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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

PEGGY HALL, an individual; **CHILDREN'S HEALTH DEFENSE-CALIFORNIA CHAPTER,** a California 501(c)(3) non-profit corporation, on its own and on behalf of its members

Petitioner,

vs.

COUNTY OF ORANGE; ORANGE COUNTY BOARD OF SUPERVISORS,

Respondents.

Case No.: 30-2021-01220678-CU-WM-CJC
Assigned for all Purposes: Hon. Derek Hunt

PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO WRIT PETITION FOR WRIT OF MANDATE AND RESPONSE TO ORDER TO SHOW CAUSE

[Declaration of Nicole C. Pearson; Objections to Request for Judicial Notice and Objections to Evidence filed concurrently herewith]

Date: December 1, 2022
Time: 1:30 p.m.
Dept: C23

Complaint Filed: September 14, 2021

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Petitioners PEGGY HALL and CHILDREN'S HEALTH DEFENSE – CALIFORNIA CHAPTER (hereinafter collectively "Petitioners") hereby reply to the Opposition to Petitioners' Writ of Mandate, and Response to Order to Show Cause of Respondents COUNTY OF ORANGE (hereinafter "COUNTY") and ORANGE COUNTY BOARD OF SUPERVISORS (hereinafter "BOARD") (hereinafter collectively "Respondents"), filed on November 14, 2022 ("Opposition").

Petitioners' Reply is based on this Reply, the Declaration of Nicole C. Pearson in support, Petitioners' Objections to Respondents' Evidence, and Petitioners' Objections to Respondents' Request for Judicial Notice filed concurrently herewith; all pleadings and documents on file in this matter' all matters upon which this Court may take judicial notice; and upon such evidence and argument that may be made at, prior to, or during the hearing on this Order to Show Causes.

I. INTRODUCTION

The instant Order to Show Cause ("OSC") hearing was scheduled by Honorable Judge Lee after issuance of an alternative writ of mandamus upon Petitioners' Application for Alternative Writ ("Application"). Respondents have filed a brief in "Opposition to Petitioners' Petition for Writ of Mandate and in response to the Court's Order to Show Cause" in an apparent attempt to comply with Judge Lee's order, issued after the September 22, 2022 hearing on the Application, which compelled Respondents to (a) conduct the statutorily-required review hearing to review local conditions and proclaim a termination of the local health and/or local emergencies if said conditions warrant, or show cause why they have not done so or, in the alternative, (b) show that they have been conducting said hearings by submitting a 15 page brief and evidence in support. Instead of supporting the position that Respondents have been conducting review hearings, Respondents continue to argue that they have no duties. Respondents' "Opposition" is procedurally defective, defies the Court's Order, fails to present any competent evidence of compliance with the mandatory duty found by the Court, and improperly attempts to relitigate issues already decided by Judge Lee. Accordingly, the Opposition fails to show cause, should be stricken in its entirety, and Petitioners' writ of mandamus should issue.

II. PROCEDURAL POSTURE

Petitioners filed their Application on May 23, 2022 (Pearson Decl., ¶3, Exhibit A; Register of Actions ("ROA"), No. 70). On August 5, Respondents filed an Opposition to Petitioners' Application

on the grounds that, *inter alia*, Respondents did not have a "clear, present and ministerial duty that the Court could order the Respondent's to perform" because "no law that currently requires the Board to hold any official review or vote on whether to renew or terminate the Emergencies while the state-wide emergency is in effect," and because "the writ that Petitioners seek demands action that is within the Board's broad discretion as the 'governing bod[y] of political subdivisions of this state.' (Gov. Code, §§ 8550(a), 8557)." ("App. Opp.") (App. Opp., pp. 8-9:24-4) (Pearso Decl., ¶4, Exhibit B; ROA No. 120). On August 18, the Court continued the hearing on Petitioners' Application to September 22, 2022, to be heard the same day as Respondents' Demurrer to Petitioners' Second Amended Verified Petition ("SVAP"). (ROA Nos. 111, 112, 143).

In his tentative ruling issued September 21, 2022, Judge Lee overruled Respondents' Demurrer to Petitioners' SAVP, issued an alternative writ, and Ordered Respondents to file a Verified Answer to the SAVP. (Pearson Decl., ¶6, Exhibit C, pp. 27, 45). In granting the writ, Judge Lee found:

For the reasons set forth above, the Court **GRANTS** the Application for an Alternative Writ of Mandate.

> IT IS **ORDERED** that an Alternative Writ of Mandate issue commanding Respondents to review local conditions to determine whether there remains the need for continuing the local health emergency and/or local emergency as required by Health & Safety Code section 101080 and Government Code section 8630(c), and to proclaim the termination of the local health emergency and/or local emergency should conditions warrant as required by Health & Safety Code section 101080 and Government Code section 8630(d), or in the alternative, to show cause why Respondents have not done so on the date and time set forth below. The Order to Show Cause is set for 12/1/2022 at 1:30 p.m. No later than 5 court days before that hearing, Petitioners and Respondents may file a status report, not to exceed five pages, detailing whether the Code mandated review hearings have occurred, the outcome of such hearings, and when the next hearings are scheduled, if any.

(*Ibid.* [emphasis added]).

After reviewing Petitioners' Application and Respondents' Opposition, and hearing over an hour of oral argument by counsel for both parties at the hearing, Judge Lee indicated that he would adopt his tentative ruling and grant Petitioners' Application. (Pearson Decl., ¶7). Upon hearing this – and vigorously insisting that they had no duty of any kind to conduct the types of review hearings Judge Lee found to be mandatory in his tentative ruling – Respondents did a complete 180 and argued, for the first time in over 12 months of litigation, that they *had*, in fact, been doing the statutorily-required review

hearings all along, and asked for an opportunity to show that to the Court. (*Ibid.*). As a result, and in response to the same, Judge Lee added the following to his final ruling by Minute Order:

> The tentative ruling becomes the following order with the following exception. … The following paragraph is added at the end of the tentative ruling. … In the alternative, **Respondents are ordered to show cause whether the Board of Supervisors is complying with their obligations under the law and conducting the *statutorily mandated* review *hearings***. Respondents may submit a brief in support of their position, not to exceed 15 pages and may submit evidence by way of declarations. Any such briefs and evidence shall be filed and served no later than November 14, 2022. Petitioners may submit a reply brief, not to exceed 15 pages. The reply brief, if any, shall be filed and served no later than November 21, 2022.

(*Ibid.*; Exhibit D [emphasis added]). Respondents have apparently chosen to take the final path offered by Judge Lee, namely: to submit by November 14 a brief not to exceed 15 pages with declarations in support of their position that they have complying with their legal obligations to conduct statutorily-mandated review hearings because on November 14, 2022, Respondents filed a 15-page Opposition to Petitioners' Writ of Mandate and Response to the OSC with Exhibits and Declarations in support. (ROA No. 218-222).

III. LEGAL ARGUMENT

Rather than submit a brief with evidence showing they have been conducting the Code- and Court-mandated review hearings, Respondents filed **another opposition** to Petitioners' Application, which has already been briefed and granted. Specifically, Respondents re-argue that they have no clear, present, or ministerial duty that this Court can order because there is no law that currently requires the Board to hold any official review or to vote on whether to renew or terminate the local health and/or local emergency (hereinafter collectively "Emergencies") while the state-wide emergency is in effect as a result of Governor Newsom's March 4, 2020 State of Emergency Proclamation ("Proclamation"), an argument that was already summarily rejected by Judge Lee at the Application Hearing. Respondents additionally argue – for the first time – that the Proclamation waived the ***meeting*** requirements under *Health and Safety Code,* § 101080 and *Government Code,* § 8630. This is false.

Respondents' defiance of the Court's Order, improper attempt to relitigate decided issues, and novel and disingenuous claims regarding waiver of the public hearing requirement should be rejected by this honorable Court. If the Court decides to entertain them, Respondents still failed to provide any

competent evidence of compliance with the mandatory duty found by the Court, and have not shown cause.

A. <u>Respondents' Opposition Is Improper and Must Be Struck in Its Entirety</u>.

1. <u>Respondents Defied the Courts Order</u>

When a Court issues an Order, litigants are charged with following the Order; failure to do so can result in sanctions, an order of contempt, rejection of non-conforming responses, and other punitive measures. (*See* Code Civ. Pro., §§ 128, 1209, 1218; *Moore v. Super. Ct.* (2020) 57 Cal.App 5th 441, 463-464; *Clark v. Optical Coating Lab., Inc.* (2008), 165 Cal.App 4th 150, 163-164; *Corn v. Miller* (1986) 181 Cal. App.3d 195). Additionally, where counsel attempts to mislead a judge by an artifice or false statement of fact or law, counsel may be punished, including by contempt. (*See* Code Civ. Pro., § 1209(a)(3); Bus. & Prof Code § 6068(d)). Respondents' utter failure to follow the Order of the Court and to submit a brief and evidence showing they conducted the mandatory review hearings, as they asserted they did during the September 22 hearing, as well as their apparent rejection of Judge Lee's findings, warrants striking the Opposition in its entirety, and granting Petitioners' underlying Writ.

> Respondents defy Judge Lee's findings by declaring outright in their Opposition:
>
> [T]here is no clear and ***present*** mandatory ministerial duty to hold periodic meetings under HSC 101080 and GC 8630 (c) because those statutory requirements have been waived by the Governor's Proclamation. Whether and when to meet to revisit the Local Emergency Orders in a public meeting is a decision committed to the Board members, any of which may place a matter on the Board's agenda for a vote." (Simmering Decl. at ¶ 13.).
>
> …
>
> "There is currently no mandatory ministerial duty on the Board to periodically renew or review the local emergency orders at a public meeting under HSC 101080 or GC 8630."

(Opp., p. 6:19-23 [emphasis in original]; 7:18-18; 11:18-19). However, Judge Lee explicitly found:

> [T]he plain language of Health & Safety Code section 101080 and Government Code section 8630 **still mandate that the board of supervisors and/or the "local governing body" of a county (1) review the need for continuing a local health emergency and/or local emergency, as well as (2) proclaim the termination** of the local health emergency and/or local emergency **at the earliest possible date that conditions warrant** the termination.
>
> …
>
> The Governor's Proclamation did **not** suspend the mandate that the board of supervisors or local governing body review the need for the continuing local health emergency or local emergency, or proclaim the termination of a local health emergency or local

> emergency at the earliest possible date that conditions warrant the termination. … **The Proclamation on its face only waived the strict 30 and 60 day time periods within which such reviews must occur**.
> …
> **[The] reviews as set forth in both the Health and Safety Code and Government Code must be scheduled and occur.**

(Pearson Decl.,¶6, Exh. C, pp. 42-43, 45 [emphasis added]).

Respondents also brazenly defy Judge Lee's direct order to file a brief in support of their position at the hearing that they *have been* conducting the required review hearings. The only reason Judge Lee modified his tentative ruling and added a paragraph to allow Respondents the opportunity to file the instant 15-page brief was because Respondents claimed that they had performed the statutorily required review. (Pearson Decl., ¶7, Exh. D). To, now file a 15-page ***Opposition*** rejecting Judge Lee's findings and failing to support the position that they have held the require review hearings defies an Order of this Court and demonstrates a lack of respect for the findings of Judge Lee, an intent to deceive this Court, and/or a fundamental misunderstanding of these proceedings. Counsel are admonished to use only those means that are consistent with truth, and never to seek to mislead the judge or a judicial officer by an artifice or false statement of fact or law. (*See* Code Civ. Pro., § 1209(a)(3); Bus. & Prof Code § 6068(d)). Because the brief filed on November 14 fails to conform with the Court Order it's arguments should be rejected, and the document stricken.

2. Judge Lee found that Respondents have a mandatory duty to conduct review hearings.

Judge Lee performed a detailed analysis of the merits of Petitioners' Application in a 21-page tentative ruling, which considered the written arguments of both sides, the merits of the underlying writ petition, and it also made certain determinations. Judge Lee made these decisions only after meticulously scrutinizing – and overruling – Respondents' demurrer, and, finally, after extensive oral argument from counsel for both parties.

Alarmingly, Respondents attempt to mislead this Court by mostly ignoring perhaps the most critical portion of Judge Lee's final order from the September 22 Alternative Writ hearing: his "alternative" order that Respondents "show cause whether the Board of Supervisors is complying with their obligations under the law and [sic] conducting the statutorily mandated [sic] review hearings.

(Exhibit 19 – ROA No. 160).” (Opp. p. 5, fn 2). Not only was this expressly discussed at the hearing and incorporated into Judge Lee’s final ruling via a subsequent Minute Order, but it was done so *at the request and based upon the representations of Respondents’ counsel*. (*See* Pearson Decl., ¶7, Exh. D). Respondents appear to attempt to bury this critical fact to lead this Court to believe their brief is properly addressing whether or not Respondents “review[ed] local conditions to determine whether there remains the need for continuing the local health emergency and/or local emergency... *or show[ed] cause why Respondents have not done so.*” (Exhibit 18.)”. (Opp. p. 5:18-24 [emphasis in original]; *see* Code Civ. Pro., § 1209; Bus. & Prof., §6068(d)). As explained above, the instant brief was not to address those issues, but rather only to support their position that they HAD done the reviews. Again, the question of whether or not Respondents have a statutorily mandated duty to conduct “review hearings” of and to terminate the local health and local emergency if local COVID-19 conditions warrant, has already been decided by the Court and are, thus, not proper for reconsideration, here.

3. The manner in which an alternative writ is issued determines the type of response.

A writ of mandamus may be either alternative or peremptory and may be granted in one of two ways: (a) following a hearing in response to an order to show cause based on a petition and application for alternative writ, or (b) following a hearing in response to a noticed motion by the petitioner based on the petition filed. (Code of Civ. Pro. §1087; *see Homestake Mining Co. v. Super. Ct. and County of San Francisco* (1936) 11 Cal. App. 2d 488). If cause is not shown, the writ should issue.

In considering a petition for writ of mandate a Court may:

(i) Summarily deny the petition (*see* Cal. Rules of Court, rule 8.487(a)(4); *Bay Development, Ltd.* v. *Super. Ct.* (1990) 50 Cal.3d 1012, 1024);

(ii) Grant a peremptory writ without oral argument (also known as *Palma* Notice) so long as notice is given (*See* Code. Civ. Pro. §§1087, 1088; *Palma v. U.S. Industrial Fasteners*, *Inc*. (1984) 36 Cal.3d 171, 180; *Brown, Winfield & Canzoneri, Inc. v. Super. Ct.* (2010) 47 Cal.4th 1233, 1238);

(iii) Issue an alternative writ that contains **no** discussion of the merits or citation to any authority, allowing the trial court to reconsider (but not necessarily change) its decision in light of the argument in the petition and supplemental briefing and issue an order to show cause, which sets forth such things as a briefing schedule and/or hearing date (*See* Code Civ. Pro., §§1087, 1088; Cal. Rules of

Court, rule 8.487(a)(4); *Palma, supra,* 36 Cal.3d at p. 177; *Bay, supra,* 50 Cal.3d at p. 1024; *Brown, supra,* 47 Cal.4th at p. 1250, fn. 10); or

(iv) Issue a "suggestive" alternative writ that includes a discussion of the merits of the petition and citations to applicable authorities,[1] and issue an order to show cause that directs the respondent to perform the act as determined by the Court, or to show cause why it has not done so. (*See* Code Civ. Proc., § 1087; Cal. Rules of Court, rule 8.487(a)(4)).

Here, Petitioners filed their Application on May 23 and, following a noticed hearing, the Court granted Petitioners' Application and issued this OSC. (Pearson Decl., ¶¶6, 7, Exhs. C, D). Judge Lee's 21-page tentative ruling – which he adopted as final and added to via Minute Order, includes an in-depth discussion of the merits of Petitioners' Writ Petition; references authorities; was adopted after almost an hour of oral argument; and issued the instant OSC – was a "suggestive" alternative writ. (*See* Code Civ. Pro. §1087; Cal. Rules of Court, rule 8.487(a)(4)). As such, it gave rise to the presumption that Petitioners are correct on the merits of the underlying writ action, and foreclosed upon argument as to the merits of the writ petition. (*See e.g.* Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals and Writs, 157.5, p. 15-80). Indeed, under normal circumstances Judge Lee would be hearing this Order to Show Cause and there would be no question about his findings. It appears that due to the change in departments, Respondents are taking an additional and improper opportunity to oppose the Petition and thus should be rejected.

B. <u>Respondents Have Presented No Relevant, Competent, Admissible Evidence that They Have Conducted the Statutorily-Required – and Court-Ordered – Review Hearings and Have Failed to Show Cause.</u>

Even if this Court is inclined to entertain the Opposition despite its defects and clear defiance of the Court's orders, Respondents have still not shown cause that they have satisfied their Code- and Court-ordered duty to conduct review hearings.

[1] This avenue is commonly seen in the Courts of Appeal, but such procedure is analogous here. (*See* eg Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals and Writs, 157.5, p. 15-80 [Court of Appeal "may issue an alternative writ accompanied by a short discussion and possibly legal citations" in order to show the trial court the 'right path' and encourage the court to reverse itself without further court proceedings"]).

1. Respondents have failed to submit relevant, admissible declarations.

In contradiction to their year-long assertion that they had **no** duty to review local COVID-19 conditions, or to vote to terminate the local health and/or local emergency is said conditions warrant, because the Governor's Proclamation allegedly waived said duty, and despite *actually conducting* public review hearings *for over a year* between the March 4, 2020 Proclamation and June 22, 2021**,** Respondents surprisingly claimed at the 11th hour of the September 22 hearing that they ***had,*** in fact, been satisfying their duty behind closed doors, away from the public. (Pearson Decl., ¶7, Exh. D). Respondents now argue that this "behind-the-scenes" "monitoring" is somehow equivalent to holding the review hearings open to the public and an official vote to end or extend the Emergencies, and somehow meets the standards set forth in the *Health and Safety Code, Government Code,* and Judge Lee's order. This spurious about face is not supported by law or evidence.

First, this new claim contradicts the assertions of Respondents for over a year. Up until the September 22, 2022 hearing Respondents had never claimed they performed required reviews, or had monitored the situation behind the scenes, or that such actions were sufficient to fulfill their duties under the applicable statutes. Respondents ALWAYS maintained that there was no duty. Period.

In a telling gesture, Respondents now offer irrelevant, inadmissible hearsay testimony that lacks foundation, and do not produce admissible, relevant documents that might have proven the BOARD'S actions since June 21, 2022. (*See* Petitioners' Objections to Respondents' Evidence). In fact, Respondents do not present one piece of evidence from any of the five (5) BOARD members to establish what the BOARD –those Members – did, received, reviewed, discussed, considered, decided or determined with respect to the Emergencies. No evidence submitted shows whether they actually engaged with any of the Declarants in any way; whether they actually received or considered information the Declarants claim to have provided them; or whether took any action whatsoever with respect to the "monitoring" reports and declarations of emergency. (*Ibid*.). Simply put: Respondents have failed to introduce any evidence to show that review hearings took place, or to show that this writ petition lacks merit, as promised to Judge Lee when they asked for an opportunity to show they had fulfilled their duties. Simply put: no such hearings took place. The evidence Respondents have produced here demonstrates conclusively that they have not done performed the review hearings and that they have

actually violated other constitutional and statutory provisions as explained below.

2. Respondents admit they have not conducted review hearings since June 2021.

Respondents ***admit*** that they held public review hearings for over one year after Governor Newsom's Proclamation, then never held another after their June 22, 2021 abdication vote. (Opp., pp. 1:2-28, 3:1-16. 4:6-12; 8:6-17). Respondents "explain," "Despite the Governor's express waiver [of the statutory period meeting requirements provided in HSC 101080 and GC 8630] the Board nevertheless exercised its discretion and continued to hold regular public meetings to vote on extending the Local Emergency Orders through June 22, 2021," then, after that time, each Board member "monitored" local COVID-19 conditions with the Health Care Agency ("HCA") and various County agencies who, along, with the Board, determined whether termination of the emergencies was warranted. (Opp., pp. 2-17-19, 3:1-3, 17-20). Respondents argue that this "monitoring," coupled with each Board member's "power" to "place the matter on the agenda and call a vote to terminate [the Emergencies]" if he or she believes local conditions warrant it, is equivalent to the statutory duty for the governing body to hold public review hearings, similar to the ones they held for over a year even after the Proclamation. (Id., pp. 3:17-19, 4:6-12).

Respondents' argument fails. First, they have not submitted any competent, admissible evidence to show that the BOARD received, reviewed, considered, discussed and/or took any action in response to the information allegedly provided to them by Declarants. Second, individual actions by BOARD members do not constitute a review by the "governing body" or "Board of Supervisors," as required by the *Government Code* and *Health and Safety Code,* respectively.[2] (Pearson Decl., ¶6, Exh. C, pp. 42-43). Ironically, Respondents' own evidence, though hearsay, an admission nonetheless – a memorandum from the County and City of San Francisco, and law review article regarding the purported Legislative History behind the Emergency Services Act show that Respondents *do* have a statutory duty to conduct review hearings, *regardless* of the time interval. (*See* Opp., p. 8, fns. 4, 5; Exhibit 26). Exhibit 26 explains that the San Francisco Board has to reaffirm declarations of emergency, even if not at regular

[2] Gov. Code, ¶§ 8630(c): "**The governing body** shall review the need for continuing the local emergency at least once every 60 days **until the governing body terminates** the local emergency." Health & Saf. Code, § 101080: "**The board of supervisors** . . . shall review, at least every 30 days until the local health emergency is terminated [and] shall proclaim the termination of the local health emergency at the earliest possible date that conditions warrant the termination."

intervals, and the law review article shows that the Legislature kept modifying its provisions to allow *for meetings,* even if at different intervals that originally mandated in the Act. (*Ibid.*). Although Respondents disingenuously attempt to distort these anecdotes as demonstrating that the Governor intended to "stop requiring repeated meetings to affirm the status quo," these actually highlight the fact that **meetings are always required by law, but may be held at different intervals, depending on the situation.** (Opp., p. 8, fn. 5).

1. <u>"Monitoring" conditions with Health Care Agency members behind closed doors is not "Reviewing" conditions and voting as a local governing body whether these are sufficient to justify ongoing declarations of emergency.</u>

According to Merriam Webster Dictionary, the verb "review" means "1: to view or see again; 2: to examine or study again *especially*: reexamine judicially; 3: to look back on: take a retrospective view of i.e. *review* the past; 4: a: to go over or examine critically or deliberately i.e. *reviewed* the results of the study; b: to give a critical evaluation of i.e. *review* a novel." [3] In contrast, the verb "monitor" means "to watch, keep track of, or check usually for a special purpose." [4] "Keeping track of" conditions is glaringly different than "examining" them "critically or deliberately." Even if these terms were arguably similar, the fact Respondents claim to have the individual ***option*** to put on the agenda a vote to review local conditions to determine whether they justify ongoing declarations of emergency is antithetical to having an ***affirmative statutory duty*** to actively review together, as a "governing body"whether or not these justify ongoing declarations of emergency, then casting an official vote and taking official agency action.

The Legislature – and this honorable Court – have directed Respondents, as a "local governing body" and "Board of Supervisors" to conduct a review hearing of local conditions. Respondents told this Court that they have done these reviews but, admittedly, they have not. Therefore, Respondents have failed to show cause.

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[3] https://www.merriam-webster.com/dictionary/review#dictionary-entry-2
[4] https://www.merriam-webster.com/dictionary/monitor#dictionary-entry-2

2. Respondents admit they deferred their statutory duties to unelected health officials and maintain the Emergencies for money, not because conditions warrant them.

Respondents also admit that unelected political appointees have determined whether or not conditions warranted ongoing emergencies instead of the governing body. The evidence submitted confirms that the BOARD relied on the HCA and the County Health Officer to make decisions for them. (Opp., pp. 3-4:1-12; 13:1-14; Simmering Decl., ¶10 ["Based upon their evaluation of COVID-19 related health data in the County, **HCA and the Orange County Health Officer** have consistently maintained that conditions still warrant the COVID-19 Local Emergency"], ¶13 ["To date, however, **County staff, including HCA,** continue to advise that County conditions require the continuance of the COVIVD-19 Local Emergency.."]; Chau Decl., ¶¶10, 11, 12 ["To date, in my communications with the Board, Board members and their staff, I have consistently advocated for maintenance of the [Emergencies] based on COVID-19 conditions in the County. … I believe and have advised that the [Emergencies] was … and remains warranted today."] [emphasis added]).

They also admit that these "advisors" have informed them that the Emergencies must continue in order to maintain a financial gravy train, regardless of the actual "conditions" in the County: "As the HCA and the CEO's staff have informed the Board, terminating the COVID-19 Local Emergency early would not exempt the County, or its residents, from complying with state or federal COVID-19 requirements. It would, however, undermine the County's ability to obtain vital financial support to mitigate COVID-19 risks and promote pandemic recovery." (Simmering Decl., ¶10). A Local Health Emergency cannot be maintained for purely financial reasons. In sum, Respondents have shown they are not, and do not intend to, fulfill their mandatory ministerial duty under the Government and Health and Safety Code, warranting granting of this writ petition.

3. Respondents admit they delegated their duty to the Governor.

Respondents also admit they have punted their duties to the Governor. They assert in their Opposition that, "On June 22, 2021, pursuant to the Governor's waiver, the Board … unanimously voted that [the Local Emergencies] would automatically terminate upon the Governor's termination of the SOE. (Id. at ¶ 7, **Exhibit 4.**)" (Opp., 3:11-16). This assertion reveals that Respondents have and still intend to shirk their statutory duties and that they will only terminate the Emergencies "**UPON THE**

GOVERNOR'S TERMINATION OF THE STATE OF EMERGENCY" "WITHOUT FURTHER ACTION OF THE BOARD." (Respondents' Exhibit 4 [emphasis in original]). In other words, Respondents are telling this Court that they do not intend to review of local conditions or vote to terminate the Emergencies as required by statute. Rather, they will allow them to *automatically* end when the Governor terminates the statewide emergency, showing that they have no intention to fulfill their mandatory ministerial duty, warranting granting of this writ petition.

C. Respondents' Admitted Actions Reveal Additional Violation of Law.

Respondents' failure to hold public meetings, or to discuss conditions related to the ongoing declarations of Emergencies with the public, and to, instead, engage in private ruminations outside of public view violate the California Constitution and Ralph M. Brown Act (hereinafter "Brown Act") and cannot be used to show cause.

The California Constitution and Brown Act are important doctrines in the State, demanding transparency from our elected officials and those doing official business.[5] The Brown Act declares:

> In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. **It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.** The people of this State do not yield their sovereignty to the agencies which serve them. **The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created**.

(Gov. Code, §54950 [emphasis added]).

To that end, all meetings of the legislative body of a local agency must be open and public, and

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[5] Article 1, section 3 of the California Constitution states, in pertinent part:

(b) (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

….

(7) In order to ensure public access to the meetings of public bodies and the writings of public officials and agencies, as specified in paragraph (1), each local agency is hereby required to comply with the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code), and with any subsequent statutory enactment amending either act, enacting a successor act, or amending any successor act that contains findings demonstrating that the statutory enactment furthers the purposes of this section

everyone permitted to attend any meeting of a legislative body of a local agency, unless an exception applies. (Gov. Code, § 54953). Further, a "meeting" is defined as any gathering of a majority of the members at the same time and location to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body. (Gov. Code, § 54952.2). This includes meetings by teleconference, or communications by other electronic means. (Gov. Code, §§ 54952.2, 54953) These requirements apply to actions short of official action, in that **"**deliberation" connotes not only collective discussion, but also collective acquisition and exchange of facts preliminary to ultimate decision. (*Stockton Newspapers, Inc. v. Members of Redevelopment Agency of City of Stockton* (1985) 171 Cal.App.3d 95). Open, public meetings serve to facilitate public participation in all phases of local government decision-making and to curb misuse of the democratic process by secret legislation by public bodies. (*Olson v. Hornbrook Cmmty. Svcs. Dist.* (2019) 245 Cal.Rptr.3d 236).

If Respondent Board members are collectively considering information regarding conditions in the County behind closed doors this violates the Brown Act. Being updated by appointed officials and deciding if sufficient evidence requires an action item on the agenda of a public meeting is "collective investigation and consideration of facts short of official action" prohibited by the Brown Act. (Opp., pp. 3-4:1-12; 13:1-14; Simmering Decl., ¶¶10, 13 Chau Decl., ¶¶10, 11, 12). Respondents' assertion that it can, "in its discretion," decide whether or not to hold public meetings regarding significant issues of significant public interest, and/or ***actually deciding them*** behind closed doors violates the Constitution and Brown Act. (Gov. Code., §§54950, 54952.2, 54953; Cal. Const. art. 1, §3 (b)). While the Board can receive information outside of a public meeting, they still have the statutory and constitutional duty to conduct review hearings to actually consider that information, and to then decide what action to take on behalf of the County in a public setting. (*See* Opp., p. 14, fn. 9). In short, Respondents are not only outright rejecting their constitutional, statutory and Court-ordered duties, but they have admitted, with evidence in support, that they are violating transparency laws.

IV. CONCLUSION

In filing their improper Opposition and Response to Order to Show Cause, Respondents have failed to prove they have been conducting statutorily- and Court-mandated review hearings, and have defied the Court's Order by rearguing their initial position. The evidence submitted to support

Respondent's position is irrelevant and shows nothing about the Board conducting review hearings. As such, cause has not been shown, the writ should issue, and Petitioners should be given leave to file a motion for attorney's fees for being compelled to bring this action.[6]

Dated: November 21, 2022

Respectfully submitted,

By: _____
Nicole C. Pearson
Jessica Barsotti
Rita Barnett-Rose
Attorney for Petitioners PEGGY HALL and CHILDREN'S HEALTH DEFENSE, CALIFORNIA CHAPTER

[6] Petitioners do not address Respondents' arguments in Sections B and C of the Opposition given that the Code requires, and Judge Lee confirmed, that Respondents do have a mandatory ministerial duty to perform the review hearings. Therefore, these arguments are without merit *ab initio.*

PROOF OF SERVICE

I am over the age of 18 and not a party to the within action. My business address is **3421 Via Oporto, Suite 201, Newport Beach, Calif. 92263.**

On the date below, I served the following document(s) described as **REQUEST FOR PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO WRIT PETITION FOR WRIT OF MANDATE AND RESPONSE TO ORDER TO SHOW CAUSE** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Laura Knapp Office of the County Counsel County of Orange 400 West Civic Center Drive, Suite 202Santa Ana, CA 92701-1379 714.834.3400 *Deputy County Counsel*	Suzy.Shoai@coco.ocgov.com Kayla.Watson@coco.ocgov.com Kevin.Dunn@coco.ocgov.com leon.page@coco.ocgov.com Laura.Knapp@coco.ocgov.com

/x / **Via Electronic Transmission.** By personally emailing the aforementioned document(s) in PDF format to the respective email address(es) listed above on pursuant to stipulation and agreement between counsel for the parties and/or Court order. I did not receive an electronic message indicating any errors in transmission.

/ / **By Personal Service.** I delivered such envelope by hand to the addressee on 09/14/2021.

/ X / **State.** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/ / **Federal.** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed at **NEWPORT BEACH, California**.

DATED: November 21, 2022

MICHELLE CUSUMANO