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17
 18 **UNITED STATES DISTRICT COURT FOR**
 19 **THE CENTRAL DISTRICT OF CALIFORNIA**
 20 **SOUTHERN DIVISION**

21 **KEVIN MULDOON,**
 Plaintiff,

22 vs.

23 **GAVIN NEWSOM, et. al.**
 24 Defendants.
 25
 26
 27
 28

Case No.: 8:20-cv-00844

**APPLICATION FOR
 TEMPORARY RESTRAINING
 ORDER AND FOR ORDER TO
 SHOW CAUSE WHY
 PRELIMINARY INJUNCTION
 SHOULD NOT ISSUE;
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

Judge: TBD



1 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF**
2 **RECORD:**

3 PLEASE TAKE NOTICE that Plaintiff Kevin Muldoon, through counsel, applies
4 to this Court pursuant to Fed. R. Civ. P. 65(b) and Local Rule 231 for a temporary
5 restraining order against Gavin Newsom, in his official capacity as the Governor of
6 California; Xavier Becerra, in his official capacity as the Attorney General of
7 California; Mark Ghilarducci, in his official capacity as the Director, Governor’s Office
8 of Emergency Services; and Wade Crowfoot, in his official capacity as the Secretary,
9 California Natural Resources Agency (“Defendants”), and seeks the issuance of an
10 order to show cause why a preliminary injunction should not issue, as follows:

11 1. Defendants, as well as their agents, employees, and successors in office,
12 shall be restrained and enjoined from enforcing, attempting to enforce, threatening to
13 enforce, or otherwise requiring compliance with any prohibition on Plaintiff’s ability to
14 access and enjoy any of the beaches of Orange County in violation of state and federal
15 fundamental constitutional rights, including the right to travel.

16 2. Defendants shall show cause, at a time and place to be directed by the
17 Court, why a preliminary injunction should not issue requiring Defendants to act as
18 described in above; the temporary restraining order shall remain effective until such
19 time as the Court has ruled on whether a preliminary injunction should issue. Such
20 relief is necessary to prevent Defendants from further violating Plaintiff’s constitutional
21 rights, pending trial on the merits of Plaintiff’s claims.

22 This Application is made on the grounds that Plaintiff is likely to succeed on the
23 merits of this case, he will suffer irreparable harm without injunctive relief, the balance
24 of equities tips sharply in his favor, and the relief sought is in the public interest.

25 Good cause exists to issue the requested Order to preserve Plaintiff’s rights under
26 the Constitution of the United States and the Constitution of the State of California, and
27 to avoid irreparable harm to those rights. This Application is supported by the
28 accompanying Memorandum of Points and Authorities, by Plaintiff’s Complaint, and

1 all exhibits attached thereto, by the declarations of Plaintiff and his counsel, Mark P.
2 Meuser, and by such further argument and evidence that may be adduced at any hearing
3 on this matter or of which the Court may take judicial notice.

4 The Attorney General has received a copy of the Complaint in this action. All
5 papers relating to this Application will be delivered by email to counsel for the
6 California Attorney General as soon as the Application is filed with the Court. As
7 reflected in the accompanying declaration of Mark P. Meuser, Plaintiff has notified the
8 Office of the California Attorney General of Plaintiffs' intention to file this Application
9 and to seek a temporary restraining order of the nature described above.

10 Plaintiff requests that the Court waive any bond requirement, because enjoining
11 Defendants from unconstitutionally prohibiting access to the beaches will not
12 financially affect Defendants.

13 Respectfully submitted,

14 Date: May 4, 2020

DHILLON LAW GROUP INC.

15
16 By: /s/ Harmeet K. Dhillon

Harmeet K. Dhillon

Mark P. Meuser

Gregory R. Michael

19 ESSAYLI & BROWN LLP

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D. Andrew Brown

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TABLE OF CONTENTS

1

2

3 MEMORANDUM OF POINTS AND AUTHORITIES 1

4 INTRODUCTION..... 1

5 RELEVANT FACTUAL BACKGROUND 2

6 A. History of State Emergency for Coronavirus 2

7

8 B. Media Release Misleading Photographs of a Supposedly Crowded
9 Newport Beach..... 4

10 C. Governor Newsom Formally Reacts to the Misleading Photographs with
11 Restrictive Measures on Public Beaches 6

12 D. Four Separate Antibody Studies Evince a COVID-19 Death Rate More
13 Comparable
14 to the Common Flue than the 1918-1919 Spanish Influenza 8

15 E. Orange County’s COVID-19 Actual Death Rate is Five Times Lower
16 than the California Death Rate and is Lower than Other Counties
17 whose Beaches were Left Open..... 9

18 F. The Closure of Public Beaches has no Logical, Much Less Scientific
19 Nexus to the Goal of Suppressing Transmission and Death from
20 COVID-19..... 11

21 LEGAL STANDARD 13

22 ARGUMENT 16

23 I. PLAINTIFF IS ENTITLED TO TEMPORARY AND PRELIMINARY
24 INJUNCTIVE RELIEF 16

25 A. There Is a Strong Likelihood That Plaintiff Will Succeed in Proving
26 His Claims on Multiple Constitutional Grounds 16

27 1. A Complete Closure of Orange County Beaches is a Violation
28 of the Fundamental Right to Travel 16

 2. The Selective Closure of Orange County Beaches Violates
 the Equal Protection Clause 18



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

3. The Governor’s Directive Banning Access to Orange County
Beaches is in Violation of the First Amendment’s Right
to Assembly.....21

4. The Governor’s Directive Also Violates the Right to Access
Navigable Waters Under the California Constitution.....22

5. The Governor’s Directive Also Violates the Right to Liberty
Under the California Constitution.....23

B. Muldoon Faces Imminent Irreparable Harm Absent Immediate
Injunctive Relief.....25

C. The Balance of Hardships Tips Decidedly in Plaintiff’s Favor.....26

D. Injunctive Relief Is in the Public Interest27

II. THE COURT SHOULD DISPENSE WITH ANY BOND REQUIREMENT....27

CONCLUSION28

TABLE OF AUTHORITIES

Cases

All. for Wild Rockies v. Cottrell
632 F.3d 1127 (9th Cir. 2011)..... 14

Americans for Prosperity Foundation v. Harris,
182 F. Supp. 3d 1049 (C.D. Cal. 2016).....25, 27

Aptheker v. Secretary of State
378 U.S. 500 (1964) 17

Bible Club v. Placentia-Yorba Linda School Dist.,
573 F. Supp. 2d 1291 (C.D. Cal. 2008).....28

City of Cleburne, Tex. v. Cleburne Living Ctr.
473 U.S. 432 (1985) 19

College Republicans at San Francisco State University v. Reed,
523 F. Supp. 2d 1005 (N.D. Cal. 2007).....25, 26, 27

Doctor John’s, Inc. v. Sioux City,
305 F. Supp. 2d 1022 (N.D. Iowa 2004).28

Doe v. Harris
772 F.3d 563 (9th Cir.2014)27

Dunn v. Blumstein,
405 U.S. 330 (1972). 17, 18, 21

Earth Island Inst. v. United States Forest Serv.
351 F.3d 1291 (9th Cir. 2003)..... 14

Edwards v. South Carolina,
372 U.S. 229 (1963). 14

Elrod v. Burns,
427 U.S. 347 (1976).25

Ex parte Arta
52 Cal. App. 380 (1921)24



1 *Ex parte Martin*
 2 83 Cal. App. 2d 164 (1948) 23
 3 *Gion v. Santa Cruz*
 4 2 Cal.3d 29 (1970) 22
 5 *Gitlow v. New York,*
 6 268 U.S. 652 (1925). 14
 7 *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers,*
 8 415 U.S. 423 (1974). 13
 9 *In re Abbott*
 10 No. 20-50264, 2020 WL 1685929 (5th Cir. Apr. 7, 2020) 14
 11 *Jacobson v. Commonwealth of Massachusetts*
 12 197 U.S. 11 (1905) 14, 15
 13 *Jew Ho v. Williamson*
 14 103 F. 10 (C.C. Cal. 1900) 24
 15 *Jorgensen v. Cassidy,*
 16 320 F.3d 906 (9th Cir. 2003). 27
 17 *Kent v. Dulles*
 18 357 U.S. 116 (1958) 1, 17
 19 *Maynard v. U.S. Dist. Court for the Cent. Dist. of California*
 20 701 F.Supp. 738 (9th Cir. 1990)..... 20
 21 *Murphy v. Hunt*
 22 455 U.S. 478, 482, 102 S. Ct. 1181, 1183 (1982) 16
 23 *New York Times Co. v. United States*
 24 403 U.S. 713 (1971) 15
 25 *Obergefell v. Hodges*
 26 135 S. Ct. 2584 (2015) 16
 27 *People v. Chambers,*
 28 22 Cal. App 2d 687 (1937). 21



1 *Robinson v. Marshall*,
 2 No. 2:19CV365-MHT, 2020 WL 1847128 (M.D. Ala. Apr. 12, 2020)..... 15
 3 *S.O.C., Inc. v. Cnty. of Clark*,
 4 152 F.3d 1136 (9th Cir. 1998)..... 25
 5 *Sammartano v. First Jud. Dist. Ct.*,
 6 303 F.3d 959 (9th Cir. 2002)..... 25, 27
 7 *San Antonio Indep. Sch. Dist. v. Rodriguez*,
 8 411 U.S. 1 (1973). 21
 9 *Stormans, Inc. v. Selecky*,
 10 586 F.3d 1109 (9th Cir. 2009)..... 25
 11 *Stuhlberg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*,
 12 240 F.3d 832 (9th Cir. 2001)..... 13
 13 *Whitney v. California*,
 14 274 U.S. 357 (1927). 21
 15 *Winter v. Natural Res. Def. Council, Inc.*,
 16 555 U.S. 7 (2008). 14
 17 *Wong Wai v. Williamson*
 18 103 F. 1 (C.C. Cal. 1900) 24
 19 **Rules**
 20 Fed. R. Civ. P. 65 13, 27
 21 **Constitutional Provisions**
 22 Cal. Const. Art. 1, §1 23
 23 Cal. Const. art. 1, § 3..... 21
 24 California Constitution Art. X, § 4..... 22
 25 California Constitution Art. X, § 5..... 23
 26 U.S. Const. amend. XIV, § 1 19
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1
2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 Freedom of movement across frontiers in either direction, and inside
4 frontiers as well, was a part of our heritage. Travel abroad, like travel
5 within the country, may be necessary for a livelihood. It may be as close to
6 the heart of the individual as the choice of what he eats, or wears, or reads.
7 Freedom of movement is basic in our scheme of values.

8 Justice William O. Douglas, Opinion in *Kent v. Dulles*, 357 U.S. 116, 126 (1958).

9 **INTRODUCTION**

10 Defendants, abusing their power, have seized upon the coronavirus pandemic to
11 expand their authority to unprecedented lengths. On March 19, 2020, Governor Gavin
12 Newsom issued Executive Order N-33-20 (the “State Order”), which directs all
13 residents to heed current State public health directives.

14 On April 30, 2020, Governor Newsom issued a letter through the California
15 Governor’s Office of Emergency Services directing all county and city beaches
16 within Orange County to close beginning May 1, 2020 (the “Governor’s Directive”).
17 The only legal authority cited in this letter was a reference to the State Order.

18 By depriving Plaintiff Muldoon, a resident, former Mayor and current
19 Councilman for Newport Beach, of his ability to access and enjoy the beaches of
20 Orange County, where he lives, Defendants have violated and continue to violate
21 fundamental rights protected by the U.S. and California Constitutions, including
22 freedom to travel, freedom to assemble, and due process and equal protection under
23 the law. It is this Court’s duty to defend these constitutional principles, by
24 safeguarding the many rights and liberties of Californians that Defendants violate on
25 an ongoing basis, to greater or lesser degrees depending upon the day.

26 Beginning on May 1, 2020, Defendants began enforcement of the Governor’s
27
28

1 Directive denying Plaintiff access and enjoyment of the Orange County beaches.¹

2 The Governor’s Directive and Defendant’s enforcement thereof (I) the Freedom
3 to Travel; (II) the Due Process of Clause of the Fourteenth Amendment; (III) the
4 Equal Protection Clause of the Fourteenth Amendment; (IV) the Freedom of
5 Assembly Clause of the First Amendment; (V) California Constitution Article 10,
6 Sections 4 and 5 Right to Access Navigable Waters; (VI) California Constitution
7 Article 1, Section 1’s Right to Liberty.

8
9 **RELEVANT FACTUAL BACKGROUND**

10 **History of State Emergency for Coronavirus**

11 On March 13, 2020, President Donald J. Trump proclaimed a National State of
12 Emergency as a result of the threat of the emergence of a novel coronavirus, COVID-
13 19.² Since the initial outbreak of COVID-19 in the United States in February and March
14 2020, the federal government’s projections of the anticipated national death toll related
15 to the virus has decreased substantially, by an order of magnitude. Despite such
16 revisions, Defendants have increasingly restricted—where not outright banned—
17 Californians’ engagement in constitutionally-protected activities.³

18 On March 4, 2020, Newsom proclaimed a State of Emergency as a result of the
19
20

21 ¹Between the filing of the Complaint in this case and the filing of this Application for
22 Temporary Restraining Order, Defendants’ announced that two beaches in Orange
23 County will be allowed to partial open. See [https://www.msn.com/en-
24 us/news/us/beaches-in-two-orange-county-cities-cleared-to-reopen-after-standoff-with-
25 newsom/ar-BB13AQQ4](https://www.msn.com/en-us/news/us/beaches-in-two-orange-county-cities-cleared-to-reopen-after-standoff-with-newsom/ar-BB13AQQ4)

26 ² As of the date of this filing, the Proclamation of a National Emergency can be found
27 online at: [https://www.whitehouse.gov/presidential-actions/proclamation-declaring-
28 national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/](https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/).

³ See, e.g.,
[https://www.usatoday.com/story/news/investigations/2020/04/09/coronavirus-deaths-u-
s-could-closer-60-k-new-model-shows/5122467002/](https://www.usatoday.com/story/news/investigations/2020/04/09/coronavirus-deaths-u-s-could-closer-60-k-new-model-shows/5122467002/).

1 threat of COVID-19.⁴ On March 19, 2020, Newsom issued Executive Order N-33-20 in
 2 which he ordered “all residents are directed to immediately heed the current State public
 3 health directives.”⁵ (also referenced as “Stay Home Order”). The state public health
 4 directive requires “all individuals living in the State of California to stay home or at
 5 their place of residence except as needed to maintain continuity of operations of the
 6 federal critical infrastructure sectors”⁶ The public health directive provides that its
 7 directives “shall stay in effect until further notice.”⁷

8 On April 22, 2020, the *Daily Pilot/Los Angeles Times* published an open letter to
 9 the Orange County Board of Supervisors in which Plaintiff assisted in drafting. This
 10 open letter was signed by a group of Orange County entrepreneurs, small business
 11 owners, restaurateurs and residents, proclaiming “It’s time for the Orange County board
 12 of supervisors to cautiously restart the local economy.”⁸

13 On April 23, 2020, Plaintiff submitted an op-ed to the *Daily Pilot/Los Angeles*
 14 *Times*, “It’s time to reopen Orange County.” In this Op Ed, Muldoon stated that
 15 according “to experts at Hoag Hospital, we have flattened the curve in Orange County.”
 16 Plaintiff identified himself as a Newport Beach City Councilman, but the opinions
 17
 18

19 ⁴ As of the date of this filing, the Proclamation of a State of Emergency can be found
 20 online at: [https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-](https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf)
 21 [SOE-Proclamation.pdf](https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf).

22 ⁵ As of the date of this filing, Executive Order N-33-20 can be found online at:
 23 [https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-](https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf)
 24 [COVID-19-HEALTH-ORDER.pdf](https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf).

25 ⁶The State Public Health Directive was included in the text of Executive Order N-33-
 26 20.

27 ⁷ *Id.*

28 ⁸ This article was accessible, as of May 4, 2020, at
[https://www.latimes.com/socal/daily-pilot/opinion/story/2020-04-22/mailbag-its-time-](https://www.latimes.com/socal/daily-pilot/opinion/story/2020-04-22/mailbag-its-time-for-the-orange-county-board-of-supervisors-to-cautiously-restart-the-local-economy)
[for-the-orange-county-board-of-supervisors-to-cautiously-restart-the-local-economy.](https://www.latimes.com/socal/daily-pilot/opinion/story/2020-04-22/mailbag-its-time-for-the-orange-county-board-of-supervisors-to-cautiously-restart-the-local-economy)

1 expressed were not the official positions of the City of Newport Beach.⁹

2
3 **Media Release Misleading Photographs of a Supposedly Crowded Newport Beach**

4 Beginning on April 25, 2020, certain newspapers published articles, alleging that
5 Southern California beaches were packed with large masses of individuals flouting
6 CDC guidelines.¹⁰ Photographs taken from a ground level viewpoint, seemingly
7 showing beachgoers tightly packed together on Newport Beach, were published in
8 tandem.¹¹

9 In an article in the Orange County Register, on April 27, 2020 entitled “Newsom
10 calls out Newport Beach ... over crowd concerns,” Newsom made comments to the
11 media based on photographs of crowds at Newport Beach. These photographs were
12 taken with a zoom lens that artificially compress perspective. Newsome said, “those are
13 the images we saw over the weekend, the images down in Orange County in Ventura
14 county, on our beaches. Those images are an example of what not to see, people. What
15 not to do...” He continued, “...we can’t see the images like we saw particularly on
16 Saturday in Newport Beach and elsewhere the state of California. Look, I’m not naive,
17 the overwhelming majority of our coastline was appropriately advanced, meaning they
18 the stay at home orders were advanced, the physical distancing, the social distancing on
19 those beaches was appropriate.”¹²

20 On April 28, the Newport Beach City Council had a special meeting to discuss

21 _____
22 ⁹ This article was accessible, as of May 4, 2020, at
23 <https://www.latimes.com/socal/daily-pilot/opinion/story/2020-04-23/commentary-its-time-to-reopen-orange-county>.

24 ¹⁰ See e.g., <https://www.ocregister.com/2020/04/25/eager-early-risers-hit-the-beach-in-san-clemente-as-closure-lifts/>; and <https://www.mercurynews.com/2020/04/26/eager-early-risers-hit-the-beach-in-san-clemente-as-closure-lifts/>.

25 ¹¹ See, headline photograph at *supra*, n. 10, 11.

26 ¹² Available as of May 4, 2020 at <https://www.ocregister.com/gov-newsom-calls-out-newport-beach-other-beaches-over-crowd-concerns>

1 potential beach restrictions. Plaintiff requested several aerial photographs taken on the
2 same day that the newspaper photographs were taken.¹³ The aerial photographs showed
3 far more space between beachgoers than the latter implied. Plaintiff also showed
4 testimonials from firemen and law enforcement, expressing their praise at those on
5 Newport and Huntington Beach for abiding by guidelines.¹⁴ ¹⁵ Charts were produced
6 that showed statistics comparing peak crowds at Newport Beach on July 4, 2019, with
7 the number of people on the beaches on April 25, 2020, the day that was the subject of
8 the aforementioned articles.¹⁶ The recent beach numbers were less than one-third what
9 they were last Fourth of July.

10 Data was produced that showed a comparison of the per-capita number of
11 COVID-19 cases in surrounding beach communities that had closed their public
12 beaches versus the ones that had stayed open, such as Newport Beach.¹⁷ The cities with
13 closed beaches—Malibu, Manhattan Beach, Santa Monica, Redondo Beach, Venice
14 Beach, Long Beach, Hermosa Beach, Marina Del Ray—had higher confirmed COVID-
15 19 cases (all more than 116 per 100,000, some more than 200 per 100,000) than the
16 ones with open beaches—Dana Point, 68.22 per 100,000, San Clemente, 68.80 per
17 100,000, Huntington Beach, 88.93 per 100,000, Newport Beach, 107.82 per 100,000.¹⁸

18 After these important presentations, Plaintiff made the motion to deny the
19 request to place on the agenda the potential beach restrictions. This motion passed, 5-2.
20

21 ¹³ Available as of May 4, 2020 at 1:23:46-1:28:48,
22 http://newportbeach.granicus.com/MediaPlayer.php?view_id=44&clip_id=3477

23 ¹⁴ *Id.*

24 ¹⁵ See *Official Statement of Newport Police Chief Jon Lewis*, accessible as of May 4,
25 2020 at:

26 <https://www.newportbeachca.gov/Home/Components/News/News/38170/2720>.

27 ¹⁶ *Id.* at 15:01-29.

28 ¹⁷ *Id.* 18:28-19:57.

¹⁸ *Id.*

1 Newport Beach City staff were instructed to develop a plan for additional enforcement
2 and education in order to keep the beaches open for residents and visitors.¹⁹

3 On April 28, Orange County Supervisors also voted 5-0 on guidelines to re-open
4 businesses.²⁰ On April 29, Plaintiff saw a video that was linked in a blog titled the
5 “Latest”. In this video of a press conference of Governor Gavin Newsom, a reporter put
6 Orange County Supervisor Don Wagner on the call, who commented regarding the
7 Orange County vote that “[t]he Orange County order satisfies Orange County — the
8 sheriff will not come and ticket you — but the state orders and any local city orders
9 remain in place.”²¹

10
11 **Governor Newsom Formally Reacts to the Misleading Photographs with**
12 **Restrictive Measures on Public Beaches**

13 On April 29 7:54 pm, Plaintiff received a text message containing a screen shot
14 of a 7:36 pm Twitter post from Bill Melugin of Fox LA stating, “BREAKING: A
15 source has provided me with this bulletin that will be sent out to all California police
16 chiefs notifying them that tomorrow, Governor Newsom will announce the closure of
17 ALL beaches and state parks effective May 1st in response to recent beach crowds in
18 OC. @FOXLA”. Below the Twitter text there was an image of what appeared to be an
19 official notification from California Police Chief Association to that effect. The story
20 aired later that night on Fox LA evening news.²²

21
22
23 ¹⁹ Available as of May 4, 2020 at <https://www.cnn.com/2020/04/29/us/california-newport-beach-open-enforcement/index.html>.

24 ²⁰ Available as of May 4, 2020 at <https://www.foxla.com/news/the-oc-board-of-supervisors-vote-unanimously-on-safety-guidelines-required-to-reopen-businesses>

25 ²¹ Available as of May 4, 2020, at: <https://laist.com/latest/post/20200429/orange-county-supervisor-don-wagner-newsom-surprise-call-coronavirus>

26 ²² Available as of May 4, 2020, at: <https://www.foxla.com/news/source-gov-newsom-to-announce-closure-of-all-beaches-and-state-parks>

1 Eric Nunez, president of the California Police Chiefs Association, said it was sent
2 to give chiefs time to plan ahead of Newsom’s expected announcement April 30.²³

3 Muldoon did not receive and is unaware of a similar memo being sent to a single
4 mayor, city council member or supervisor of a California city, township, or
5 municipality. The communique effectively bypassed all local authorities. It reached out
6 to local law enforcement only to ready a closure of public spaces while not conferring
7 with or obtaining the feedback from local authorities.

8 On April 30, 2020, Newsom stated that he was unaware of the memorandum, and
9 claimed that he had “never saw it.”²⁴ The same day, Newsom announced a total closure
10 of state and city beaches located in Orange County, and only Orange County. This order
11 prohibited access to the sand, shoreline, and water. Governor Newsom did not order the
12 closure of Ventura County beaches, the other county he referenced in his April 27 news
13 conference.

14 To the best of Plaintiff’s knowledge, at no point in time did the Governor’s
15 Office contact Newport Beach City staff or elected Councilmembers to discuss the
16 potential closure of beaches in the city of Newport Beach. The Governor’s office did
17 not request any information as to what the city was doing regarding additional
18 education of the community or what steps the city was taking to ensure proper
19 enforcement of the CDC’s social distancing requirements.

20 Muldoon understands that before the Governor will allow Newport Beach to
21 reopen its beaches, the city will need to submit plans for the management of the beaches
22 before the governor will consider reopening them.

23 On May 2, in response to the Governor’s request, the City of Newport Beach
24

25 ²³ This article was accessible, as of May 4, 2020, at:
26 [https://www.kpbs.org/news/2020/apr/29/gov-newsom-order-all-beaches-closed-memo-
27 police-ch/](https://www.kpbs.org/news/2020/apr/29/gov-newsom-order-all-beaches-closed-memo-police-ch/).

28 ²⁴ Available as of May 4, 2020 at: [https://www.cnn.com/travel/article/california-
newsom-close-beaches-parks/index.html](https://www.cnn.com/travel/article/california-newsom-close-beaches-parks/index.html).

1 submitted its plan. The Governor has still not allowed the city to reopen its beaches
2 even though it promptly provided the Governor with the plan that the city had already
3 commenced earlier in the week.

4
5 **Four Separate Antibody Studies Evince a COVID-19 Death Rate More**
6 **Comparable to the Common Flue than the 1918-1919 Spanish Influenza**

7 On April 27, 2020, a revised study released by a team at Stanford University
8 estimated that, based on antibody tests of 3,300 people, as much as 4.16% of Santa
9 Clara County's population (81,000 people), had already contracted COVID-19 by April
10 3 and 4, 2020.²⁵ Santa Clara had 39 deaths as of April 4, 2020²⁶ out of a county
11 population of 1,927,852.²⁷ This means that the death rate of those who had COVID-19
12 is .048%.

13 On April 10, 2020, Los Angeles County had 8,430 confirmed cases 241 deaths;²⁸
14 on April 11, 2020, Los Angeles County had 8,873 cases and 265 deaths, for an
15 approximate death rate of 2.98 percent.²⁹ On April 20, 2020, the preliminary results of a
16 collaborative antibody study done between the University of South California and the
17 Public Health Department of Los Angeles County were released. Based on 863 tests,
18 researchers estimated that as many as 5.6 percent of the L.A. County's population, or
19

20 ²⁵ As of May 4, 2020, accessible at:

21 <https://www.medrxiv.org/content/10.1101/2020.04.14.20062463v2.full.pdf>.

22 ²⁶ As of May 4, 2020, accessible at: [https://www.santaclaraca.gov/i-want-to/stay-](https://www.santaclaraca.gov/i-want-to/stay-informed/newsroom/coronavirus-updates/archived-covid-19-news-updates)
23 [informed/newsroom/coronavirus-updates/archived-covid-19-news-updates](https://www.santaclaraca.gov/i-want-to/stay-informed/newsroom/coronavirus-updates/archived-covid-19-news-updates).

24 ²⁷ <https://www.census.gov/quickfacts/fact/table/santaclaracountycalifornia/PST045219>

25 ²⁸ As of May 4, 2020, accessible at:

26 [http://publichealth.lacounty.gov/phcommon/public/media/mediapubdetail.cfm?unit=me-](http://publichealth.lacounty.gov/phcommon/public/media/mediapubdetail.cfm?unit=media&ou=ph&prog=media&prid=2309)
27 [dia&ou=ph&prog=media&prid=2309](http://publichealth.lacounty.gov/phcommon/public/media/mediapubdetail.cfm?unit=media&ou=ph&prog=media&prid=2309).

28 ²⁹ As of May 4, 2020, accessible at:

[http://publichealth.lacounty.gov/phcommon/public/media/mediapubdetail.cfm?unit=me-](http://publichealth.lacounty.gov/phcommon/public/media/mediapubdetail.cfm?unit=media&ou=ph&prog=media&prid=2311)
[dia&ou=ph&prog=media&prid=2311](http://publichealth.lacounty.gov/phcommon/public/media/mediapubdetail.cfm?unit=media&ou=ph&prog=media&prid=2311).

1 442,000, already had COVID-19 on April 10 and 11.³⁰

2 A similar antibody test in and by New York City showed that 21 percent of the
3 population (1,763,737) were infected with COVID-19.³¹ With the current number of
4 confirmed deaths (12,571),³² the putative death rate is 0.71 percent.

5 A similar antibody study by Miami-Dade County told a similar story: the
6 confirmed number of deaths (1,268)³³ divided by the estimated number of infections
7 (221,000)³⁴ gave a putative death rate of .57 percent. Each of these studies indicates that
8 the COVID-19 mortality rate falls significantly short of those associated with other
9 epidemics, including the 1917-1918 Spanish Flu, believed to have caused at least 2.5
10 percent of the infected to die.³⁵

11
12 **Orange County's COVID-19 Actual Death Rate**
13 **is Five Times Lower than the California Death Rate**
14 **and is Lower than Other Counties whose Beaches were Left Open**
15
16

17 ³⁰ As of May 4, 2020, accessible at:

18 [http://www.publichealth.lacounty.gov/phcommon/public/media/mediapubhpdetail.cfm?
19 prid=2328](http://www.publichealth.lacounty.gov/phcommon/public/media/mediapubhpdetail.cfm?prid=2328).

20 ³¹ As of May 4, 2020, accessible at:

21 <https://www.nytimes.com/2020/04/23/nyregion/coronavirus-antibodies-test-ny.html>.

22 The estimated population of NYC is 8,398,748 as of July 1, 2018 per

23 <https://www.census.gov/quickfacts/newyorkcitynewyork>.

24 ³² As of May 4, 2020, accessible at: [https://www1.nyc.gov/site/doh/covid/covid-19-
25 data.page](https://www1.nyc.gov/site/doh/covid/covid-19-data.page).

26 ³³ As of May 4, 2020, accessible at:

27 <https://www.miamiherald.com/news/coronavirus/article242395581.html>.

28 ³⁴ As of May 4, 2020, accessible at: [https://www.miamidade.gov/releases/2020-04-24-
sample-testing-results.asp](https://www.miamidade.gov/releases/2020-04-24-sample-testing-results.asp).

³⁵ As of May 4, 2020, accessible at:

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3291398/>.

1 As of May 3, 2020, there were a total of 65,735 deaths³⁶ in the United States out
2 of a total population of 328,239,523. Based on these numbers, the United States' actual
3 death rate due to COVID-19 is approximately .0200 percent (or 1 for every 4,993).

4 As of May 3, 2020, there were a total of 1,229 deaths in Los Angeles County³⁷
5 out of a total population of 10,039,107. Based on these numbers, the Los Angeles
6 County's actual death rate due to COVID-19 is approximately .0122 percent (or 1 for
7 every 8,168).

8 As of May 3, 2020, there were a total of 2,215 deaths³⁸ in California out of a total
9 population of 39,512,223. Based on these numbers, the California's actual death rate
10 due to COVID-19 is approximately .0056 percent (or 1 for every 17,838).

11 As of May 3, 2020, there was a total of 138 coronavirus deaths in San Diego
12 County³⁹ out of a total population of 3,338,330. Based on these numbers, the San Diego
13 County's actual death rate as a result of COVID-19 is approximately .0041 percent (or 1
14 for every 24,190).

15 As of May 3, 2020, there was a total of 19 coronavirus deaths⁴⁰ in Ventura
16 County out of a total population of 846,006. Based on these numbers, the Ventura
17 County's actual death rate as a result of COVID-19 is approximately .0022 percent (or 1
18 for every 44,527).

19
20
21 _____
22 ³⁶ As of May 4, 2020, accessible at: [https://www.cdc.gov/coronavirus/2019-ncov/cases-
updates/cases-in-us.html](https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html).

23 ³⁷ As of May 4, 2020, accessible at:
24 <http://www.publichealth.lacounty.gov/media/Coronavirus/>.

25 ³⁸ As of May 4, 2020, accessible at: <https://covid19.ca.gov/>.

26 ³⁹ As of May 4, 2020, accessible at:
27 [https://www.arcgis.com/apps/opsdashboard/index.html#/96feda77f12f46638b984fcb1d
17bd24](https://www.arcgis.com/apps/opsdashboard/index.html#/96feda77f12f46638b984fcb1d17bd24).

28 ⁴⁰ As of May 4, 2020, accessible at: <https://www.vcemergency.com/>.

1 As of May 3, 2020, there was a total of 52 deaths in Orange County⁴¹ out of a
2 total population of 3,175,692. Based on these numbers, the Orange County's actual
3 death rate as a result of COVID-19 is approximately .0016 percent (or 1 for every
4 61,071).

5
6 **The Closure of Public Beaches has no Logical, Much Less Scientific Nexus**
7 **to the Goal of Suppressing Transmission and Death from COVID-19**

8 Studies and health data show that the closure of public beaches would not only be
9 of no benefit to preventing the transmission of COVID-19 or death from it, it could
10 actually be detrimental to such efforts.

11 First, open air and sunlight (whether the mechanism of action is UV radiation or
12 thermal energy) reduce the likelihood of transmission; the open air seemingly dissipates
13 viruses to a negligible amount,⁴² while sunlight lessens the lifetime of an infectious,
14 viral particle.^{43 44} A study, conducted by Chinese scientists on COVID-19 clusters in
15 Wuhan, showed that outdoor transmissions were few and rare.⁴⁵ A study on the
16 physical-chemical structure of the SARS virus, a virus in the same family of
17 coronaviruses as COVID-19 virus, showed that prolonged exposure to UV radiation
18 resulted in the destruction of viral particles.⁴⁶ A Department of Homeland Security

19 _____
20 ⁴¹ As of May 4, 2020, accessible at: <https://occcovid19.ochealthinfo.com/coronavirus-in-oc>.

21 ⁴² As of May 4, 2020, accessible at:
22 <https://www.medrxiv.org/content/10.1101/2020.04.04.20053058v1>.

23 ⁴³ As of May 4, 2020, accessible at:
24 <https://www.sciencedirect.com/science/article/pii/S016609340400179X> (similar
25 coronavirus, the one that causes the SARS outbreak, is vulnerable to UV radiation).

26 ⁴⁴ As of May 4, 2020, accessible at: <https://www.newsweek.com/sunlight-kills-coronavirus-scientist-1500012>.

27 ⁴⁵ *See, supra*, n.35.

28 ⁴⁶ *See, supra*, n.36.

1 official revealed that the preliminary results from a study showed that sunlight and high
2 temperatures could destroy a COVID-19 viral particle within minutes.⁴⁷

3 Second, COVID-19 seems to most severely affect those with underlying medical
4 issues. The lack of access to fresh air, sunlight, exercise and social companionship
5 (even from six feet away) can be detrimental, if not downright deadly, to the physical
6 and psychological health of people.⁴⁸ Substance abuse relapse, lower immune system
7 response, and higher risks for other medical conditions leaves one more vulnerable to
8 COVID-19 transmission, infection, and death.⁴⁹

9 Third, Southern California cities with closed beaches—Malibu, Manhattan
10 Beach, Santa Monica, Redondo Beach, Venice Beach, Long Beach, Hermosa Beach,
11 Marina Del Ray—had *higher* confirmed COVID-19 cases (all more than 116 per
12 100,000, some more than 200 per 100,000) than the ones with open beaches—Dana
13 Point, 68.22 per 100,000, San Clemente, 68.80 per 100,000, Huntington Beach, 88.93
14 per 100,000, Newport Beach, 107.82 per 100,000.⁵⁰

15 Finally, official health bodies do not recommend the closure of public spaces and
16 or the implementation of major, internal travel restrictions. For example, the CDC's
17 official mitigation guidelines for COVID-19 make no mention of closing public parks
18
19
20

21 ⁴⁷ As of May 4, 2020, accessible at: [https://www.reuters.com/article/us-health-](https://www.reuters.com/article/us-health-coronavirus-trump/sunlight-heat-and-humidity-weaken-coronavirus-u-s-official-says-idUSKCN2253SA)
22 [coronavirus-trump/sunlight-heat-and-humidity-weaken-coronavirus-u-s-official-says-](https://www.reuters.com/article/us-health-coronavirus-trump/sunlight-heat-and-humidity-weaken-coronavirus-u-s-official-says-idUSKCN2253SA)
23 [idUSKCN2253SA](https://www.reuters.com/article/us-health-coronavirus-trump/sunlight-heat-and-humidity-weaken-coronavirus-u-s-official-says-idUSKCN2253SA).

24 ⁴⁸ City Council meeting with video showing discussions with doctors at Hoag Hospital
25 about observing increase in at 11:55-12:10, available as of May 4, 2020 at:
26 http://newportbeach.granicus.com/MediaPlayer.php?view_id=44&clip_id=3477.

27 ⁴⁹ As of May 4, 2020, accessible at: [https://www.cdc.gov/coronavirus/2019-ncov/need-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html)
28 [extra-precautions/groups-at-higher-risk.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html).

⁵⁰ See chart, available as of May 4, 2020 at 18:28-19:57,
http://newportbeach.granicus.com/MediaPlayer.php?view_id=44&clip_id=3477.

1 or breaches.⁵¹ WHO and European CDC guidelines also advise against “internal travel
2 restrictions” during a pandemic because they have little effect on reducing transmission,
3 while imposing huge social and economic costs.⁵²

5 LEGAL STANDARD

6 A temporary restraining order preserves the status quo and prevents irreparable
7 harm until a hearing may be held on a preliminary injunction application. *See Granny*
8 *Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423,
9 439 (1974). A temporary restraining order may be issued without providing the
10 opposing party an opportunity to be heard where “specific facts in an affidavit or a
11 verified complaint clearly show that immediate and irreparable injury, loss, or damage
12 will result to the movant before the adverse party can be heard in opposition,” and “the
13 movant’s attorney certifies in writing any efforts made to give notice and the reasons
14 why it should not be required.” Fed. R. Civ. P. 65(b)(1).

15 The standards for issuing a temporary restraining order and a preliminary
16 injunction are the same. *See, e.g., Stuhlberg Int’l Sales Co., Inc. v. John D. Brush &*
17 *Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). The Ninth Circuit has established two

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20 ⁵¹ As of May 4, 2020, accessible at: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf>.

21 ⁵² “There is limited evidence supporting the effectiveness of internal travel restrictions,
22 and it has legal, ethical and economic implications. Although 37% of national pandemic
23 preparedness plans of Member States have travel restriction plans as a component of
24 NPIs (65), the acceptability is still undetermined.” World Health Organization, *Non-*
25 *pharmaceutical public health measures for mitigating the risk and impact of epidemic*
26 *and pandemic influenza*, at p. 71, accessible as of May 4, 2020 at:
27 <https://apps.who.int/iris/bitstream/handle/10665/329438/9789241516839-eng.pdf?ua=1>;
28 *see also* European Centre for Disease Prevention and Control, *Public Health Measures*
for Influenza Pandemics, p. 9, § 12 (“Internal travel restrictions [have] minor delaying
effect[s and] [m]assive [costs and risks], including social disruption.”).

1 sets of criteria for evaluating a request for injunctive relief. *Earth Island Inst. v. United*
2 *States Forest Serv.*, 351 F.3d 1291, 1297 (9th Cir. 2003). Under the “traditional”
3 criteria, a plaintiff must show (1) a strong likelihood of success on the merits, (2) a
4 likelihood of irreparable injury to plaintiff if preliminary relief is not granted, (3) a
5 balance of hardships favoring the plaintiff, and (4) advancement of the public interest.
6 *See, e.g., Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

7 Alternatively, a temporary restraining order or preliminary injunction may be
8 appropriate when a movant raises “serious questions going to the merits” and the
9 “balance of hardships tips sharply in the plaintiff’s favor,” provided that the plaintiff is
10 able to show there is a likelihood of irreparable injury and that the injunction is in the
11 public interest. *All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

12 In recent weeks, some Courts have relied on *Jacobson v. Commonwealth of*
13 *Massachusetts*, 197 U.S. 11 (1905) when reviewing government actions during the
14 coronavirus pandemic, arguing that during a state of emergency substantial deference is
15 owed to executive actions. *See In re Abbott*, No. 20-50264, 2020 WL 1685929, at *1
16 (5th Cir. Apr. 7, 2020) (holding that the district court erred by failing to consider
17 *Jacobson* when issuing a temporary restraining order to ensure access to abortion).

18 Here, *Jacobson* is inapposite to the beach closure context. In *Jacobson*, the
19 Supreme Court upheld a conviction under a Massachusetts statute that criminalized the
20 defendant’s failure to vaccinate himself from smallpox, despite the defendant’s
21 assertion that the statute violated his Fourteenth Amendment rights. *Jacobson*, 197 U.S.
22 at 12. *Jacobson* was decided *decades* before the First Amendment was held to apply to
23 the States by incorporation. *Gitlow v. New York*, 268 U.S. 652 (1925) (Free Speech
24 Clause); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (Free Assembly Clause);
25 *Edwards v. South Carolina*, 372 U.S. 229 (1963) (Right to Petition). As such, *Jacobson*
26 does not, and could not, control this Court’s analysis of Muldoon’s First Amendment
27 and other constitutional claims.

28

1 During the 115 years since *Jacobson* was decided, the Supreme Court has
2 developed a substantial and durable body of case law establishing, unequivocally, that a
3 state's infringement of fundamental rights enshrined by the First Amendment to the
4 U.S. Constitution are subject to the most rigorous form of judicial scrutiny: strict
5 scrutiny. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 717 (1971)
6 ("The word 'security' is a broad, vague generality whose contours should not be
7 invoked to abrogate the fundamental law embodied in the First Amendment."). The
8 Court should not abandon this analysis here, for the first time.

9 Even under *Jacobson*, however, government action is still rendered
10 unconstitutional if it "has no real or substantial relation to those objects, or is, beyond
11 all question, a plain, palpable invasion of rights secured by the fundamental law."
12 *Jacobson*, 197 U.S. at 31; *see also Robinson v. Marshall*, No. 2:19CV365-MHT, 2020
13 WL 1847128 (M.D. Ala. Apr. 12, 2020) (granting temporary restraining order to
14 abortion providers) (appeal pending). For the reasons set forth below, Defendants
15 cannot meet even the more deferential standard applied in *Jacobson*; their indefinite and
16 total ban on accessing Orange County beaches is beyond all question, a plain, palpable
17 invasion of fundamental rights protected by the First and Fourteenth Amendments and
18 the California Constitution's liberty and waterways access rights.

19 Muldoon seeks by this motion a return to the status quo ante, that is the status of
20 the beaches of Orange County being open to the public prior to the Governor's unlawful
21 April 30, 2020 order, and an order that these beaches not be closed again by the
22 Governor until such time as a full hearing is held on a preliminary injunction
23 concerning these issues.

24 Defendants have shown by their actions a willingness to ignore and to violate the
25 fundamental civil rights of California residents. Their actions described herein are
26 persistent and capable of repetition unless they are enjoined by this Court. The supreme
27 court has "recognized an exception to the general [mootness] rule in cases that are
28 "capable of repetition, yet evading review.'" *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.

1 Ct. 1181, 1183 (1982). As shown by the fact that the Governor and Defendants
2 purported to close the beaches of Orange County by way of a terse directive with almost
3 no advance notice, this action may easily be reversed and reinstated at a moment's
4 notice. As such, the conduct in question is capable of repetition and evading review.

6 ARGUMENT

7 As Californians, respect and reverence for our beaches in our DNA, so much so
8 that we enshrined public beach access into our state Constitution Gavin Newsom,
9 October 10, 2019 when signing AB 1680.

11 I. PLAINTIFF IS ENTITLED TO TEMPORARY AND PRELIMINARY 12 INJUNCTIVE RELIEF

13 A. There Is a Strong Likelihood That Plaintiff Will Succeed in Proving 14 His Claims on Multiple Constitutional Grounds

15 1. A Complete Closure of Orange County Beaches is a Violation of 16 the Fundamental Right to Travel

17 As Plaintiff's first cause of action, he asserts factual and as-applied challenges
18 pursuant to 42 U.S.C. Section 1983 on the grounds that the Governor's Directive
19 closing all Orange County beaches violates the Due Process Clause of the Fourteenth
20 Amendment of the U.S. Constitution, implicating the fundamental right to travel.

21 Under the Due Process Clause of the Fourteenth Amendment, no State shall
22 "deprive any person of life, liberty, or property, without due process of law." The
23 fundamental liberties protected by this Clause include most of the rights enumerated in
24 the Bill of Rights." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015). In addition, these
25 liberties extend to certain personal choices central to individual dignity and autonomy,
26 including intimate choices that define personal identity and beliefs. *Id.* at 2597.

27 The Supreme Court has acknowledged the right to travel as a fundamental
28 constitutional liberty protected by the Due Process Clause. The "right to travel is a part

1 of the liberty of which the citizen cannot be deprived without the due process of law
2 under the Fifth Amendment.” *Kent v. Dulles*, 357 U.S. 116, 126(1958). “It may be as
3 close to the heart of the individual as choice of what he eats, or wears, or reads.
4 Freedom of movement is basic in our scheme of values.” *Kent*, 357 U.S. at 126. The
5 “right to travel is an unconditional personal right, a right whose exercise may not be
6 conditioned.” *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972). The “[f]reedom of
7 movement is kin to the right of assembly and to the right of association. These rights
8 may not be abridged.” *Aptheker v. Secretary of State*, 378 U.S. 500, 520 (1964).

9 The reason that the right to travel is fundamental is because “[f]reedom of
10 movement...is important for job and business opportunities – for cultural, political, and
11 social activities—for all the commingling which gregarious man enjoys.” *Aptheker*, 378
12 U.S. at 519-520. The “right to travel is an unconditional personal right, a right whose
13 exercise may not be conditioned.” *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972).

14 The fundamental right to travel may not be restricted because California is
15 presently under a state of emergency and Defendants assert that travel must be restricted
16 for the public’s safety. *See Aptheker*, 378 U.S. at 520 (“Those with the right of free
17 movement use it at times for mischievous purposes. But that is true of many liberties we
18 enjoy. We nevertheless place our faith in them, and against restraint, knowing that the
19 risk of abusing liberty so as to give rise to punishable conduct is part of the price we
20 pay for this free society.”).

21 In this instance, there can be no question that the State Order the Governor’s
22 Directive mandating the immediate and indefinite closure of all Orange County beaches
23 has denied Plaintiff the right to travel to, travel from, and travel along the beaches of
24 Orange County, in violation of his fundamental right to move freely and in violation of
25 the Due Process Clause of the Fourteenth Amendment.

26 As the courts have articulated, the right to travel is in part important because it
27 allows for cultural and social activities, and commingling. It is also important for
28 economic reasons and livelihood, including fishing. By necessary extension, the right to

1 travel would be rendered useless if citizens are not free to travel *somewhere*. By
2 denying citizens the right to travel to, travel from, and travel along the beach, the
3 Governor’s Order closing the beaches runs afoul of the constitutionally enshrined right
4 to travel.

5 Under the compelling state interest test, the government must prove that there is a
6 “clear showing that the burden imposed is necessary to protect a compelling and
7 substantial governmental interest.” *Dunn* at 341. The *Dunn* Court held that to prove that
8 there is a substantial government interest, the government “cannot choose means that
9 unnecessarily burden or restrict constitutionally protected activity,” that a statute must
10 be “drawn with precision,” and “must be tailored to serve their legitimate objectives.”
11 *Dunn* at 343. In this instance, the burden imposed by mandating full closure of the
12 beaches is not necessary to serve the purported interest of combating the virus, as there
13 are lesser measures that can be taken to achieve the same goal. Instead of mandating a
14 full closure, the Defendants could have mandated social distancing and local
15 enforcement thereof. Defendants could have restricted groups to those that cohabitate
16 and are thus already exposed to each other. Defendants could also impose restrictions
17 on anyone who has shown symptoms or been around anyone showing symptoms from
18 traveling to the beach, or closed parking lots and street parking near the beach to
19 prevent crowds. Instead, Defendants entirely cleared the beach and denied everyone
20 access.

21 Defendants have violated Muldoon’s fundamental right to travel to, from and
22 along the beach, and their violation is unduly burdensome, broadly tailored, and
23 unnecessary and indeed unrelated to achieving any legitimate government purpose.

24 25 **2. The Selective Closure of Orange County Beaches Violates the** 26 **Equal Protection Clause**

27 The Governor’s Directive and Defendants’ enforcement thereof violate the
28 Fourteenth Amendment, both facially and as-applied to Muldoon. The Fourteenth

1 Amendment of the Constitution provides that “[n]o State shall . . . deny to any person
2 within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.
3 Equal protection requires the state to govern impartially—not draw arbitrary
4 distinctions between individuals based solely on differences that are irrelevant to a
5 legitimate governmental objection. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473
6 U.S. 432, 446 (1985). In other words, persons similarly situated must be similarly
7 treated.

8 Defendants intentionally and arbitrarily singled out Orange County beaches for
9 complete state government mandated closure, thereby depriving Muldoon, a resident of
10 Orange County, access to the beach, a unique and valued place for travel, recreation,
11 assembly and leisure.

12 Defendants did not direct the closure of the beaches in any other county in the
13 state. Those counties not subject to the mandated closure are permitted to continue
14 using their beaches for exercise, leisure (including fishing), travel, and assembly at their
15 discretion, so long as certain mitigation tactics such as social distancing are employed.
16 As a result, every single Californian who visited the beach in Orange County on April
17 30 can visit a beach on May 1 – so long as the beach is not located in Orange County.
18 Singling out Orange County in this manner is arbitrary and irrational on its face, and
19 will likely serve no purpose other than to deprive Muldoon and other Orange County
20 residents of their right to access and enjoy the beaches.

21 Orange County has an effective COVID-19 death rate of 1 per 61,071 yet their
22 beaches have been closed starting May 1, 2020 due to Governor Newsom’s Order, yet
23 just across the county boundary, there are open public beaches in San Diego County
24 where the COVID-19 death rate is 1 per 24,190, or 2.5 times greater death rate. While
25 Orange County Beaches are closed, beaches in Ventura County are open, even though
26 Ventura County has a slightly higher COVID-19 death rate than Orange County.

27 Strict scrutiny under the Equal Protection Clause applies where, as here, the
28 classification impinges on a fundamental right, including the right to travel and the right

1 to assembly, among others. *Maynard v. U.S. Dist. Court for the Cent. Dist. of*
2 *California*, 701 F.Supp. 738, 742 (“When a law disadvantages a suspect class or
3 impinges upon a ‘fundamental right,’ the court will examine the law by applying a strict
4 scrutiny standard”), *aff’d sub nom. Maynard v. U.S. Dist. Court for Cent. Dist. Of*
5 *California*, 915 F.2d 1581 (9th Cir. 1990). Under strict scrutiny review, the law may be
6 justified only if it furthers a compelling government purpose, and, even then, only if no
7 less restrictive alternative is available. (*See, e.g., Memorial Hospital*, 415 U.S. at 257-
8 258.)

9 Defendants cannot satisfy strict scrutiny; their arbitrary classifications are not
10 narrowly tailored measures because Defendants have granted numerous special
11 exemptions to their bans on public gatherings, including for purportedly “essential”
12 businesses and activities, provided that social distancing practices are observed. Since
13 these gatherings may be permitted, there can be no doubt that Defendants must permit
14 Muldoon to engage in equivalent constitutionally protected activities at Orange County
15 beaches, provided that Muldoon also adheres to the social distancing guidelines and
16 other reasonable measures. Defendants’ actions in mandating a full beach closure, as
17 opposed to requiring mitigating steps short of a full closure, is an overbroad approach.

18 Further, as indicated above, Defendants could have taken less restrictive actions
19 to address any concerns about the use of Orange County beaches, such as limiting
20 parking lot and street parking availability, requiring that only families or people that
21 cohabitate gather together on the beaches, or limiting the type of activities that take
22 place there, but elected not to.

23 Defendants’ beach shutdown order cannot satisfy strict scrutiny, because their
24 arbitrary classifications are not narrowly tailored measures that further compelling
25 government interests, for the reasons stated above. As such, the Defendants’ directive
26 impermissibly violates the Equal Protection Clause.

1 **3. The Governor’s Directive Banning Access to Orange County**
2 **Beaches is in Violation of the First Amendment’s Right to**
3 **Assembly**

4 As Muldoon’s third cause of action, he asserts facial and as-applied challenges
5 pursuant to 42 U.S.C. Section 1983 on the grounds that the Governor’s Directive and
6 Defendants’ enforcement thereof violate the First Amendment, both facially and as-
7 applied to Plaintiff.

8 “The right of free speech, the right to teach, and the right of assembly are, of
9 course, fundamental rights.” *Whitney v. California*, 274 U.S. 357, 373 (1927). The First
10 Amendment of the Constitution protects the “right of the people peaceably to
11 assemble.” The Freedom of Assembly Clause was incorporated against the states in *De*
12 *Jonge v. Oregon*, 299 U.S. 353 (1937). The California Constitution also protects the
13 right to freely assemble. *See, e.g.*, Cal. Const. art. 1, § 3; *People v. Chambers*, 22 Cal.
14 App 2d 687, 706 (1937) (“laws should not infringe upon our guaranteed freedom of
15 speech and lawful assembly.”).

16 When a government practice restricts fundamental rights, it is subject to “strict
17 scrutiny” and can be justified only if it furthers a compelling government purpose and,
18 even then, only if no less restrictive alternative is available. *See, e.g.*, *San Antonio*
19 *Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *Dunn v. Blumstein*, 405 U.S.
20 330 (1972).

21 By denying Muldoon the ability to access public beaches, whether to gather with
22 others or organize a rally, Defendants violate the Freedom of Assembly Clause.
23 Defendants also cannot meet the no-less-restrictive-alternative test. The CDC’s social
24 distancing guidelines are appropriate to limit the spread of COVID-19. An outright ban
25 on public gatherings for the purpose political demonstration, rally, or protest, while at
26 the same time allowing a myriad of activities that are deemed critical by the State
27 Health Officer, but which do possess the special constitutional protections conferred by
28

1 the First Amendment, by definition cannot be deemed the least restrictive means of
2 achieving Defendants' public safety goals.

3 By flatly denying Muldoon and all citizens of California the right to peaceably
4 assemble on the beaches of Orange County, whether to protest or otherwise express
5 themselves, Defendants are infringing on the Freedom of Assembly Clause.

6 Muldoon has no adequate remedy at law and will suffer serious and irreparable
7 harm to his constitutional rights unless Defendants are enjoined from implementing and
8 enforcing the Governor's Directive.

9
10 **4. The Governor's Directive Also Violates the Right to Access**
11 **Navigable Waters Under the California Constitution**

12 Californians have a state constitutional interest in the use and enjoyment of the
13 coastline. Courts have recognized the California Constitution expresses a strong public
14 policy of encouraging public use of shoreline recreational areas. *Gion v. Santa Cruz*, 2
15 Cal.3d 29, 42 (1970). The California Supreme Court has acknowledged several
16 legislative enactments that indicate the strong public policy in favor of according public
17 access to the coast. *Id.*

18 California Constitution Art. X, § 4 states:

19 No individual, partnership, or corporation, claiming or
20 possessing the frontage or tidal lands of a harbor, bay, inlet,
21 estuary, or other navigable water in this State, shall be
22 permitted to exclude the right of way to such water whenever
23 it is required for any public purpose, nor to destroy or obstruct
24 the free navigation of such water; and the Legislature shall
25 enact such laws as will give the most liberal construction to
26 this provision, so that access to the navigable waters of this
27 State shall be always attainable for the people thereof.

1 The last sentence of Section 4 provides for the explicit right that the navigable
2 waters of California, including the beaches, *shall* always be attainable for the people.
3 Newsom’s directive forcing the closure of Orange County beach is in direct
4 contradiction with Section 4 of the California Constitution.

5 Additionally, California Constitution Art. X, § 5 provides:

6 The use of all water now appropriated, or that may hereafter
7 be appropriated, for sale, rental, or distribution, is hereby
8 declared to be a public use, and subject to the regulation and
9 control of the State, in the manner to be prescribed by law.

10 The California Constitution express a clear desire to make all water within
11 California a public use. Together, these provisions make clear that the California
12 Constitution affords the public right of access the coastline and requires that the public
13 be afforded liberal access to its use.

14 Preventing Muldoon from accessing and enjoying the beach, despite the
15 availability of less restrictive measures to satisfy the public health interests at stake,
16 violates his California Constitutional right to access the states navigable waters.

17
18 **5. The Governor’s Directive Also Violates the Right to Liberty**
19 **Under the California Constitution**

20 In California, “[a]ll people are by nature free and independent and have
21 inalienable rights. Among these are enjoying and defending life and liberty, acquiring,
22 possessing, and protecting property, and pursuing and obtaining safety, happiness, and
23 privacy. Cal. Const. Art. 1, §1.

24 California courts have held that Public Health Officials’ authority over the rights
25 of personal liberty is limited. Before exercising their full powers to quarantine, there
26 must be “reasonable grounds [] to support the belief that the person so held is infected.”
27 *Ex parte Martin*, 83 Cal. App. 2d 164 (1948). Public Health Officials must be able to
28 show “probable cause to believe the person so held has an infectious disease ...” *Id.*

1 In a case that is somewhat analogous to what Californians are facing with the
2 coronavirus pandemic of 2020, California courts found that Public Health Officials
3 could not quarantine 12 blocks of San Francisco Chinatown because of nine (9) deaths
4 due to bubonic plague. See *Jew Ho v. Williamson*, 103 F. 10 (C.C. Cal. 1900), and
5 *Wong Wai v. Williamson*, 103 F. 1 (C.C. Cal. 1900).

6 The court found it “purely arbitrary, unreasonable, unwarranted, wrongful, and
7 oppressive interference with the personal liberty of complainant” who had “never had
8 or contracted said bubonic plague; that he has never been at any time exposed to the
9 danger of contracting it, and has never been in any locality where said bubonic plague,
10 or any germs of bacteria thereof, has or have existed”. *Jew Ho*, 103 F. 10 (C.C. Cal.
11 1900).

12 California courts have found that “a mere suspicion [of a contagious disease],
13 unsupported by facts giving rise to reasonable or probable cause, will afford no
14 justification at all for depriving persons of their liberty and subjecting them to virtual
15 imprisonment under a purported order of quarantine.” *Ex parte Arta*, 52 Cal. App. 380,
16 383 (1921) (emphasis added).

17 In *Jew Ho v. Williamson*, 103 F. 10 (C.C. Cal. 1900), and *Wong Wai v.*
18 *Williamson*, 103 F. 1 (CC Cal. 1900), the California courts found that there were more
19 than 15,000 people living in the twelve blocks of San Francisco Chinatown who were to
20 be quarantined. The courts found it unreasonable to shut down the ability of over
21 15,000 people to make a living because of nine deaths. This was one death for every
22 1,666 inhabitants of Chinatown. Orange County has an effective COVID-19 death rate
23 of 1 per 61,071 yet their beaches have been closed starting May 1, 2020, pursuant to the
24 Governor’s directive.

25 There is no evidence that Muldoon is presently infected to justify any restrictions
26 to his liberties. Neither may Muldoon be presumed to be infectious on the basis of the
27 evidence available to Defendants, who bear the burden of proving a basis for restricting
28 liberty rights, and the government has no good faith basis whatsoever for so arguing.

1 On the contrary, as each day passes, public health officials and noted
2 epidemiologists are undermining the very basis for the sweeping orders banning
3 fundamental protected speech and other activities in California. The government could
4 not possibly meet its burden of justifying its position, which grows less tenable by the
5 hour.

6 Preventing Muldoon from accessing and enjoying the beach, despite the
7 availability of less restrictive measures to satisfy the public health interests at stake,
8 violates his California Constitutional right to liberty.

9 **B. Muldoon Faces Imminent Irreparable Harm Absent Immediate**
10 **Injunctive Relief**

11 “In a case like the one at bar, where the First Amendment is implicated, the
12 Supreme Court has made clear that ‘[t]he loss of First Amendment freedoms, for even
13 minimal periods of time, unquestionably constitutes irreparable injury’ for purposes of
14 the issuance of a preliminary injunction.” *College Republicans at San Francisco State*
15 *University v. Reed*, 523 F. Supp. 2d 1005, 1011 (N.D. Cal. 2007) (citing *Sammartano v.*
16 *First Jud. Dist. Ct.*, 303 F.3d 959, 973-74 (9th Cir. 2002), in turn citing *Elrod v. Burns*,
17 427 U.S. 347, 373 (1976)); see also *S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1148
18 (9th Cir. 1998) (holding that a civil liberties organization that had demonstrated
19 probable success on the merits of its First Amendment overbreadth claim had thereby
20 also demonstrated irreparable harm). “In other words, the requirement that a party who
21 is seeking a preliminary injunction show ‘irreparable injury’ is deemed fully satisfied if
22 the party shows that, without the injunction, First Amendment freedoms would be lost,
23 even for a short period.” *Reed*, 523 F. Supp. 2d at 1011. “Unlike a monetary injury,
24 violations of the First Amendment ‘cannot be adequately remedied through damages.’”
25 *Americans for Prosperity Foundation v. Harris*, 182 F. Supp. 3d 1049, 1058 (C.D. Cal.
26 2016) (citing *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009)).

27 Without an injunction preventing Defendants from further enforcing the Orders,
28 Muldoon will suffer irreparable harm in the form of deprivation of fundamental

1 freedoms secured by the First and Fourteenth Amendment to the U.S. Constitution and
2 the California Constitution. Plaintiff’s irreparable injuries cannot adequately be
3 compensated by damages or any other remedy available at law. Thus, irreparable injury
4 is clearly shown, necessitating the relief Plaintiff seeks in this Application.
5
6

7 **C. The Balance of Hardships Tips Decidedly in Plaintiff’s Favor**

8 In cases implicating constitutional rights, “the ‘balancing of the hardships’ factor
9 also tends to turn on whether the challengers can show that the regulations they attack
10 are substantially overbroad.” *Reed*, 523 F. Supp. 2d at 1101.

11 Given Muldoon’s showing of the facially and as-applied invalidity of the vague,
12 overbroad Orders, Muldoon necessarily has shown that leaving those Orders in place
13 for even a brief period of time “would substantially chill the exercise of fragile and
14 constitutionally fundamental rights,” and thereby constitute an intolerable hardship to
15 Muldoon. *Reed*, 523 F.Supp.2d at 1101. As mentioned above, Defendant’s closure of all
16 local Orange County beaches will deprive Muldoon, and innumerable other
17 Californians, of his ability to exercise his rights to travel and assembly as secured by the
18 First and Fourteenth Amendments and Article 1 and 10 of the California Constitution.

19 By contrast, temporarily enjoining Defendants’ enforcement of the Governor’s
20 Directive will not result in hardship to Defendants, who are in a position to adopt, at
21 least on an interim basis, a more narrowly crafted set of equally applied provisions that
22 enable the government to achieve any legitimate ends without unjustifiably invading
23 First and Fourteenth Amendment freedoms. *See id.* In addition, Defendants will suffer
24 no legitimate harm by accommodating Muldoon’s exercise of fundamental rights in the
25 same manner Defendants are accommodating thousands—and millions—of others
26 engaged in non-First Amendment protected activities. The Constitution demands no
27 less.
28

1 **D. Injunctive Relief Is in the Public Interest**

2 “As the Ninth Circuit has consistently recognized, there is a significant public
3 interest in upholding First Amendment principles.” *Americans for Prosperity*
4 *Foundation*, 182 F. Supp. 3d at 1059 (internal citations omitted); *see also Doe v.*
5 *Harris*, 772 F.3d 563, 683 (9th Cir.2014); *Sammartano*, 303 F.3d at 974. As such, the
6 requirement that issuance of a preliminary injunction be in the “public interest” usually
7 is deemed satisfied when it is clear that core constitutional rights would remain in
8 jeopardy unless the court intervened. *Reed*, 523 F. Supp. 2d at 1101. The public is best
9 served by preserving a foundational tenet of this American democracy: religious liberty.
10 *See Sammartano*, 303 F.3d at 974 (“Courts considering requests for preliminary
11 injunctions have consistently recognized the significant public interest in upholding
12 First Amendment principles.”).

13 As discussed above, Muldoon’s core constitutional rights to travel, free assembly,
14 due process, and equal protection, will remain in jeopardy so long as Defendants remain
15 free to enforce the Governor’s Directive. Accordingly, issuance of injunctive relief is
16 proper, and the Court should grant this Application.

17
18 **II. THE COURT SHOULD DISPENSE WITH ANY BOND**
19 **REQUIREMENT**

20 Rule 65(c) of the Federal Rules of Civil Procedure provides that a TRO or
21 preliminary injunction may be issued “only if the movant gives security in an amount
22 that the court considers proper to pay the costs and damages sustained by any party
23 found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c). However,
24 the Court has discretion as to whether any security is required and, if so, the amount
25 thereof. *See, e.g., Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003).

26 Muldoon requests that the Court waive any bond requirement, because enjoining
27 Defendants from unconstitutionally enforcing the Governor’s Directive in Orange
28 County will not financially affect Defendants, who already categorically exempt all

1 other counties in the state from compliance. A bond would, however, be burdensome on
2 an already burdened plaintiff under these circumstances. *See, e.g., Bible Club v.*
3 *Placentia-Yorba Linda School Dist.*, 573 F. Supp. 2d 1291, fn. 6 (C.D. Cal. 2008)
4 (waiving requirement of student group to post a bond where case involved “the
5 probable violation of [the club’s] First Amendment rights” and minimal damages to the
6 District of issuing injunction); *citing Doctor John’s, Inc. v. Sioux City*, 305 F. Supp. 2d
7 1022, 1043-44 (N.D. Iowa 2004) (“requiring a bond to issue before enjoining
8 potentially unconstitutional conduct by a governmental entity simply seems
9 inappropriate, because the rights potentially impinged by the governmental entity’s
10 actions are of such gravity that protection of those rights should not be contingent upon
11 an ability to pay.”).

12 13 CONCLUSION

14 Muldoon respectfully requests that the Court Grant his motion for a temporary
15 restraining order, and issue an order to show cause why a preliminary injunction
16 should not be issued, as follows:

17 1. Defendants, as well as their agents, employees, and successors in office,
18 shall be restrained and enjoined from enforcing, attempting to enforce, threatening to
19 enforce, or otherwise requiring compliance with any prohibition on Muldoon’s ability
20 to access and enjoy any and all of the beaches of Orange County in violation of state
21 and federal fundamental constitutional rights, including the right to travel.

22 2. Defendants shall show cause, at a time and place to be directed by the
23 Court, why a preliminary injunction should not issue requiring Defendants to act as
24 described in above; the temporary restraining order shall remain effective until such
25 time as the Court has ruled on whether a preliminary injunction should issue. Such
26 relief is necessary to prevent Defendants from further violating Muldoon’s
27 constitutional rights, pending trial on the merits of Muldoon’s claims.

28

1 Date: May 4, 2020

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2
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