII. CONCLUSION 38

CERTIFICATE OF SERVICE 40

TABLE OF AUTHORITIES

Cases **Page(s)**

Anderson v. Superior Court
(1989) 213 Cal. App. 3d 1321 [262 Cal.Rptr. 405] 29

Apple Inc. v. Superior Court
(The Police Retirement Sys. of St. Louis) (2017) 18 Cal. App. 5th 222 [227 Cal.Rptr.3d 8] 33

Blumenthal v. Bd. of Med. Examiners
(1962) 57 Cal. 2d 228 [18 Cal.Rptr. 501] 6

Brown v. Fair Political Practices Commission
(2000) 84 Cal. App. 4th 137 [100 Cal.Rptr.2d 606] 30

Bush v. Schiavo
(Fl. 2004) 885 So.2d 321 [29 Fla. L. Weekly S515] 24

Campaign for Quality Educ. v. State
(2016) 246 Cal. App. 4th 896 [209 Cal.Rptr.3d 888] 32, 34

Carmel Valley Fire Prot. Dist. v. State
(2001) 25 Cal. 4th 287 [105 Cal.Rptr. 2d 636] 25

Carson Mobilehome Park Owners' Assn. v. City of Carson
(1983) 35 Cal. 3d 184 [197 Cal.Rptr. 284] 26

Clean Air Constituency v. State Air Resources Bd.
(1974) 11 Cal. 3d 801 [114 Cal.Rptr. 577] 26

Corbett v. Superior Court
(Bank of Am., N.A.) (2002) 101 Cal. App. 4th 649 [125 Cal.Rptr.2d 46] 33

County of Sacramento v. Hickman
(1967) 66 Cal.2d 841 [59 Cal.Rptr. 609] 33

County of Sonoma v. Cohen
(2015) 235 Cal. App. 4th 42 [184 Cal.Rptr.3d 911] 28

Gundy v. United States
(2019) – U.S. – [139 S. Ct. 2116, 2123, 204 L.Ed.2d 522] 25

Guzman v. Cty. of Monterey
(2009) 46 Cal. 4th 887 [95 Cal.Rptr.3d 183] 22

Jenkins v. Knight
(1956) 46 Cal.2d 220 [293 P.2d 6] 32

Joint Anti-Fascist Refugee Committee v. McGrath
(1951) 341 U.S. 123 [71 S.Ct. 624] 32

Kugler v. Yocum
(1968) 69 Cal.2d 371 27

Lazan v. County of Riverside
(2006) 140 Cal. App. 4th 453 [44 Cal.Rptr.3d 394] 22

Legislature v. Eu
(1991) 54 Cal. 3d 492 [286 Cal.Rptr. 283] 30

Los Angeles Dredging Co. v. Long Beach
(1930) 210 Cal. 348 [71 A.L.R. 161] 21

Love v. State Dep't of Educ.
(2018) 29 Cal. App. 5th 980 [240 Cal.Rptr.3d 861] 35

Macias v. State
(1995) 10 Cal. 4th 844 [42 Cal.Rptr.2d 592] 30

Malibu W. Swimming Club v. Flournoy
(1976) 60 Cal. App. 3d 161 [131 Cal.Rptr. 279] 21,22

Martin v. Municipal Court
(People of the State of Cal.) (1983) 148 Cal. App. 3d 693 [196 Cal.Rptr. 218] 21

Mathews v. Becerra
(2019) 8 Cal. 5th 756 [257 Cal.Rptr.3d 2] 35

McClung v. Employment Dev. Dep't
(2004) 34 Cal. 4th 467 [20 Cal.Rptr.3d 428] 32

McGautha v. California
(1971) 402 U.S. 183 [28 L.Ed.2d 711] 29

Nat'l Tax-Limitation Com. v. Schwarzenegger
(2003) 113 Cal. App. 4th 1266 [8 Cal.Rptr.3d 4] 22, 23, 31, 32

Newsom v. Superior Court
(Gallagher) (2021) 63 Cal. App. 5th 1099 [278 Cal.Rptr.3d 397] . 26, 27

Ng v. Superior Court
(The People) (1992) 4 Cal. 4th 29 [13 Cal.Rptr.2d 856] 33

Palma v. United States Industrial Fasteners, Inc.
(1984) 36 Cal. 3d 171 [203 Cal.Rptr. 626] 33

People ex rel. Lockyer v. Sun Pacific Farming Co.
(2000) 77 Cal. App. 4th 619 [92 Cal.Rptr.2d 115] 25

Raven v. Deukmejian
(1990) 52 Cal. 3d 336 [276 Cal.Rptr. 326] 30

Samples v. Brown
(2007) 146 Cal. App. 4th 787 [53 Cal.Rptr.3d 216] 25

Serrano v. Priest
(1971)5 Cal.3d 584 [96 Cal.Rptr. 601] 34

Steen v. App. Div. of Superior Court
(People) (2014) 59 Cal. 4th 1045 [175 Cal.Rptr.3d 760] 28

Tandon v. Newsom
(2021) 141 S. Ct. 1294 [209 L.Ed.2d 355] 31

Wilke & Holzheise, Inc. v. Dep't of Alcoholic Beverage Control
(1966) 65 Cal. 2d 349 [55 Cal.Rptr. 23] 25

Wilkinson v. Madera Community Hospital
(1983) 144 Cal. App. 3d 436 [192 Cal.Rptr. 593] 26

Statutes

California Code of Civil Procedures § 1085 16
California Code of Civil Procedures § 1086 16

California Government Code § 14 22
California Government Code § 8558 21
California Government Code § 8629 ..... 12, 22
California Rules of Court, Rule 8.208 2
California Rules of Court, Rule 8.486 16
California Rules of Court, Rule 8.490(i) 2
California Rules of Court, Rule 8.494(c) 2
California Rules of Court, Rule 8.496(c) 2
California Rules of Court, Rule 8.498(d) 2

Other

California Constitution, Wilke VI, § 10 16
California Constitution, Article III, § 3 24

VERIFIED PETITION WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES

To the Honorable Tani Cantil-Sakauye, Chief Justice of the Supreme Court of California and to the Honorable Associate Justices of the Supreme Court of California:

I. INTRODUCTION

This Petition does not focus on any specific policy issues. It concerns fundamental issues of governance that are the foundation of American self-government. It seeks to restore the People's right to participate in their government, to have policy decisions made in public by the People's elected officials and not behind the scenes by a revolving door of unelected technocrats.

Last fall, the Orange County Board of Education asked this Court to exercise original jurisdiction to decide whether Governor Gavin Newsom's order to close all in-person schooling across California was lawful. The Court declined to hear the case. As a result, despite little risk of harm from in-classroom instruction, millions of children suffered through a year of virtual school that many people did not want but followed because the State ordered it.

Last winter, San Bernardino County asked the Court to order the Governor to terminate his stay-at-home order and end the state of emergency. The Governor's office also asked the Court to hear the case. Again, the Court declined. Now, more than eighteen months after the pandemic began, Californians are living in a seemingly perpetual quasi-state of emergency, with ballparks full but mask mandates returning and millions of families waiting to see whether, and how, their children will be educated this school

year. These policy decisions continue to be made not by elected officials but, by and large, by unelected public health officials in Sacramento or Washington, D.C., who operate behind closed doors with little transparency about how they make decisions and no opportunity for public debate.

California's government is not supposed to function like this. Policy choices are supposed to be made by the Legislature, through the legislative process, with the executive branch administering the law. Of course, the Legislature can delegate authority to the Governor or administrative agencies under certain circumstances. But, even then, the government is supposed to follow a decision-making process that is transparent and which gives the People a voice in the process. It has not been doing that during the past eighteen months because the Governor suspended the normal rules of government under the California Emergency Services Act.

On June 11, the Governor issued an executive order that said Californians had successfully slowed the spread of COVID-19 and protected the health care system from collapse, the threat that caused him to declare the state of emergency. But he refused to terminate the state of emergency and said the emergency would continue indefinitely to give state health officials "flexibility" in their policymaking.

That is not proper. The Emergency Services Act says the Governor "shall" terminate the state of emergency at the earliest possible moment. This is a mandatory duty not a discretionary one. The Governor does not have the right to continue the state of emergency indefinitely. Interpreting the Emergency Services Act to give the Governor such discretion, simply for his convenience, would cause it to violate the non-delegation doctrine. The Third District Court of Appeal recognized as much when it recently ruled on the constitutionality of the Act. It cited the Governor's obligation to terminate

the emergency at the earliest possible moment as an important safeguard that saved the Act from violating the separation of powers.

Determining whether the Governor violated his duty to terminate the COVID-19 state of emergency now that he has effectively declared the emergency over is a matter of great public importance that this Court should address in the first instance. Deciding this Petition will also help resolve other cases going forward. Only one other court (the Third District Court of Appeal in 2003) has considered the scope of the Governor's duty to terminate a state of emergency in detail and that opinion was de-published after a new governor terminated the emergency.

Time is of the essence. Petitioners educate and advocate for thousands of California's children. They take the Governor at his word. With the successful slowing of the spread so COVID-19 did not overwhelm the health care system, it is time for government to return to normal. Given the importance of this issue, the Court should exercise original jurisdiction to hear the Petition and order the Governor to terminate the COVID-19 state of emergency.

II. PETITION

1. Early in 2020, California public health officials became aware that a novel respiratory virus—dubbed COVID-19—was spreading in the state and could trigger a pandemic. Exhibit A to Petition.

2. On March 4, 2020, Governor Gavin Newsom declared a state of emergency related to COVID-19. The Governor stated that he declared a state of emergency, pursuant to his powers under the California Emergency Services Act, "to combat the spread of COVID-19, which will require access to services, personnel, equipment, facilities, and other resources, potentially including resources beyond those currently available to prepare for and

respond to any potential cases and the spread of the virus ….” Exhibit B, at p. 47. The press release announcing the declaration said the Governor issued it specifically “to make additional resources available, formalize emergency actions already underway across multiple state agencies and departments, and help the state prepare for broader spread of COVID-19.” Exhibit C, at p. 52.

3. Emphasizing this focus on preparation for the spread of COVID-19, the Governor said: “The State of California is deploying every level of government to help identify cases and slow the spread of this coronavirus. This emergency proclamation will help the state further prepare our communities and our health care system in the event it spreads more broadly.” *Ibid.*

4. For the next fifteen months, the Governor and public health officials asserted unprecedented powers, including issuing a “stay at home” order that directed all Californians to stay inside their homes, indefinitely, unless they left to do something the government had deemed “essential.” Exhibit D.

5. During this time, the Governor also asserted his power under the Emergency Services Act to suspend the rulemaking procedures in the Administrative Procedure Act, thus exempting public health and other administrative officials from the normal decision-making process in exercising their quasi-legislative regulatory powers. Exhibits B, E.

6. On June 11, 2021, the Governor declared that “the effective actions of Californians over the past fifteen months have successfully curbed the spread of COVID-19, resulting in dramatically lower disease prevalence and death [ ] in the State ….” Exhibit E, at p. 57.

7. The Governor's June 11 order also said that it was time "for a full reopening of California" and thus the Governor terminated the stay-at-home order he had issued on March 19, 2020. *Id.* at pp. 57-58. He said "California is turning the page on this pandemic …." Exhibit F, at p. 60. He also stated that "[b]y the end of September, nearly 90 percent of the executive actions taken since March 2020 will have been lifted." *Ibid.*

8. The June 11 executive order did not terminate the COVID-19 related state of emergency. Instead, the Governor stated that he would continue the state of emergency indefinitely "to preserve the flexibility to modify public health directives and respond to changing conditions and to new and changing health guidance from the Centers for Disease Control …." Exhibit E, at p. 57.

9. The June 11 executive order also continued to suspend the rulemaking procedures for state agencies, including state health officials, indefinitely. *Ibid.*

10. The Governor's refusal to terminate the COVID-19 state of emergency violates California law. The Emergency Services Act states: "The Governor shall proclaim the termination of a state of emergency at the earliest possible moment that conditions warrant." Cal. Govt. Code § 8629. This is a mandatory duty, not a discretionary one.

11. Curbing the spread of the novel coronavirus was the condition that led to the declaration of emergency on March 4, 2020. The Governor found that Californians had "successfully curbed the spread" of COVID-19 by June 11, 2021. Thus, the Governor has a ministerial duty to terminate the state of emergency. Even if the Governor's duty to terminate the state of emergency is discretionary, his refusal to terminate it after June 11, 2021, constitutes an abuse of discretion.

12. Although the Governor cited the need for "flexibility" in dealing with COVID-19 in the future, that is not a legitimate basis to exercise emergency powers indefinitely.

13. The Governor's refusal to terminate the COVID-19 emergency after June 11, 2021, is also inconsistent with statements his office has made in pending legal proceedings. For example, last week, the Governor's office successfully moved to dismiss a case in Ventura County, arguing that the case is moot "because the conditions that led the State to adopt the Blueprint [for a Safer Economy last August] and other health orders imposing capacity restrictions are now absent." Exhibit H, at p. 93.

14. To avoid any doubt, the Governor's brief in the Ventura case stated: "Because of widespread vaccinations, infection rates [] in California have plummeted, and the State no longer faces a threat that the State's health care system will be overwhelmed. To the contrary, all available evidence suggests a resurgence of cases, hospitalizations, and deaths to the level that prompted the Blueprint and the other now-rescinded public health directives at issue is unlikely to occur …." *Id.* at p. 94.

15. The Orange County Board of Education is a five-member elected board of trustees which serves some of Orange County's most vulnerable student populations and provides support and mandated fiscal oversight to 27 school districts serving more than 600 schools and nearly 500,000 students. The Board provides direct instruction to students through its own alternative and special education programs. The Board, through a majority (unopposed) vote, brings this instant petition out of necessity as they are in an irreconcilable position where they must choose between complying with the ever-changing directives from state public health officials, in violation of the constitutional rights of their students, or upholding the

Constitution by doing what is best for their students, subjecting themselves to criminal culpability, expulsion from office, and loss of funding. The Board has been adversely affected by emergency government orders that have dictated the conditions under which children in their schools can be educated. Declaration of Mari Barke dated August 9, 2021 ("Barke Decl."), ¶¶ 2-4.

16. Children's Health Defense ("CHD") is a not-for-profit 26 U.S.C. § 501(c)(3) membership organization incorporated under the laws of the State of Georgia, and headquartered at 1227 North Peachtree Parkway, Suite 202, Peachtree City, Georgia 30269. CHD was founded in 2015 (under a different name) to educate the public about the risks and harmful effects of chemical exposures upon prenatal and children's health and to advocate for social change both legislatively and through judicial action. CHD does not oppose all vaccines but instead advocates for transparency and tighter safety standards in children's health, particularly since pharmaceutical companies have been given broad statutory immunity from tort liability related to vaccines, including the COVID-19 vaccines. Declaration of Mary Holland dated August 9, 2021 ("Holland Decl."), ¶¶ 2-3.

17. Children's Health Defense-California Chapter ("CHD-CA") is a not-for-profit 26 U.S.C. § 501(c)(3) membership organization incorporated under the laws of the State of California, and headquartered at P.O. Box 407, Ross, California 94957. CHD-CA was founded in 2020 to educate the public about the risks and harmful effects of environmental and chemical exposures upon prenatal and children's health and to advocate for social change both legislatively and through judicial action. CHD-CA does not oppose all vaccines but instead advocates for transparency and tighter safety standards in children's health, particularly since pharmaceutical companies have been given broad statutory immunity from tort liability related to vaccines,

including the COVID-19 vaccines. Declaration of Alix Mayer dated August 10, 2021 ("Mayer Decl."), ¶¶ 2-3.

18. CHD was established and is run by Robert F. Kennedy, Jr., and a group of parents whose children have been affected by environmental exposures. CHD operates the https://childrenshealthdefense.org website and publishes a "weekly wrap up" with research articles and opinion pieces about health issues that affect children, including issues related to the novel coronavirus, COVID-19. Through these publications and the activities of its California chapter, CHD represents the interests of thousands of children and families in California. Holland Decl., ¶¶ 4-5; Mayer Decl., ¶¶ 4-5.

19. Petitioners disagree with many of the public health orders that have been used to dictate the conditions under which California's children live and are educated. They also believe that these policy decisions should be made at the local level or in individual settings, not by bureaucrats in Sacramento or Washington, D.C., acting without any transparency or public comment pursuant to a perpetual state of emergency. Barke Decl., ¶ 4; Holland Decl., ¶ 5; Mayer Decl., ¶ 5. Thus, Petitioners have standing to bring this Petition and a beneficial interest in the relief it seeks.

20. The Governor issued the state of emergency and is responsible for terminating it.

21. The Governor has refused to terminate the state of emergency despite his obligation to do so.

22. Petitioners will suffer irreparable harm if the Court does not order the Governor to terminate the coronavirus state of emergency based on his finding that Californians had "successfully curbed the spread of COVID-19" during the past fifteen months. No amount of monetary damages can compensate the children who Petitioners educate and advocate for. Nothing

can replace the opportunities they have lost under the State's emergency orders and which they will continue to be deprived of under the Governor's permanent pandemic. In any event, the Governor has immunity from damages claims under the Emergency Services Act. Furthermore, the Petition raises questions of first impression about: (1) whether the Governor has a ministerial or discretionary duty to terminate a state of emergency after he announces that the conditions that led to its issuance have passed; (2) if the duty is discretionary, whether the Governor abuses that discretion by extending the state of emergency indefinitely despite changed conditions; and (3) whether a court can order the Governor to terminate a state of emergency if he violates his duty to do so. These are issues of great public importance that justify writ relief.

23. Indeed, as a result of the Governor's indefinite suspension of the APA rulemaking procedures, state health officials have continued to issue health directives to California schools without any public debate or transparency about their decision-making process. This has resulted in a dysfunctional process in which, for example, state health officials will announce a rule for all schools—such as mandating masks and removing students who do not wear them—but quickly change the policy after public outcry. Exhibits I, J.

24. The Court has concurrent original jurisdiction over the Petition pursuant to article VI, section 10 of the California Constitution, and under sections 1085 and 1086 of the California Code of Civil Procedure as well as Rule 8.486 of the California Rules of Court.

25. Petitioners filed the Petition less than 60 days after the Governor declared that Californians had effectively slowed the spread of

COVID-19, but refused to terminate the state of emergency. Thus, the Petition is timely.

26. This Court is the ultimate arbiter of state law. It should assume original jurisdiction and decide whether the Governor is obligated to terminate the state of emergency based on the findings set forth in his June 11 executive order. Time is of the essence. The next school year is about to start. State health officials still have not committed to allowing in-person instruction to occur throughout the year and they recently ordered that all students wear masks at all times, a policy Petitioners disagree with. Moreover, further lockdowns are threatened on an almost daily basis, casting a cloud over the next school year. Therefore, the Court should issue a *Palma* notice and set this case for further briefing and argument, if needed, as quickly as possible.

III. PRAYER FOR RELIEF

Therefore, Petitioners respectfully requests that the Court:

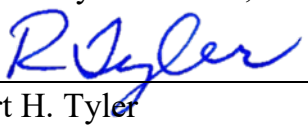
1. Grant the Petition;

2. Issue a writ of mandate ordering the Governor to terminate the declaration of emergency he issued on March 4, 2020; and

3. Award Petitioners their costs and other appropriate relief, as well as any other relief the Court determines is just and proper.

Dated: August 10, 2021

Respectfully Submitted,



Robert H. Tyler
Jennifer L. Bursch
Tyler & Bursch, LLP
Attorneys for Petitioners Orange County Board of Education, Children's Health Defense and Children's Health Defense-California Chapter

Scott J. Street
Musick, Peeler & Garrett LLP
Attorneys for Petitioner Orange County Board of Education

IV. VERIFICATION

I, Robert H. Tyler., declare as follows:

1. I am an attorney licensed to practice law before all courts in the state of California and am a partner with the law firm Tyler & Bursch LLP, counsel of record to Petitioners Orange County Board of Education, Children's Health Defense and Children's Health Defense-California Chapter in this matter. As a lawyer for the Petitioners in this action, I make this verification because I am familiar with the proceedings that gave rise to this Petition.

2. I have read the foregoing petition for a writ of mandate. It is true of my own knowledge except as to those matters that are stated on information and belief. As to those matters, I believe them to be true. If called as a witness, I could and would testify competently to these facts.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, and that this verification was executed on August 10, 2021, at Murrieta, California.

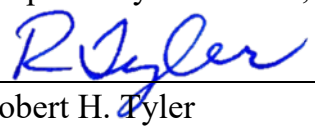
Robert H. Tyler

V. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the relief sought in the Verified Petition for a Peremptory Writ of Mandate in the First Instance and Request for Immediate Stay.

Dated: August 10, 2021

Respectfully Submitted,



Robert H. Tyler
Jennifer L. Bursch
Tyler & Bursch, LLP
Attorneys for Petitioners Orange County Board of Education, Children's Health Defense and Children's Health Defense-California Chapter

Scott J. Street
Musick, Peeler & Garrett LLP
Attorneys for Petitioner Orange County Board of Education

VI. ARGUMENT

The Petition should be granted because, based on his own statements and actions, the Governor has a duty to terminate the state of emergency that he declared on March 4, 2020. His refusal to terminate the emergency despite the changed conditions violates a ministerial duty, or constitutes an abuse of discretion, that the Court can enforce through a writ of mandate.

A. Having Determined that Californians Slowed the Spread of COVID-19 and Saved the Health Care System, the Governor Must Terminate the State of Emergency.

During the past eighteen months, the Governor has asserted unprecedented powers under the Emergency Services Act. There has been little litigation under the Act, but a few things are clear.

First, the Act gives the Governor power to act quickly not at all times but during a condition of "extreme peril to the safety of persons and property within the state …." (Gov't Code § 8558, subd. (b).) *Second*, the Governor's powers are not unlimited. They 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 (People of the State of Cal.)* (1983) 148 Cal. App. 3d 693, 696 [196 Cal.Rptr. 218].) *Third*, the term "emergency" has been construed strictly; it "implies that a sudden or unexpected necessity requires speedy action." (*Los Angeles Dredging Co. v. Long Beach* (1930) 210 Cal. 348, 356 [71 A.L.R. 161].) When "the 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 [131 Cal.Rptr. 279].) This focus on the *acuteness* of the threat means that, by definition, an emergency cannot be indefinite.

The Act reflects these principles by requiring that the Governor "proclaim the termination of a state of emergency at the earliest possible date that conditions warrant." (Gov't Code § 8629.) This Court has never decided whether the Governor's obligation to terminate a state of emergency is discretionary or mandatory. The Act uses the word "shall." "The word 'shall' indicates a mandatory or ministerial duty." (*Lazan v. County of Riverside* (2006) 140 Cal. App. 4th 453, 460 [44 Cal.Rptr.3d 394]; but see *Guzman v. Cty. of Monterey* (2009) 46 Cal. 4th 887, 898-899 [95 Cal.Rptr.3d 183] [stating that "this term's inclusion in an enactment does not necessarily create a mandatory duty; there may be other factors that indicate that apparent obligatory language was not intended to foreclose a governmental entity's or officer's exercise of discretion," cleaned up].) However, in the only case to analyze this language as part of the Emergency Services Act, the Third District Court of Appeal concluded that the Governor does not have a "ministerial duty to terminate a state of emergency under section 8629 until he determines, in the exercise of his discretion, that conditions warrant such an action …." (*Nat'l Tax-Limitation Com. v. Schwarzenegger* (2003) 113 Cal. App. 4th 1266 [8 Cal.Rptr.3d 4, 14], review denied but ordered de-published (Mar. 17, 2004).)

This conclusion cannot be squared with the Act's language or canons of statutory construction, including the Government Code's own provision that "'[s]hall' is mandatory and 'may' is permissive." (Gov't Code, § 14.) Apparently recognizing that, *Schwarzenegger* also held that, while partially a discretionary duty, mandamus would "lie to correct an abuse of discretion by the Governor in making that foundation[al] determination" about whether

an emergency still exists. (*Schwarzenegger, supra,* 8 Cal.Rptr.3d at p. 14.) For example, if "one of the requisite conditions for declaring the state of emergency in the first place ceases to exist, [ ] it would be an unreasonable exercise of discretion for the Governor to make any choice other than to determine that conditions now warrant termination of the state of emergency he proclaimed …." (*Id.* at p. 15.)

Schwarzenegger arose out of Governor Gray Davis' declaration of a state of emergency during the 2001 Enron-fueled electricity crisis. This Court denied review but ordered the Court of Appeal's opinion to be de-published because, by the time the Third District issued it, a new governor had been elected and terminated the emergency. Thus, there was no live controversy to decide, and this Court apparently believed that the legal question of whether, and under what circumstances, a court could order the Governor to terminate a state of emergency was unlikely to arise again. They do now. In fact, there is a greater need for judicial action here, as the Governor has already announced that there is no longer an emergency that requires immediate government action. Exhibit E, at p. 57. Thus, whether the Governor's duty to terminate the state of emergency is ministerial or discretionary—an issue this Court should decide—he has violated it.

The Governor may try to limit the statements from his June 11 executive order. But he has made similar statements in litigation that challenges his emergency orders. For example, the Governor convinced a court in Ventura County to dismiss a church's challenge to its emergency orders, saying that, apart from limited guidance issued by public health officials pursuant to the Health and Safety Code, the State "will not issue any other mandatory health directives" related to COVID-19. Exhibit H, at p. 88. Why not? The State said the emergency orders were issued last year because

"the State had no other immediate options to deal with the COVID-19 emergency at the time, when there was neither a cure for the disease nor a vaccine. But now, case and hospitalization rates are dramatically lower, and the State now has better options to control the pandemic." *Id.* at p. 93.

If this were not clear enough, the Governor emphasized in the Ventura case that "the State no longer faces a threat that the State's health care system will be overwhelmed. To the contrary, all available evidence suggests a resurgence of cases, hospitalizations. and deaths to the level that prompted the Blueprint [for a Safer Economy last August] and the other now-rescinded public health directives at issue is unlikely to occur in light of the percentage of eligible Californians who are fully vaccinated." *Id.* at p. 94.

If the Governor believes that the conditions that led to the declaration of a state of emergency no longer exist, then he has a duty to terminate it. The Act says that. It does not give the Governor discretion to extend the emergency for convenience or flexibility. The Court should grant review to decide this important issue and to order the Governor to comply with the law.

B. Interpreting the Emergency Services Act to Let the Governor Keep an Emergency in Place Indefinitely Would Eliminate the Act's Only Safeguard and Render it Unconstitutional.

It is critical for the Court to decide this issue, as interpreting the Emergency Services Act to give the Governor the power to continue a state of emergency indefinitely, after the condition that spawned the emergency has passed, would cause the Act to violate the separation of powers.

In California, as in all American 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.) As a practical

matter, the three branches of government are interdependent, and one will occasionally do something that affects the others. That is fine as long as the action is "properly within its sphere" and has only the "incidental effect of duplicating a function or procedure delegated to another branch." (*Carmel Valley Fire Prot. Dist. v. State* (2001) 25 Cal. 4th 287, 298 [105 Cal.Rptr. 2d 636], cleaned up.) But each branch has core functions, with this Court long recognizing that "truly fundamental issues should be resolved by the Legislature" and not by the executive or judicial branches. (*Wilke & Holzheise, Inc. v. Dep't of Alcoholic Beverage Control* (1966) 65 Cal. 2d 349, 369 [55 Cal.Rptr. 23].)

The non-delegation doctrine ensures that. It "is rooted in the principle of separation of powers that underlies our tripartite system of Government." (*Samples v. Brown* (2007) 146 Cal. App. 4th 787, 804 [53 Cal.Rptr.3d 216], as modified on denial of reh'g (Jan. 29, 2007), quotations omitted; *cf. Gundy v. United States* (2019) – U.S. – [139 S. Ct. 2116, 2123, 204 L.Ed.2d 522] [discussing non-delegation doctrine under federal Constitution].) "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, 632 [92 Cal.Rptr.2d 115], quotations omitted.) Although the non-delegation doctrine is most often invoked to challenge decisions made by an administrative agency, there is no reason it cannot apply when the Legislature delegates authority to the Governor. (See, e.g., *Bush v. Schiavo* (Fl. 2004) 885 So.2d 321, 332-335 [29 Fla. L. Weekly S515] [holding that law authorizing Florida governor to issue one-time stay to prevent withholding of food and water to comatose patient violated non-delegation doctrine].)

"Once it has established the law, the Legislature may delegate the authority to administer or apply the law." (*Wilkinson v. Madera Community Hospital* (1983) 144 Cal. App. 3d 436, 442 [192 Cal.Rptr. 593].) "An unconstitutional delegation of authority occurs only when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy." (*Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal. 3d 184, 190 [197 Cal.Rptr. 284].) "Underlying these rules is 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. State Air Resources Bd.* (1974) 11 Cal. 3d 801, 817 [114 Cal.Rptr. 577].) Courts also must look closely to ensure that legislative delegations are not too broad. "Delegated power must be accompanied by suitable safeguards to guide its use and to protect against its misuse." (*Blumenthal v. Bd. of Med. Examiners* (1962) 57 Cal. 2d 228, 236 [18 Cal.Rptr. 501].) "The absence of such standards, or safeguards ... renders effective review of the exercise of the delegated power impossible." (*Ibid.*)

In *Newsom v. Superior Court (Gallagher)* (2021) 63 Cal. App. 5th 1099 [278 Cal.Rptr.3d 397, 404-410], the Third District Court of Appeal analyzed the Emergency Services Act in light of these principles. It could not find any standards to guide the exercise of emergency power. (*See id.* at p. 408 [stating that "the requirement of particularized standards delimiting the specific orders that the Governor may issue is antithetical to the purpose of the Emergency Services Act"].) Nonetheless, it held that, "of greater significance than 'standards' is the requirement that legislation provide

'safeguards' against the arbitrary exercise of quasi-legislative authority." (*Ibid.*) It echoed this Court's statement that "'the most perceptive courts are motivated much more by the degree of protection against arbitrariness than by the doctrine about standards ….'" (*Id.* at p. 409, quoting *Kugler v. Yocum* (1968) 69 Cal.2d 371, 381 [71 Cal.Rptr.687].) But the only safeguard the Third District mentioned in *Newsom* was the Governor's obligation to terminate the state of emergency "at the earliest possible date that conditions warrant …." (*Id.* at p. 409.)

This duty was essential to the outcome of *Newsom*. The Third District distinguished the Governor's powers under the Emergency Services Act from the powers granted to Michigan's governor under a similar law, which the Michigan Supreme Court found unconstitutional, by saying that, unlike the Act, the Michigan law was "'of indefinite duration.'" (*Id.* at p. 410, quoting *In re Certified Questions from the U.S. Dist. Ct., W. Dist. Ct. of Mich., S. Div.* (Mich. 2020) 506 Mich. 332, 365 [958 N.W.2d 1].) The court also emphasized the Michigan law's "expansiveness, its indefinite duration, and its inadequate standards" as being insufficient to satisfy the non-delegation doctrine. (*Ibid.*, quotations omitted.) Importantly, the Third District did not construe the Governor's obligation to terminate a state of emergency in California as a discretionary duty immune from judicial review. To the contrary, it held that, "[u]nlike the Michigan statute, the Emergency Services Act *obligates* the Governor to declare the state of emergency terminated as soon as conditions warrant …." (*Ibid.*, emphasis added.)

For this safeguard to mean anything, the duty must be construed as ministerial, not discretionary, and it must require that the Governor act now. The June 11 order and the Governor's statements in the Ventura case confirm

that there is no more emergency that requires immediate government action. The Governor simply wants "flexibility" in making policy decisions going forward. That may be convenient for the Governor and his staff, but while "efficiency and good government are laudable objectives, they must be pursued in conformity with our constitutional structure." (*Steen v. App. Div. of Superior Court (People)* (2014) 59 Cal. 4th 1045, 1060 [175 Cal.Rptr.3d 760] (Liu, J., concurring).)

The Governor's desire to have indefinite policy-making authority for all issues related to COVID-19 cannot be squared with the separation of powers. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." (*County of Sonoma v. Cohen* (2015) 235 Cal. App. 4th 42, 48 [184 Cal.Rptr.3d 911], quotations omitted.) These principles form the foundation of American government. The Constitution's framers "believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty." (*Gundy, supra,* 139 S. Ct. at p. 2134 (Gorscuh, J., dissenting).) "To address that tendency, the framers went to great lengths to make lawmaking difficult." (*Ibid.*) They did this partially by creating a system of checks and balances. "Separation of powers protects liberty not only by creating checks and balances, but also by maintaining clear lines of political accountability." (*Steen, supra,* 59 Cal. 4th at p. 1060 (Liu, J.); see also John F. Manning, *Textualism as a Nondelegation Doctrine* (1997) 97 Colum. L. Rev. 673, 708 [calling checks and balances "key elements of the constitutional scheme to preserve individual liberty"].)

As Justice William Brennan noted, basic policy choices must "be made by a responsible organ of state government. For if they are not, the very best that may be hoped for is that state power will be exercised, not upon the

basis of any social choice made by the people of the State, but instead merely … at the whim of the particular state official wielding the power ….” (*McGautha v. California* (1971) 402 U.S. 183, 250 [28 L.Ed.2d 711] (Brennan, J., dissenting); see also The Federalist No. 49 (Cooke ed. 1961) p. 339 (J. Madison) [explaining that “the people are the only legitimate fountain of power”].)

Political accountability has been lacking during the COVID-19 pandemic, with decisions made by a revolving door of unelected public health officials in Sacramento and Washington, D.C., who frequently change their minds, as they did this summer when trying to decide whether, and how, children should attend school this year. Exhibits I, J. That may have been acceptable during the pandemic’s early stages, but it cannot last forever, especially when, as in the Michigan case, the Governor has interpreted the Emergency Services Act to give himself virtually unlimited power to control Californians’ lives.

C. The Court Can Order the Governor to Terminate the Emergency and It Should Exercise Its Original Jurisdiction to Do So.

The Court should exercise jurisdiction to decide these important constitutional issues in the first instance.

While not the normal course, 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. Superior Court* (1989) 213 Cal. App. 3d 1321, 1328 [262 Cal.Rptr. 405], citation omitted.) For example, the Court has exercised original jurisdiction over a

constitutional challenge to a ballot measure because it "involves issues of sufficient public importance to justify departing from our usual course." (*Legislature v. Eu* (1991) 54 Cal. 3d 492, 500 [286 Cal.Rptr. 283]; see also *Raven v. Deukmejian* (1990) 52 Cal. 3d 336, 340 [276 Cal.Rptr. 326] [exercising original jurisdiction over writ petition to determine constitutionality of ballot proposition].)

Similarly, in *Brown v. Fair Political Practices Commission* (2000) 84 Cal. App. 4th 137 [100 Cal.Rptr.2d 606], the First District Court of Appeal exercised original jurisdiction to decide whether state law precluded then Oakland Mayor Jerry Brown from participating in decisions concerning a redevelopment project near his property. The court took the case "because (1) the petition raises novel issues of substantial public interest involving municipal government and the [Political Reform Act of 1974]; (2) the public interest in proceeding with redevelopment favors minimizing delay in resolving the issues; (3) there are no disputed issues of fact; and (4) the FPPC has not objected to proceeding in this court in the first instance." (*Id.* at p. 140, fn. 2.)

Determining whether the Governor is obligated to end a state of emergency that has lasted nearly eighteen months, and which the Governor and unelected state health officials have used to take unprecedented control over people's lives, is just as important. Furthermore, this is a novel issue, with the Court having addressed the scope of the Emergency Services Act only once before, in *Macias v. State* (1995) 10 Cal. 4th 844 [42 Cal.Rptr.2d 592], and with only one, de-published appellate court opinion discussing the nature of the Governor's obligation to terminate a statement of emergency. There are no factual issues to resolve. The only material facts come from the Governor's own words and pleadings. And the Governor will likely not

object to proceeding in this Court in the first instance, as he asked the Court to hear a similar petition filed by San Bernardino County last winter.

With *Newsom* also pending review, and fundamental issues of governance at stake, the Court should not ignore these important issues. It is well-suited to decide them. Many litigants have challenged the government's COVID-19 restrictions under federal law and the Supreme Court has rejected California's restrictions on in-person worshipping five times. (*Tandon v. Newsom* (2021) 141 S. Ct. 1294, 1297-1298 [209 L.Ed.2d 355] [listing them].) But that should not be the only route. In a famous 1977 article, Justice Brennan said that "state courts no less than federal are and ought to be the guardians of our liberties." (William Brennan, *State Constitutions and the Protection of Individual Rights* (1977) 90 Harv. L. Rev. 489, 491.) Others have echoed this thesis. (Goodwin Liu, *State Courts and Constitutional Structure* (2019) 128 Yale L.J. 1304, 1313-1314 [observing that 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].)

This Court is also best positioned to determine the politically sensitive question of whether a court has the power—period—to order the Governor to terminate a state of emergency. The parties litigated that issue in *Schwarzenegger*, with the Governor's office arguing that such power "plainly and fatally intrudes upon the powers of the executive and legislative branches." (*Schwarzenegger*, *supra*, 8 Cal.Rptr.3d at pp. 15-16, quotations omitted). The Third District disagreed, quoting this Court's admonition that "no man is above the law" and "'that where no discretion exists and a specific legal duty is imposed, ministerial in its character, an officer of the executive department of the government, like any other citizen is subject to judicial

process'" to compel performance of the act. (*Id.* at p. 16, quoting *Jenkins v. Knight* (1956) 46 Cal.2d 220, 223 [293 P.2d 6].) *Schwarzenegger* went a step further and also held that mandamus could be used to correct an abuse of discretion by the Governor in making foundational determinations about whether a state of emergency exists. (*Ibid.*)

The Governor's arguments in *Schwarzenegger* raised serious constitutional questions. After all, while conducting the State's sovereign functions during a pandemic may fall primarily to the Governor, "interpreting the law is a judicial function." (*McClung v. Employment Dev. Dep't* (2004) 34 Cal. 4th 467, 470 [20 Cal.Rptr.3d 428]; see also *Campaign for Quality Educ. v. State* (2016) 246 Cal. App. 4th 896 [209 Cal.Rptr.3d 888, 923, 929] (Cuellar, J., dissenting from denial of review) [explaining that separation of powers has never "meant that we should strain to avoid our responsibility to interpret the state Constitution simply because the right at issue touches on concerns the Legislature might ultimately address"].) Judicial review matters more now than ever. Indeed, the "availability of judicial review is ... commonly cited as one of the most important and effective safeguards" in determining whether a law violates the non-delegation doctrine. (Jennifer Holman, *Re-Regulation at the CPUC and California's Non-Delegation Doctrine: Did the CPUC Impermissibly Convey Its Power to Interested Parties?* (June 1997) 20 Environs 58, 61.)

Judicial restraint is admirable. But, at its root, such deference reflects the respect the judiciary owes to elected officials, "those who also have taken the oath to observe the Constitution …." (*Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U.S. 123, 164 [71 S.Ct. 624].) It does not call for blind allegiance to the unelected administrative state or to an executive who exceeds his powers. After nearly eighteen months it is time

for this Court to review the scope of the Governor's power under the Emergency Services Act. This Petition, combined with *Newsom*, provides the best opportunity.

D. Given the Exigency and the Importance of These Issues. Immediate Relief is Warranted.

Petitioners could have brought this Petition in the lower courts first. But the importance of the issue, combined with the exigency of the coming school year, warrants immediate relief, including expedited review by this Court pursuant to *Palma v. United States Industrial Fasteners, Inc. (*1984) 36 Cal. 3d 171, 180 [203 Cal.Rptr. 626].

"A writ of mandate should not be denied when the issues presented are of great public importance and must be resolved promptly." (*Corbett v. Superior Court (Bank of Am., N.A.)* (2002) 101 Cal. App. 4th 649, 657 [125 Cal.Rptr.2d 46], quoting *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845 [59 Cal.Rptr. 609], cleaned up.) That is the case here. Writ review may also be utilized at the early stages of a case if a "significant issue of law is raised, or resolution of the issue would result in a final disposition as to the petitioner." (*Apple Inc. v. Superior Court (The Police Retirement Sys. of St. Louis)* (2017) 18 Cal. App. 5th 222, 239 [227 Cal.Rptr.3d 8], quotations omitted.) That is also the case here. And, although not routine, this Court has said that the expedited *Palma* procedure may be used "when petitioner's entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue—for example, when such entitlement is conceded or when there has been clear error under well-settled principles of law and undisputed facts—or when there is an unusual urgency requiring acceleration of the normal process." (*Ng v. Superior Court (The People)* (1992) 4 Cal. 4th 29, 35 [13 Cal.Rptr.2d 856].)

That time has come in the COVID-19 pandemic. The new school year is starting. Petitioners want to give a voice to the students and families who otherwise have had little say in the State's COVID-19 decision-making process. They want to provide their students with in-person instruction. They want to make their own decisions about how to do that safely. They want to be freed from the control of unelected bureaucrats who, acting behind the scenes and with almost no transparency, have used the COVID-19 emergency to impose unprecedented restrictions on children and educators. Terminating the state of emergency will enable that.

Terminating the state of emergency may also help courts avoid deciding many difficult constitutional cases that could arise during the next school year. For example, the Ninth Circuit Court of Appeals recently held that the State cannot block private schools from providing in-person instruction to students during the pandemic. (*Brach v. Newsom* (9th Cir. July 23, 2021) – F.4th –, 2021 WL 3124310, at *18 [21 Cal. Daily Op. Serv. 7455].) In light of that decision, private schools may bring even more lawsuits as long as the state of emergency lasts. That could lead to very different experiences for children who attend private schools and children who attend public schools, including in Orange County, undermining "a fundamental right under the California Constitution" that this Court has called "'the lifeline of both the individual and society.'" (*Campaign for Quality Educ., supra*, 209 Cal.Rptr.3d at pp. 923, 928 (Liu, J., dissenting from denial of review), quoting *Serrano v. Priest* (1971)5 Cal.3d 584, 605 [96 Cal.Rptr. 601].)

Similarly, during the past century California extended some of the broadest rights imaginable to its citizens, including "an express right to 'privacy'" that this Court has interpreted to "craft [ ] a privacy doctrine that

has no equivalent in federal constitutional law." (Liu, *supra*, 128 Yale L.J. at p. 1327, citations omitted.) But some government officials, and even many private entities, want to ignore this development of state constitutional law and mandate COVID-19 vaccines to keep a job or enter public spaces. That will almost certainly lead to litigation, for "when a statute intrudes on a privacy interest protected by the state Constitution, it is our duty to independently examine the relationship between the statute's means and ends." (*Mathews v. Becerra* (2019) 8 Cal. 5th 756, 786-787 [257 Cal.Rptr.3d 2]; cf. *Love v. State Dep't of Educ.* (2018) 29 Cal. App. 5th 980, 987 [240 Cal.Rptr.3d 861] [noting that each school vaccination requirement "was added to California code through legislative action, after careful consideration of the public health risks of these diseases, cost to the state and health system, communicability, and rates of transmission"].)

Demanding that COVID-19 policies be set through the normal process of government is not a fringe viewpoint. In 2019, Governor Newsom himself shared concerns about a bill that proposed giving state health officials, not local doctors, the authority to decide which children could forego vaccines before attending school, saying that "as a parent, he wouldn't want a bureaucrat to make a personal decision for his family." Exhibit K, at p. 113. Although the Governor eventually signed the legislation, he did so only after the Legislature added certain amendments and after robust debate about the bill's costs and benefits. Terminating the state of emergency will allow COVID-19 policies to also be handled through the normal legislative and administrative decision-making process, with transparency and an opportunity for judicial review before policies take effect.

The Governor may ask the Court to wait just a little longer. He may promise that the end of the pandemic is near. But he made that promise before

and broke it. His "stay at home" order was supposed to last a few weeks, "not many, many months." Exhibit L, at p. 119. It lasted sixteen months. Thus, the Court should not wait any longer. COVID-19 will not go away. In a *Nature* study of immunologists, infectious-disease researchers and virologists working on the coronavirus, 90 percent said the virus would never be eradicated. (Nicky Phillips, *The coronavirus is here to stay—here's what that means* (Feb. 16, 2021) *Nature*, available at https://www.nature.com/articles/d41586-021-00396-2.) According to one prominent epidemiologist: "Eradicating this virus right now from the world is a lot like trying to plan the construction of a stepping-stone pathway to the Moon. It's unrealistic." (*Ibid.*; see also Jay Bhattacharya & Donald J. Boudreaux, *Eradication of Covid Is a Dangerous and Expensive Fantasy* (Aug. 4, 2021) The Wall Street Journal, available at https://www.wsj.com/articles/zero-covid-coronavirus-pandemic-lockdowns-china-australia-new-zealand-11628101945 [noting that only infectious disease to be deliberately eradicated by man was smallpox and that "required a concerted global effort lasting decades and unprecedented cooperation among nations"].)

The Governor knows that. He did not issue the declaration of emergency to eliminate COVID-19 but to curb its spread so the health care system did not become overwhelmed. Exhibit B. The Governor said in his June 11 order that Californians fulfilled that goal. Exhibit E. He repeated that in his pleadings in the Ventura case. Exhibit H. Thus, the Governor has a duty to end the state of emergency and the Court should order him to fulfill it.

* * *

On June 6, 1966, Senator Robert F. Kennedy spoke to students and faculty at the University of Capetown. His words echo today:

> Hand in hand with the freedom of speech goes the power to be heard—to share in the decisions of government which shape men's lives. Everything that makes man's lives worthwhile—family, work, education, a place to rear one's children and a place to rest one's head—all this depends on the decisions of government; all can be swept away by a government which does not heed the demands of its people, and I mean all of its people. Therefore, the essential humanity of man can be protected only where the government must answer—not just to the wealthy; not just to those a particular religion, not just to those of a particular race; but to all of the people.

(Robert F. Kennedy, Day of Affirmation Address (June 6, 1966) Capetown, South Africa, available at https://www.jfklibrary.org.).

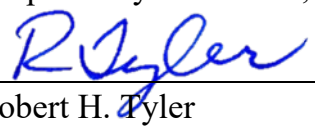
The state of emergency has deprived Californians of the right to participate in their own government. While this may have been necessary briefly, at the outset of a pandemic that caught the government off-guard, it cannot last forever. The Governor recognized that himself. Based on his own words and pleadings, it is time to end the state of emergency and return to normal governance.

VII. CONCLUSION

Therefore, Petitioners respectfully request that the Court grant the Petition and issue an order requiring the Governor to terminate the state of emergency he declared on March 4, 2020.

Dated: August 10, 2021

Respectfully Submitted,



Robert H. Tyler
Jennifer L. Bursch
Tyler & Bursch, LLP
Attorneys for Petitioners Orange County Board of Education, Children's Health Defense and Children's Health Defense-California Chapter

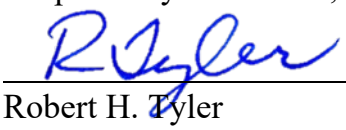
Scott J. Street
Musick, Peeler & Garrett LLP
Attorneys for Petitioner Orange County Board of Education

CERTIFICATE OF WORD COUNT

I, the undersigned counsel for Petitioners, relying on the word count function of Microsoft Word, the computer program used to prepare this brief, certify that the above document contains 8,055 words.

Dated: August 10, 2021

Respectfully Submitted,



Robert H. Tyler
Jennifer L. Bursch
Tyler & Bursch, LLP
Attorneys for Petitioners Orange County Board of Education, Children's Health Defense and Children's Health Defense-California Chapter

Scott J. Street
Musick, Peeler & Garrett LLP
Attorneys for Petitioner Orange County Board of Education

CERTIFICATE OF SERVICE

I am an employee in the County of Riverside. I am over the age of 18 years and not a party to the within entitled action; my business address is 25026 Las Brisas Road, Murrieta, California 92562.

On August 10, 2021, I served a copy of the following document(s) described as **VERIFIED PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF MARI BARKE; DECLARATION OF MARY HOLLAND; AND DECLARATION OF ALIX MAYER** on the interested party(ies) in this action by-email or electronic service [C.C.P. Section 1010.6; CRC 2.250-2.261]. The documents listed above were transmitted via e-mail to the e-mail addresses on the attached service list.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am an employee in the office of a member of the bar of this Court who directed this service.

Susan Y. Kenney

SERVICE LIST

Governor Gavin Newsom — Respondent
1303 10th Street, Ste. 1173
Sacramento, CA 95814
(916) 445-2841
Email: ServiceofProcess@gov.ca.gov
Todd.Grabarsky@doj.ca.gov