

1 Nicole C. Pearson [SBN 265350]
2 Jessica R. Barsotti [SBN 209557]
3 Rita Barnett-Rose [SBN 195801]
4 LAW OFFICES OF NICOLE C. PEARSON
5 3421 Via Oporto, Ste. 201
6 Newport Beach, CA 92663
7 Telephone: (949) 200-9170
8 Nicole@FLTJllp.com; Jessica@FLTJllp.com;
9 Rita@FLTJllp.com

10 Attorneys for Petitioners
11 PEGGY HALL, CHILDREN'S
12 HEALTH DEFENSE-CALIFORNIA CHAPTER

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **FOR THE COUNTY OF ORANGE**

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

20 Petitioners,

21 vs.

22 **COUNTY OF ORANGE; ORANGE COUNTY**
23 **BOARD OF SUPERVISORS,**

24 Respondents.

Case No.: 20-2021-01220678-CU-WM-CJC
Assigned for All Purposes to: Judge Thomas
McConville

PETITIONERS' SUPPLEMENTAL BRIEF
DEMONSTRATING THAT THIS CASE IS
NOT MOOT AND WRIT OF MANDATE
MUST ISSUE

Complaint Filed: September 14, 2021
Trial Date: None yet

Hearing: April 3, 2023
Time: 1:30 p.m.
Dept.: C28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Contents

I. INTRODUCTION 1

II. BACKGROUND FACTS..... 3

III. ARGUMENT..... 4

 A. Effectual Relief Was Available on the February 27, 2023 Order to Show Cause Hearing Date, and Considering Any Other Future Date for a Mootness Claim is Severely Prejudicial to Petitioners . 4

 B. Petitioners’ Claims Are Not Moot as Respondents Still Have Not Complied with Their Statutory Obligations and the Court Should Fully Adjudicate All Claims and Controversies Between the Parties..... 7

 C. Even if this Court finds the Writ Action is Moot, the Court Retains the Ability to Decide the Matter Because it is an issue of Law and of Substantial Public Importance 10

 1. *The Court has discretion to hear matters, even if moot, where it is an issue of Substantial Public Interest.* 10

 D. Any Finding of Mootness Now Will Result in Irreparable Harm to Petitioners and a Complete Denial of Justice for Millions of Orange County Residents..... 13

IV. CONCLUSION..... 14

1 **Cases**

2 *A.R.* (2009) 170 Cal.App.4th 733 7

3 *Brach v. Newsom*, 2022 WL 2145391, *4, *8 8

4 *Calif. for Alternatives to Toxics v. Calif. Dept. of Pesticide Regulation* (2006) 136 Cal. App. 4th 1049 10

5 *Carson Citizens for Reform v. Kawagoe* (2009) 178 Cal.App.4th 357 7

6 *City of Plymouth v. Super. Ct.* (1970) 8 Cal. App. 3d 454 10

7 *County of San Diego v. Super. Ct.* (1986) 176 Cal.App.3d 1009 11

8 *Davis v. Superior Court* (1985) 169 Cal. App. 3d 1054 5

9 *Dylan T.* (1998) 65 Cal.App.4th 765 7

10 *Eye Dog Found v. State Bd. of Guide Dogs* (1967) 67 Cal. 2d 536 11

11 *Ferrara v. Belanger* (1976) 18 Cal. 3d 54 10

12 *Goldberg v. Regents of Univ.* (1967) 248 Cal. App. 2d 867 7

13 *Huntington Beach Police officers' Assn. v. City of Huntington Beach* (1976) 58 Cal. App. 3d 49 6

14 *Jones v. Omnitrans* (2004) 125 Cal.App.4th 273 6

15 *Lazan v. County of Riverside* (2006) 140 Cal.App.4th 453 5

16 *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal. App. 4th 425 5

17 *Lincoln Place Tenants Assn., supra*, 155 Cal. App. 4th at 454 7

18 *Moore v. Superior Court* (2020) 57 Cal. App. 5th 441 8

19 *Motown Record Corp. v. Brockert* (1984) 160 Cal. App. 3d 123 11

20 *Pac. Legal Found. v. Cal. Coastal Com.* (1982) 33 Cal. 3d 158 10

21 *People v. Redus* (2020) 54 Cal. App. 5th 998 5

22 *Schraer v. Berkeley Property Owners' Ass'n* (1989) 207 Cal. App. 3d 719 10

23 *Serna v. Superior Court (People)* (1985) 40 Cal.3d 239 6

24 **Statutes**

25 (*Code Civ. Proc.*, §1086A 5,13

26 *Code Civ. Proc.*, §1085 4

27

28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The sole question at the Order to Show Cause hearing held on February 27, 2023, and then
4 continued to April 3, 2023 on the Court’s own motion, was whether Respondents held a public hearing to
5 review local conditions in the County under the requirements of the Health and Safety and Government
6 Codes pursuant to the mandatory and ministerial duties found by Judge Lee to exist. Such duties were not
7 properly discharged by Respondents on February 27, 2023 and they have still not been properly discharged
8 today. Therefore, mootness is not a proper inquiry here, it is a red herring.

9 Indeed, the entirety of Respondents’ “supplemental briefing” on mootness is based on two events
10 *that had not yet occurred* at the time of the substantive February 27, 2023 Order to Show Cause (“OSC”)
11 hearing. As a result, Petitioners now find themselves in the staggeringly surreal position of having to
12 provide “supplemental briefing” on an issue of potential “mootness” of their meritorious claims and the
13 purported lack of “effective relief,” when such issues were clearly not present on the long-delayed and
14 operative OSC hearing date in February. This argument should never have been entertained by this Court.
15 Petitioners have cautioned this Court about Respondents’ intention to simply run out the clock numerous
16 times in their unsuccessful attempts to secure an earlier OSC hearing as well as other *ex parte* assistance
17 in the interests of justice and fairness. By managing to push this OSC hearing out numerous times,
18 Respondents now seek to escape an unfavorable judicial determination on the merits, as well as to avoid
19 payment of fees and costs to Petitioners that are justified under the law, *and* any performance of their
20 mandatory duties through this bogus mootness argument. This end-run should not be enabled by this Court,
21 as Petitioners’ claims are not moot, and effective relief is still available to them.

22 Specifically, Respondents have now twice been informed by two judges of this Court that they do,
23 in fact, have mandatory, ministerial duties under both Health & Safety Code section 101080 and
24 Government Code section 8630 (together, the “emergency laws”) to conduct periodic reviews of local
25 conditions to determine whether local conditions actually warrant continuing or terminating their declared
26 Emergencies. Respondents have also been previously advised by Judge Lee and this Court that these
27 underlying duties to review local conditions and vote to terminate or continue the Emergencies were *not*
28

1 waived by Governor Newsom’s Proclamation and waiver of the fixed 30 and 60 day periods. Yet, despite
2 having almost six months to simply comply with the performance of these mandatory duties, Respondents
3 now assert that their “automatic termination” of the Emergencies on February 28, 2023 “without further
4 action” by the Board negates performance of these mandatory duties, in complete contempt of both Judge
5 Lee’s Order, and this Court’s own finding that Respondents had failed to show cause on February 27, 2023.

6 This Court should refuse to entertain meritless claims of “mootness” and Respondents’ last ditch
7 effort to skirt the laws already found applicable to them for the following reasons. First, the issue of
8 “mootness” must be determined on the operative date of the long-delayed February 27, 2023, OSC hearing,
9 and not at any future date thereafter. As there were no events that had occurred on or before that date that
10 could have “mooted” Petitioners’ claims or that prevented the Court’s grant of a Writ, and because the
11 Court expressly found that Respondents failed to show cause on that day, Petitioners’ Writ should have
12 been granted as a matter of right then.

13 Second, this Court has already determined at the OSC hearing on February 27, 2023 and in the
14 Court’s own minute order of the same date (“Minute Order”) that Respondents are required to comply with
15 the applicable emergency laws and the Ralph M. Brown Act (“Brown Act”) to review local conditions at
16 a publicly held hearing prior to terminating or continuing local emergencies. Respondents still have not
17 performed these mandatory duties, and now admit that they will never comply with these mandatory duties,
18 pursuant to the automatic “termination” of the Emergencies as provided by their own vote of June 21, 2021
19 abdicating all responsibilities to periodically review local conditions (the “Abdication Vote”). Because
20 Respondents have still not performed their statutory duties to review the local conditions at an open public
21 meeting, “effectual relief” is still available to Petitioners in all forms, including writ relief, injunctive relief,
22 and declaratory relief.

23 Finally, even if this Court somehow finds that Governor Newsom’s termination of the state-wide
24 emergency and the unlawful and purported “automatic” termination of the local Emergencies after the
25 February 27, 2023 OSC hearing date “mooted” Petitioners’ otherwise meritorious writ claims, this Court
26 has the discretion to – and should -- decide this matter anyway, because it is a matter of significant public
27 interest and because significant issues remain outstanding between the parties. Allowing Respondents to
28

1 completely escape their clear mandatory duties and Judge Lee’s Order would severely prejudice Petitioners
2 and would create significant public doubt as to the ability of the judicial branch to act impartially and serve
3 as the purported check and balance on elected officials who refuse to follow enacted laws. Because
4 Petitioners have established they had no plain, speedy or adequate remedy at law, and because this Court
5 has already found Respondents failed to show cause, Petitioners’ Writ must issue.

6 **II. BACKGROUND FACTS**

7 On February 27, 2023, this Court finally heard substantive argument on the issue of whether
8 Respondent Orange County Board of Supervisors had mandatory duties to periodically review local
9 conditions in the County and terminate the ongoing Emergencies for COVID-19 declared in March 2020,
10 as required by the applicable emergency laws. Pursuant to an Alternative Writ Application granted by
11 Judge Richard Lee five months earlier on September 22, 2022, and his resultant Order to Show Cause
12 issued on the same date, Judge Lee commanded Respondents to either: 1) review local conditions to
13 determine whether there remains the need for continuing the local health emergency and/or local
14 emergency as required by Health & Safety Code section 101080 and Government Code section 8630(c),
15 and to proclaim the termination of the local health emergency and/or local emergency should conditions
16 warrant as required by Health & Safety Code section 101080 and Government Code section 8630(d), or
17 in the alternative, (2) to show cause why Respondents have not done so; or (3) in the alternative,
18 Respondents are ordered to show cause whether the Board of Supervisors is complying with their
19 obligations under the law and conducting the statutorily mandated review hearings.” (See ROA 155, 160
20 [9-22-22 minute orders].) The OSC hearing on this granted Alternative Writ Application was originally
21 set for December 1, 2022, but due to various actions by both Respondents and this Court, as fully detailed
22 in numerous documents already submitted to this Court, this OSC hearing was moved from December 1,
23 2022 to February 27, 2022.

24 On the morning of the OSC hearing, this Court issued a tentative ruling favorable to Petitioners,
25 finding that Respondents had not met the requirements of Judge Lee’s OSC Order in that they did not
26 meet any one of the three alternatives offered by Judge Lee. Specifically, this Court found that
27 Respondents had not shown cause why they had not complied with their statutorily-required open and
28

1 public review of local conditions under the applicable statutory provisions and further that, although
2 Respondents had attempted to comply with the third alternative of evidentiary proof of prior compliance,
3 had also failed to show compliance, as Respondents admitted they had conducted no public meetings
4 compliant with the Brown Act and also failed to show how the reports Respondents offered from various
5 staff and agencies monitoring Covid-19 conditions satisfied *Respondents'* statutory local review
6 requirements (February 27, 2023 Minute Order, at 2) (“Minute Order”).

7 Nevertheless, at the February 27th OSC hearing, this Court allowed Respondents to interrupt
8 Petitioners and ask the Court to consider a belated Request for Judicial Notice (“RJN”), filed on the
9 afternoon of February 24, 2023. On the basis of this improperly submitted and irrelevant RJN, this Court
10 ordered the parties to submit “supplemental briefing” on the issue of possible “mootness” over
11 Petitioners’ strong objections and “continued” the OSC hearing until April 3, 2023, thirty-four days after
12 Governor Newsom would presumably end the state-wide state of emergency. Petitioners subsequently
13 received an electronic copy of the Court’s Minute Order on March 2, 2023, further indicating the Court
14 did not believe Respondents had discharged what they were asked to do by Judge Lee, but failing to issue
15 Petitioners’ Writ. On February 28, 2023, Governor Newsom ended the state-wide state of emergency.
16 On March 10, 2023, Petitioners filed an *ex parte* Motion for Reconsideration, asking this Court to
17 reconsider its February 27, 2023 Minute Order, which failed to grant the requested Writ relief despite
18 finding that Respondents had failed to show cause. This Court denied the *ex parte* relief.

19 **III. ARGUMENT**

20 **A. Effectual Relief Was Available on the February 27, 2023 Order to Show Cause Hearing**
21 **Date, and Considering Any Other Future Date for a Mootness Claim is Severely**
22 **Prejudicial to Petitioners**

23 A writ of mandamus is an order from a court to an inferior government officer instructing him to
24 properly fulfill his official duties or correct an abuse of discretion. (*Code Civ. Proc.*, §1085a)).
25 The writ *must* be issued in all cases where there is no plain, speedy, and adequate remedy in the ordinary
26 course of law. (*Code Civ. Proc.*, §1086c it is determined, as it has been here, that mandamus is the only
27 remedy that can furnish the relief to which the petitioner is entitled, the court’s discretion disappears and
28

1 the petitioner is entitled to the writ upon the appropriate showing. (*Cal. Civ. Proc. Code* §1086 *see also*
2 *Flores v. Department of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199; *Lazan v. County of*
3 *Riverside* (2006) 140 Cal.App.4th 453 [for a writ of mandate, where a statute or ordinance clearly defines
4 the specific duties or course of conduct that a governing body must take, that course of conduct becomes
5 mandatory and eliminates any element of discretion]).

6 Denying relief to a party on the basis of “mootness” presumes that an event has *already taken place*
7 that has now removed any ability for the court to grant the party “effectual relief.” (*See e.g., Lincoln Place*
8 *Tenants Assn. v. City of Los Angeles* (2007) 155 Cal. App. 4th 425, 454) (mootness generally occurs when
9 any ruling would have no practical effect on the parties’ substantive rights); *People v. Redus* (2020) 54 Cal.
10 App. 5th 998 (same). In addition, “courts should proceed with caution when presented with a mootness
11 claim, since granting a motion to dismiss on that ground deprives plaintiff a day in court and precludes
12 judicial consideration of the merits.” (*Davis v. Superior Court* (1985) 169 Cal. App. 3d 1054).

13 In this case, and in fairness to Petitioners, the February 27, 2023 OSC hearing date is the *only*
14 *operative date* that this Court should consider in assessing whether Petitioners’ claims are “moot” or
15 whether the Court could offer any effectual relief, as any date past this operative date was not ripe for the
16 Court’s consideration at the time of the substantive hearing. On February 27, 2023, no event had yet
17 occurred that could have potentially mooted the Petitioners’ claims or prevented effectual relief. Governor
18 Newsom had not yet terminated the state-wide state of emergency, and Respondents had not yet conducted
19 any review of local conditions or terminated the Emergencies if local conditions had shown they were no
20 longer warranted. Accordingly, no issue of “mootness” was present. Further, on this date, Petitioners had
21 already met the standards required to be entitled to a writ of mandate. Judge Lee’s Order already
22 determined on September 22, 2022 that there was no plain, speedy and adequate remedy available to
23 Petitioners, and he issued the alternative writ and an order to show cause on this basis. Thereafter, on
24 February 27, 2023, this Court also determined that the Respondents had **not** discharged their ministerial
25 duties under the law or complied with Judge Lee’s Order – i.e., Respondents had not shown cause.
26 Given this determination, this Court should – and could -- have offered effective relief to Petitioners by
27 issuing the Writ of Mandate on that date. (*See e.g. Huntington Beach Police officers' Assn. v. City of*
28

1 *Huntington Beach* (1976) 58 Cal. App. 3d 492 [although a court has considerable discretion in deciding
2 whether to grant a writ, where the petitioner shows compliance with the requirements for a writ, including
3 lack of a plain, speedy, and adequate remedy in the usual course of the law, he or she is entitled to a writ as
4 a matter of right]; *Jones v. Omnitrans* (2004) 125 Cal.App.4th 273 [the essential element of a mandamus
5 cause of action is the existence of a clear, present, and usually “ministerial duty” upon the part of the
6 respondent, which is an act that a public officer is obligated to perform in a prescribed manner required by
7 law when a given state of facts exists]. *See also Serna v. Superior Court (People)* (1985) 40 Cal.3d 239
8 [superior court abused its discretion in denying petition for writ of mandate and in failing to compel
9 municipal court to conduct hearing at which the People would be called upon to justify more than four-
10 year delay between filing of complaint and petitioner's arrest, where petitioner offered evidence
11 establishing presumptively prejudicial delay and trial court failed to put the People to its proof.]

12 Because no issue of “mootness” was present on February 27, 2023, it was only this Court’s
13 continuance of the OSC hearing until April 3, 2023, thirty-four days after the anticipated future event(s)
14 announced in the Governor’s October 2022 press release would potentially occur, that gave rise to *any*
15 potential concerns regarding the *future availability* of effectual relief. In other words, the Court’s own
16 decision to continue the hearing in order to consider an unripe mootness concern created the actual concern
17 in the first place. Yet, if “mootness” is to have any fair meaning to earnest litigants pursuing justice, it
18 surely cannot not be *judicially created* in this way. Nor should unripe future events be used to moot a
19 present controversy. Indeed, if the Governor’s October 2022 press release, offered by Respondents at the
20 OSC hearing on February 27, 2023, could create the issue of “mootness” on that date, despite the fact that
21 the announced future event had not yet occurred, then by the same faulty logic, this case was also already
22 “moot” as soon as this October 2022 press release sprung into being, warning of such eventual potential
23 future occurrence. And if this absurd premise is accepted, all ongoing cases are at risk for similar unripe
24 mootness claims, at least as long as a clever party finds some announcement of some potential future
25 occurrence that may eventually impact an ongoing lawsuit.

26 Tellingly, in their Supplemental Brief, Respondents do not even bother to focus on the February
27 27, 2023 OSC hearing date or the fact that effectual relief clearly existed on this operative date. They fail
28

1 to do so, because it would kill their entire “mootness” ploy. Instead, Respondents opportunistically argue
2 that *now* that the events of February 28, 2023 *have* occurred, where Governor Newsom has now terminated
3 the state-wide state of emergency, and, by the terms of Respondents’ own unlawful June 21, 2021
4 Abdication Vote, the Emergencies have also now automatically terminated “without any further action” on
5 the part of Respondents, Petitioners should be denied a remedy for clearly meritorious claims. In short,
6 Respondents have lost at every stage of this litigation on the *actual* merits, and their only remaining
7 argument is that because the “unlawful deed is done, nothing more can be done about it.”

8 However, something *can* be done. This Court *can* reject Respondents’ post-hearing “mootness”
9 argument entirely, and issue Petitioners’ Writ. These orders are neither superfluous, untimely, or
10 unnecessary now that the “unlawful deed is done.” Indeed, ordering that Respondents comply with their
11 still-unperformed statutory duties to actually review local conditions prior to terminating their Emergencies
12 is the only outcome that comports with both the law and the equities in this case.

13 **B. Petitioners’ Claims Are Not Moot as Respondents Still Have Not Complied with Their**
14 **Statutory Obligations and the Court Should Fully Adjudicate All Claims and**
15 **Controversies Between the Parties**

16 The issue of “mootness” only arises once there no longer remains an active controversy between
17 the parties. (*See e.g., Lincoln Place Tenants Assn., supra*, 155 Cal. App. 4th at 454). Additionally, if a
18 substantial right of one party remains in issue, the mootness of other rights originally presented by the
19 action does not prevent continuation to judgment (*See e.g., Goldberg v. Regents of Univ.* (1967) 248 Cal.
20 App. 2d 867, 873 fn. 6; *Carson Citizens for Reform v. Kawagoe* (2009) 178 Cal.App.4th 357, 365
21 [declaratory relief is not automatically rendered moot just because injunctive relief is mooted]); (*In re A.R.*
22 (2009) 170 Cal.App.4th 733 [a case is also not moot if any material question remains that affects the
23 substantial rights of the parties, or an issue “infects the outcome of subsequent proceedings.”]; *In re Dylan*
24 *T.* (1998) 65 Cal.App.4th 765, 769) (same).

25 Here, despite the post-OSC hearing termination events of February 28, 2023 by the Governor, the
26 claims and controversies in this litigation are still very much in controversy. Specifically, despite
27 purporting to have the Emergencies automatically terminate without any further action by the Respondent
28

1 Board per their unlawful Abdication Vote, Respondents *have still not conducted the local review hearings*
2 *found by both Judge Lee and this Court to be mandatory under the applicable laws.* Respondents openly
3 admit in their supplemental briefing that they have not conducted any statutorily required review hearings
4 on the Emergencies, despite literally representing to the Court at the September 22 Alternative Writ hearing
5 that they would “absolutely have to take place” in order to terminate the local emergencies (*See Alt Writ*
6 *Transcript at p. 35, lines 21-25*).¹

7 Respondents have never held any meeting regarding COVID-19 conditions since June 21, 2021,
8 that is clear, despite counsel’s misrepresentations to this Court. Further, Respondents now openly admit
9 that they intend to never hold a hearing to review local conditions, due to the “automatic” termination per
10 the terms of their unlawful Abdication Vote. Respondents’ abdication and delegation of their duties and
11 failure to conduct the requisite public local review hearings is exactly what this litigation has been about,
12 and it remains in active controversy. Furthermore, conducting the open and public review of local
13 conditions prior to terminating or continuing the Emergencies is exactly what this Court has already ordered
14 Respondents to perform,² and Respondents’ blatant refusal to comply is a contempt of this Court. (*See Cal.*
15 *Code Proc. §§ 128, 1209; Moore v. Superior Court (2020) 57 Cal. App. 5th 441, 463-64 [failure to comply*
16 *with a Court Order can result in sanctions and orders against the offending party]*).

17 The fact that this Court *has already determined*, at least twice, that Respondents have failed to
18 perform their mandatory duties also distinguishes this case from the “COVID-19 cases” Respondents cite
19 to support their baseless mootness claim. Specifically, in such COVID-19 regulation cases where the cases
20 were mooted after a certain event had occurred, the cases were “mooted” either because the defendants *had*
21 *already ceased the complained about conduct or no findings on the merits* had yet been made when an
22 event intervened to deprive the plaintiff of any remaining relief. For example, in *Brach v. Newsom, 2022*
23 *WL 2145391, *4, *8*, the court found an appeal challenging the suspension of in-person public schooling

24 _____
25 ¹ From County Counsel Kevin Dunn: “And I would also say, though, in case this was at issue at all, the County does not
26 dispute in any way that to modify, terminate, or extend the emergency, declarations would absolutely have to take place in a
27 public meeting. No question about that.” (*See September 22, 2022 hearing Transcript at 35:21-25*).

28 ² Despite Respondents’ claims to the contrary, Judge Lee confirmed the mandatory duty to review conditions in the
September 22, 2022 hearing on page 28, lines 3-10:

“THE COURT: “NO, THERE IS A DUTY TO DO IT. YOU KEEP SAYING THAT, BUT THERE IS A DUTY UNDER
THE CODE. THERE IS JUST NO TIME REQUIREMENT AS TO WHEN THAT MUST HAPPEN, BUT IT'S BEEN 18 --
ALMOST 18 MONTHS.”

1 to be moot after the defendants had already re-opened the schools. In *Cerletti vs. Newsom*, (2021) 71
2 Cal.App.5th 760, 765-66, because the challenged payments to undocumented Californians had already been
3 paid by defendants prior to determination of the actual merits of plaintiffs’ claims, no equitable relief
4 remained to be granted to plaintiffs, as the payments to third parties could not be retrieved. In contrast, in
5 this case, both Judge Lee and this Court have already found that Respondents had mandatory, ministerial
6 duties to conduct periodic reviews of local conditions prior to terminating their Emergencies, and
7 Respondents had failed to show that they had been doing them all along. An alternative writ and an OSC
8 were already issued in favor of Petitioners, and two judges of this Court have already determined both in
9 their Orders and during the substantive hearings that the Petitioners’ claims in this case were meritorious
10 and that Respondents had **not** performed their mandatory ministerial duties. Unlike in the cited precedent,
11 all that remains in the case before this Court is the procedural issuance of the requested writ, a remedy to
12 which Petitioners are already entitled. In addition, unlike the cited precedent, the claim of “mootness” is
13 not because Respondents have already ceased the complained of conduct, but rather because Respondents’
14 have engaged in further violations of the law. However, no so-called “local law” aka Abdication Vote can
15 relieve Respondents of their statutory duties imposed by our State legislature, or ordered by this Superior
16 Court. Nor can Respondents’ claim that their required local review hearing took place *over a year and a*
17 *half ago, on June 21, 2021*, as this claim was already specifically rejected by Judge Lee at the September
18 22, 2022 Alternative Writ hearing. (See September 22, 2022 Alt Writ hearing Transcript at p. 36, lines 5-
19 10, where Judge Lee expressly states that Respondents’ failure to conduct any local review hearings since
20 June 21, 2021 was not reasonable.). That Respondents, as members of the governing body of the County,
21 can assert with straight faces that a review of local conditions of “emergency” conducted *nearly two years*
22 *ago* satisfies their statutory duties or obligations to their citizens beggars belief.

23 Because Respondents have not performed their mandatory duties, continue to insist in their
24 supplemental brief that Governor Newsom “waived” these statutory duties, despite this precise claim
25 already being rejected by this Court, and now admit they do not intend to perform these mandatory duties,
26 this matter remains an active controversy, is clearly not moot, and *all* forms of Petitioners’ requested relief
27 remain viable for Petitioners and cannot be dismissed against Petitioners by way of this “continued” OSC
28

1 hearing.³

2 **C. Even if this Court finds the Writ Action is Moot, the Court Retains the Ability to Decide**
3 **the Matter Because it is an issue of Law and of Substantial Public Importance**

4 1. *The Court has discretion to hear matters, even if moot, where it is an issue of Substantial Public*
5 *Interest.*

6 Even if an issue becomes moot during the course of an ongoing action, a court has discretion to
7 resolve it. (*See Calif. for Alternatives to Toxics v. Calif. Dept. of Pesticide Regulation* (2006) 136 Cal. App.
8 4th 1049, 1069, 1070 [“a court may exercise its inherent discretion to resolve the issue”]; *City of Plymouth*
9 *v. Super. Ct.* (1970) 8 Cal. App. 3d 454, 460 [a court does not act without or in excess of jurisdiction merely
10 by proceeding to trial of moot case]. This discretion to hear a “moot” case is most particularly utilized
11 where the matter is of public importance. (*See e.g., Ferrara v. Belanger* (1976) 18 Cal. 3d 54, 58 [finding
12 that completed election did not moot the matter given the important need to interpret election statutes and
13 Petitioners were entitled to issuance of writ and to recover costs of action]; *Schraer v. Berkeley Property*
14 *Owners’ Ass’n* (1989) 207 Cal. App. 3d 719, 728 [court declined to dismiss case as moot because of the
15 importance of the issue at stake]). Indeed, even advisory opinions can be issued if *not* deciding the case
16 will create “lingering uncertainty in the law, especially when there is widespread public interest in the
17 answer to a particular legal question.” (*Pac. Legal Found. v. Cal. Coastal Com.* (1982) 33 Cal. 3d 158,
18 170).

19 Accordingly, even if this Court somehow accepts that the matter is “moot” due to post-February
20 27, 2023 events that did nothing to discharge the found duties, exercising its discretion to decide this matter
21 is particularly important here, where lingering issues remain concerning elected local officials’ ability to
22 disregard emergency laws and Brown Act requirements during declared times of local emergency. After
23 three long years of prolonged local states of local emergency for COVID-19, and after having endured
24 unprecedented and crushing restrictions on their basic civil liberties, the issue of whether local governing
25 bodies must follow the emergency laws enacted by our Legislature and conduct open public hearings on
26

27 ³ Respondents’ claim in its supplemental brief for an OSC hearing asking this Court to “dismiss with prejudice” *all* of
28 Petitioners’ claims, including separate non-writ claims for declaratory and injunctive relief, must be immediately rejected, as
such arguments are not properly before this Court at this time.

1 these critical topics is undoubtedly of significant public interest. Petitioners and other residents of the
2 County have the right to expect that their elected representatives will follow the laws enacted for these very
3 times of emergency and to ensure that the public is allowed to participate in these matters deeply impacting
4 their lives and livelihoods. To allow Respondents to avoid this determination, even after Petitioners have
5 essentially prevailed on the merits, would deprive Petitioners and millions of County residents of the legal
6 clarity they deserve. Respondents argue that there is “zero likelihood” of recurrence of a similar scenario
7 where Respondents would refuse to perform their mandatory obligations under the applicable laws. Yet
8 Respondents continue to insist that COVID-19 remains an ongoing concern and even declared another
9 local state of emergency for a different respiratory virus during the ongoing Emergencies, indicating that
10 quite the opposite is true. Absent a Court Order defining the duty of Respondents to review local
11 conditions at a public hearing in order to terminate or continue locally declared emergencies, these
12 Respondents have already made clear that they will never abide by that duty and intend to repeat such
13 actions if given the opportunity. Because these issues are of the utmost concern to Orange County citizens,
14 this Court should exercise its discretion and fully adjudicate this matter, even if it believes that the matter
15 is now “moot.” (*See Ferrara v. Belanger, supra* 18 Cal.3d at 259 (viewing case as important legal question
16 under circumstances “capable of repetition yet evading review”).

17 *2. The Court has discretion to decide issues, even if they are moot, where substantial rights remain*
18 *at issue or where failing to do so would fail to “do complete justice.”*

19 Another exception to mootness is where dismissing a case would leave important questions
20 unanswered and/or where the court would thereby fail to do “complete justice.” (*See e.g., Eye Dog Found*
21 *v. State Bd. of Guide Dogs* (1967) 67 Cal. 2d 536, 541). If any of litigant’s **substantial rights** remain at
22 issue, no more is needed to defeat a finding of mootness, although the courts often add additional grounds
23 for avoiding mootness, such as public interest. (*See e.g., County of San Diego v. Super. Ct.* (1986) 176
24 Cal.App.3d 1009, 1017 fn. 2; *Motown Record Corp. v. Brockert* (1984) 160 Cal. App. 3d 123, 128; *Davies*
25 *v. Grossmont Union H.S. Dist.* (1991) 930 F.2d 1390 (9th Cir.), *cert. denied*, 501 U.S. 1252, 111 S.Ct.
26 2892 (1991).

1 Here, there is no question that absent a final ruling on the merits, substantial rights of Petitioners
2 and millions of Orange County residents whose elected leaders have refused to follow the emergency laws
3 or the requirements of the Brown Act remain at issue, including but not limited to: (1) the right to have
4 their elected leaders follow the emergency laws during times of declared emergencies, specifically
5 including their obligations to review local conditions periodically, as set forth under Health & Safety Code
6 section 101080 and Government Code section 8630; (2) the right, as members of the impacted public, to
7 participate in and speak out at an open public board meeting regarding the review of local conditions and
8 the continuation or termination of declared local emergencies, as specifically required by the Brown Act;
9 (3) the right to a plain, speedy, and adequate remedy in the form of a Writ of Mandate, which is not
10 discretionary once a court determines that the elements have been established; (4) the right to the issuance
11 of a Writ of Mandate, in response to this Court’s express determination on February 27, 2023 that
12 Respondents failed to comply with Judge Lee’s Order to Show Cause; and (4) the right to have their elected
13 leaders refrain from arbitrary and capricious decision-making, such as “automatically” terminating the
14 Emergencies after three years without even conducting any local public review of the actual local
15 conditions in the County since June 21, 2021.

16 That these substantial questions linger and still need to be answered by a court is particularly clear
17 here, where the unelected public health officer in the County, in a duly held deposition taken on February
18 17, 2023 in this matter, continues to insist that COVID-19 remains a significant County concern.⁴ Indeed
19 Mr. Dunn reiterated this fact at the last hearing, making it very clear that the Board had determined that the
20 Emergencies MUST CONTINUE due to the conditions present on February 27, 2023.⁵ Yet, in another

21 ⁴ Q. · Okay. · Now, earlier you were talking about how you had advised the board of supervisors to continue -- or not
22 terminate the Local Emergency related to COVID because you believed there were still risks to the community from the
COVID-19 disease. · Yes?

23 A. Yes. · And I can give you an example as of yesterday. · I met with one of the board officers and gave them the numbers
24 and, example, I still strongly recommended that we continue the emergency because we are starting to see cases rise and yet
other new variants, so I actually even as of yesterday made that specific recommendation. (February 17, 2023 Deposition
testimony of Chinsio-Kwan p. 233:12-23).

25 ⁵ Kevin Dunn stated: “What it demonstrates again is that notwithstanding that the meetings are not required under 101080
26 or 8630, the board continued to maintain its appraisal of conditions in orange county with an eye toward whether those
mandated that conditions were now appropriate to terminate the local emergencies. **The board has determined that they are
27 not.** As our evidence shows, they have been constantly informed that the conditions have not significantly dropped to a safe
level, and in fact, the public health director as well as the health care agency director has consistently advised individual board
28 members that they do not believe that the emergency should end, **hence, the reason that it didn’t go on the agenda or vote
prior to tomorrow’s previously scheduled meeting.**” (February 27, 2023 OSC hearing transcript, p. 28:2-17) (emphasis
added).

1 head spinning pivot, Respondents claim that the *conditions magically warranted termination the very next*
2 *day* upon Newsom’s proclamation, which failed to consider any conditions present in this County.

3 If local conditions are still giving rise to COVID-19 concerns by their “health” officers and the
4 Respondents, as of February 27, 2023, felt the conditions *did not warrant termination*, the governing body
5 is charged with an actual review of these local conditions and cannot just let the Emergencies
6 “automatically” expire on the Governor’s say so. Alternatively, Respondents’ lack of concern on February
7 28, 2023 about the state of “COVID-19” within the County, again without bothering to conduct any local
8 conditions review at all, might suggest that the Respondents haven’t been concerned with COVID-19 for
9 a while, and that Respondents have kept their citizens under these prolonged Emergencies for something
10 other than “public health.” At any rate, without a judicial determination that Respondents must follow the
11 emergency laws and the Brown Act during declared emergencies, Respondents will continue to act with
12 blatant disregard for their mandatory duties during times of declared emergencies in the future.

13 Respondents concede it is *their duty alone* to review and terminate local emergencies and that they
14 cannot delegate such authority to others as they have admittedly now done.⁶ This flatly contradicts the
15 claims made in their supplemental brief that a *rote letter* from Leon Page, County Counsel, ending the
16 emergencies automatically is sufficient. As such the writ must issue to ensure performance.

17 **D. Any Finding of Mootness Now Will Result in Irreparable Harm to Petitioners and a Complete**
18 **Denial of Justice for Millions of Orange County Residents**

19 Writ actions are supposed to be **swift determinations** of mandatory duties, in particular of
20 governmental officials. (*Code Civ. Proc.*, §1085 the ordinary course of law. (*Code Civ. Proc.*, §1086A
21 swift determination, to say the least, has clearly not occurred here to provide Petitioners with any relief for
22 their efforts to secure Respondents’ compliance with their mandatory duties as government officials.
23 Instead, for over eighteen months, Respondents have managed to repeatedly delay the proceedings through
24 staggeringly unethical methods, in order to achieve their goal of simply running out the clock. That
25 Respondents have chosen such dilatory tactics, rather than simply perform their clearly defined mandatory,

26 ⁶ Kevin Dunn stated: “So not only is the Board of Supervisors granted the discretion to determine when conditions warrant
27 termination of the emergencies. . . that is why these decisions are entrusted to this branch of government and so that the
28 elected officials accountable to the people can look at the conditions and make public policy decisions for the County in
accordance with their authority.” (February 27, 2023 OSC Transcript at p. 29:13-25).

1 ministerial duties, is bad enough. That Respondents may find such tactics have succeeded is even worse,
2 and perhaps suggests a much deeper rot in our purported system of “justice.” It is currently hard to imagine
3 a more unjust unfolding of this matter of significant public concern.

4 Nevertheless, Petitioners retain hope that this Court will reject Respondents’ opportunistic and false
5 claims of “mootness,” and instead affirm its determination of February 27, 2023 that Respondents failed
6 to show cause at the OSC hearing and grant Petitioners’ Writ. At the very least, Respondents must be
7 ordered to pay Petitioners’ costs and be subject to a fee motion due to the issuance of the alternative writ.
8 (*See Ferrara v. Belanger*, 18 Cal.3d at 259) (deciding “moot” issue in favor of petitioners and awarding
9 costs).

10 **IV. CONCLUSION**

11 On February 27, 2023, this Court found that Respondents failed to satisfy their statutorily and
12 Court-mandated duties to conduct public review hearings of local COVID-19 conditions and to terminate
13 the Emergencies if said conditions warranted. Absolutely nothing has occurred since that time to “moot”
14 Petitioners’ active claims against Respondents, nor to prevent this Court from granting “effectual relief.”
15 Accordingly, for all of the foregoing reasons, Petitioners request the Court to do the following (1) confirm
16 that Respondents failed to show cause at the February 27, 2023 OSC hearing; (2) issue Petitioners’ Writ of
17 Mandate, commanding Respondents to hold the statutorily mandated local review hearing at an open and
18 public board meeting compliant with their obligations under the Brown Act and the emergency laws; (3)
19 declare that Respondents had and have mandatory ministerial duties under the emergency laws to
20 periodically review local conditions prior to terminating or continuing declared local emergencies and local
21 health emergencies; and (4) order Respondents to pay Petitioners’ costs and fees upon motion.

22 Dated: March 20, 2023

Respectfully submitted,

23
24
25 By: _____

Jessica R. Barsotti
Rita Barnett-Rose
Nicole C. Pearson
Attorney for Petitioners
PEGGY HALL and CHILDREN’S HEALTH
DEFENSE – CALIFORNIA CHAPTER

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 **PETITIONERS’ SUPPLEMENTAL BRIEF DEMONSTRATING THAT CASE IS NOT MOOT AND THAT WRIT OF MANDATE MUST ISSUE** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Laura Knapp Kevin Dunn Suzy Shoai Kayla Watson Office of the County Counsel County of Orange 400 West Civic Center Drive, Suite 202 Santa Ana, CA 92701-1379 <i>Deputy County Counsel for Respondents COUNTY OF ORANGE and ORANGE COUNTY BOARD OF SUPERVISORS</i>	<u>Suzy.Shoai@coco.ocgov.com</u> <u>Kayla.Watson@coco.ocgov.com</u> <u>Kevin.Dunn@coco.ocgov.com</u> <u>leon.page@coco.ocgov.com</u> <u>Laura.Knapp@coco.ocgov.com</u> <u>Simon.Perng@coco.ocgov.com</u> <u>chloe.maksoudian@coco.ocgov.com</u>
---	---

/ 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 Mail. I am “readily familiar” with the firm’s practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U. S. Postal Service on that same day with postage thereon fully prepaid at Irvine, CA in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing of affidavit.

/ / By Personal Service. I delivered such envelope by hand to the addressee on November 10, 2022.

/ 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**



MICHELLE CUSUMANO

DATED: March 20, 2023