

DELAY REDUCTION CASE

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10 FOR SAFE REOPENING

ENDORSED

JAN 19 2021

Clerk of the Napa Superior Court
By: M. BAHENA
Deputy

CASE MANAGEMENT CONFERENCE
DATE: 6/29/2021
TIME: 8:30am
PLACE: Courtroom B
825 Brown Street, Napa CA 94550

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF NAPA

14 WINE COUNTRY COALITION FOR SAFE
15 REOPENING,

16 Plaintiff,

17 v.

18 GAVIN NEWSOM, in his official capacity as
19 Governor of California; TOMÁS J.
20 ARAGÓN, in his official capacity as State
21 Public Health Officer and Director of the
22 California Department of Public Health; and
23 DOES 1 through 10,

24 Defendants.

Case No.

21CV000065

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

Trial Date:

None Set

24 Plaintiff Wine Country Coalition for Safe Reopening (the "Coalition") for its Complaint
25 against Defendants Governor Gavin Newsom and State Public Health Officer Tomás J. Aragón,
26 alleges as follows:
27
28

NATURE OF THE ACTION

Businesses with restaurant service, such as Plaintiffs’ establishments, serve the public interest. These business establishments provide sustenance to and enliven the spirits of the community, while providing employers and employees with means to put food on the table and secure shelter, clothing, medical care, education and, of course, peace of mind for they and their families.

– *Midway Ventures LLC v. County of San Diego*, Case No. 37-2020-00038194-CU-CR-CTL (S.D. Sup. Ct., Dec. 16, 2020) (granting preliminary injunction enjoining enforcement of the Regional Stay at Home Order)

1. This action challenges Governor Newsom’s arbitrary, irrational, and unfair ban on outdoor dining and wine tasting. With each passing day, it wreaks growing devastation on Napa’s and Sonoma’s restaurants, wineries, related businesses, and their employees.

2. The greatest catastrophe of this ban is that it is senseless. It has no scientific basis, does nothing to protect public safety, and, in fact, likely undermines public health. Its only effect is to ravage the region’s businesses, community members, and workers.

3. The Wine Country Coalition for Safe Reopening is an association of over 50 restaurants, wineries, tasting rooms, and suppliers across Napa and Sonoma counties.

4. Napa’s and Sonoma’s restaurants and wineries have always been leaders in caring for their community. In a year in which the region has been buffeted by the economic and human devastations of the Glass Wildfire and the risk of COVID, they have remained dedicated to providing support for their neighbors, health and safety workers, and community members. Through free meals and charitable donations, they have supported their communities in spite of their own hardships.

5. They also have stood at the forefront of efforts to keep their community safe. In the ten months since this pandemic began, collectively they have spent millions of dollars adapting to the state’s roller coaster of COVID guidance. Coalition members have depleted their capital to reconfigure their spaces, purchase safety equipment, and train staff and customers about new dining protocols. Not merely following state and local safety guidelines, they have taken additional voluntary measures to ensure the greatest level of safety for their customers and employees.

1 6. Restaurants and wineries made these costly efforts because on-premises operations
2 are a crucial aspect of their business. They are a vital revenue lifeline to keep their businesses
3 alive until vaccination becomes available. In restaurants, on-premises operations account for more
4 than 80% of overall revenue. In tasting rooms, they are often the primary point of contact in
5 which a customer can appraise a winery’s products, and are critical to creating and sustaining
6 relationships that last for years.

7 7. Last month, all of this struggle, effort, and expense was obliterated by Defendants’
8 latest orders. In a pen stroke, the orders swept aside all prior health guidance, and the Coalition’s
9 painstaking work to ensure compliance, effectively banning *all* outdoor dining and tasting in Napa
10 and Sonoma *indefinitely*.

11 8. This ban poses an existential threat to Napa’s and Sonoma’s core industries,
12 threatening them with economic collapse. With every passing day, it forces Wine Country
13 businesses to close permanently, plunges many deeper into debt, and stacks compounding
14 hardships upon the most vulnerable members of their community.

15 9. The greatest sacrifice is paid by workers like cooks, dishwashers, waiters, and
16 pourers—already whipsawed by regulatory uncertainty—who have lost their livelihoods. These
17 workers have struggled through months of unstable employment, indefinite furloughs, and ever-
18 changing compliance requirements. For those who managed to survive this demoralizing process,
19 the latest orders deliver a final and definitive blow, to sacrifice their jobs anyway. Many of them
20 will never work in the industry again.

21 10. The Coalition supports the state’s efforts to limit the spread of COVID, but not the
22 needless sacrifice of its businesses and community members for no purpose.

23 11. There is *no* scientific evidence indicating that when conducted with protective
24 measures, outdoor dining or wine tasting contributes to the spread of the disease. To the contrary,
25 the data indicate that this outdoor activity presents very low risk. In fact, Defendants’ ban on
26 outdoor dining and tasting likely *increases* risk because it drives people into indoor gatherings—
27 away from compliance with safety protocols—that are proven to spread disease.

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1 12. The ban is also causing a deeper, and more pernicious, long-term erosion of trust.
2 The Governor has repeatedly intoned that the state’s COVID response would be “science-based
3 and data-driven.” These orders, which are the opposite of data-driven, perpetuate a false narrative
4 that “science” has judged outdoor dining and tasting to be unsafe—so unsafe, in fact, that it
5 warrants an outright ban. They also seed the false notion that this activity is riskier than many
6 others that the state continues to permit, such as shopping in big-box stores, undergoing elective
7 cosmetic surgery, and flying on airplanes. In fact, the opposite is true.

8 13. If these messages take root, they will cause still further harm. They will cause the
9 public to believe that Coalition businesses, in insisting that their livelihoods and communities not
10 be devastated needlessly, are somehow hostile to the common good. Again, the opposite is true.

11 14. The Coalition supports the necessary work of public health officials in promoting
12 the health and safety of Californians, and of taking responsible measures to reduce the risk of
13 disease. But when wielding his awesome emergency powers, almost a year into the pandemic, the
14 Governor is obligated to act with a rational basis. Restaurants and wineries, like other California
15 businesses, must be treated fairly and provided opportunities to run their businesses with safety
16 protocols in place.

17 15. The Coalition does not seek to insulate restaurants and wineries from the state’s
18 general public health guidelines. To the contrary, it supports those guidelines and seeks to
19 incorporate them into its members’ businesses. Defendants cannot offer a sound evidence-based
20 reason for failing to trust restaurants and wineries to operate in outdoor settings under the state’s
21 health guidelines, even while they trust other businesses like malls, big-box retail, and liquor
22 shops to operate in far riskier indoor settings.

23 16. The Coalition brings this action to ensure that its members’ restaurants and tasting
24 rooms are treated equally to other similarly-situated businesses, and allowed to operate outdoors
25 subject to the state’s safety protocols, for the benefit of their valued employees and customers.

26 **THE PARTIES**

27 17. Plaintiff Wine Country Coalition for Safe Reopening is a California unincorporated
28 association headquartered in Calistoga, California. Its members include over 50 Napa and

1 Sonoma County restaurants, wineries, suppliers, and related businesses that are committed to safe
2 service to their community.

3 18. Members of the Coalition include:

4 a. Indian Springs Resort, a family-owned resort and restaurant in Calistoga;

5 b. Brannan Cottage Inn, a historic Calistoga hotel established in 1862, and its
6 adjoining café, Sam’s General Store;

7 c. Tre Posti, an events and catering company serving wineries, charity
8 organizations, and private clients from its venue in St. Helena;

9 d. Costeaux French Bakery, a family-owned business with four locations in
10 Sonoma County, including its flagship Healdsburg café;

11 e. Amizetta winery, which grows and makes wines in St. Helena;

12 f. Trancas Steakhouse, a locally-owned Napa restaurant operated since 1999;

13 g. AVOW, a Napa bar and restaurant housed in a landmark building
14 constructed in 1908;

15 h. Quilt & Co., a Napa wine tasting room owned and operated by a fifth-
16 generation winemaker;

17 i. Fumé Bistro, featuring seasonal dishes sourced from local growers in Napa;

18 j. Lovina restaurant, a brunch and dinner venue in Calistoga owned, chefed
19 and managed by local women;

20 k. The Calistoga Inn, Restaurant and Brewery, whose restaurant along the
21 Napa River is one of the most popular outdoor dining venues in Napa Valley;

22 l. Panorama Baking, a bakery that provides fresh baked items to restaurants in
23 Napa and Sonoma Counties;

24 m. Filippi’s Pizza Grotto, a restaurant with two locations in Napa, opened by
25 the current owner’s grandparents in 1950;

26 n. Biagio Artisan Meats, a restaurant and distributor of local sustainably-raised
27 meats;

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- 1 o. Farmhouse Inn, a boutique hotel in Forestville known for dining and wine
2 tasting;
3 p. Vaughn Duffy Wines, owned by a first-generation winemaking family in
4 Santa Rosa;
5 q. Olabisi Wines, a celebrated Calistoga winery; and
6 r. Pizzeria Tra Vigne, a pizzeria and restaurant operating in St. Helena for
7 over 25 years that the St. Helena Chamber of Commerce recognized as its 2020 “Business of the
8 Year.”

9 19. Defendant Gavin Newsom is a party to this action in his official capacity as the
10 Governor of California. Defendant Newsom issued Executive Order N-60-20 on May 4, 2020,
11 directing the State Public Health Officer to establish criteria and procedures for reopening
12 businesses throughout the state following the state of emergency found to exist in California as a
13 result of COVID-19.

14 20. Defendant Tomás J. Aragón is a party to this action in his official capacity as the
15 State Public Health Officer and Director of the California Department of Public Health (CDPH).
16 On December 3, 2020, the then-Acting State Public Health Officer issued an Order (the “Regional
17 Stay at Home Order”) that is the subject of this action.

18 21. Does 1 through 10, inclusive, are sued herein pursuant to Code of Civil Procedure
19 Section 474 under fictitious names inasmuch as their true names and capacities are presently
20 unknown to the Coalition. The Coalition is informed and believes, and on that basis alleges, that
21 Does 1 through 10, inclusive, were employees, agents or alter egos of Defendants, or are otherwise
22 responsible for all of the acts herein alleged. The Coalition will seek leave to amend the
23 Complaint to allege their true names and capacities if and when the Coalition ascertains them.

24 **JURISDICTION AND VENUE**

25 22. This Court has jurisdiction pursuant to Article VI, Section 10 of the California
26 Constitution, which grants the Superior Court original jurisdiction in all causes except those
27 expressly reserved to other courts.

28

1 23. Venue is proper in this Court pursuant to Code of Civil Procedure Section 393
2 because this cause arose in Napa County, California, where the Regional Stay at Home Order
3 prohibits outdoor dining and outdoor wine tasting, and where Plaintiff Coalition is headquartered.

4 **SUBSTANTIVE ALLEGATIONS**

5 **The State’s Prior Public Health Orders**

6 24. In response to the COVID pandemic, Defendant Newsom declared a March 4, 2020
7 “State of Emergency,” followed by a March 19, 2020 Stay at Home Order. The Stay at Home
8 Order included an indefinite prohibition on operating “non-essential businesses,” including
9 restaurants and winery tasting rooms.

10 25. Defendant Newsom specified that California’s response to the coronavirus
11 pandemic “must be done using a gradual, science-based and data-driven framework.”

12 26. In April 2020, Defendants established “California’s Pandemic Roadmap,” a
13 protocol for reopening businesses. It identified four stages, including a “Stage 2” covering dine-in
14 restaurants and winery tasting rooms. The state imposed regulations for the operation of these
15 businesses, covering topics such as “cleaning and disinfecting protocols,” “physical distancing
16 guidelines,” and “individual control measures and screening.”

17 27. On August 28, 2020, Defendants issued *new* guidance entitled the “Blueprint for a
18 Safer Economy,” establishing *revised* criteria for controlling activities within the state. It assigned
19 every county in California a color-coded “tier,” from Yellow (Minimal) to Purple (Widespread).
20 A county’s tier assignment was based on three factors: (1) the county’s COVID test positivity
21 rate, (2) its adjusted case rate, and (3) later, a “health equity metric.”

22 28. Restaurants and wineries are specifically listed as business sectors in the Blueprint.
23 A county in the “Red” (Substantial) tier may allow indoor dining and wine tasting subject to
24 capacity restrictions, while a county in the “Purple” tier (Widespread) may permit only outdoor
25 dining and wine tasting. But even in the most restrictive tier, outdoor dining and wine tasting are
26 expressly permitted.

27 29. Under the Blueprint, on-premises dining and wine tasting are permitted subject to
28 state and local safety protocols. These protocols include physical distancing (*e.g.*, spacing tables

1 six feet or more apart), cleaning and sanitizing (*e.g.*, disinfecting surfaces after use by each
2 patron), and employee health and personal hygiene (*e.g.*, temperature checks, wellness checks, and
3 mandatory hand washing).

4 30. Since the health orders were implemented, Coalition members have stood at the
5 forefront of efforts to keep their employees and patrons safe. In addition to following state and
6 county public health guidelines, Coalition members voluntarily adopted guidance from industry
7 organizations such as the National Restaurant Association, the Wine Institute, and Napa Valley
8 Vintners. These protocols comply not only with California regulations, but also with federal
9 guidance from the Centers for Disease Control and Prevention (CDC), Occupational Safety and
10 Health Administration (OSHA) and the U.S. Food and Drug Administration (FDA).

11 31. Among their many steps to safeguard the health of their customers and employees,
12 Coalition members have:

13 a. Purchased or rented expensive equipment such as tents, heaters, “parklets,”
14 umbrellas, and outdoor furniture to accommodate outdoor dining or wine tasting.

15 b. Installed hand sanitation stations at all points of entry and exits, and
16 anywhere else someone would come in contact with a handle—in some cases doubling their pre-
17 COVID cleaning and disinfecting costs.

18 c. Installed glass or Plexiglas walls between customers and employees for
19 ordering.

20 d. Purchased and mandated masks for all customers and employees.

21 e. Purchased protective equipment, including gloves and face shields or
22 goggles for all restaurant dishwashers.

23 f. Required temperature checks of all staff, required employees to report
24 symptoms upon arrival for a shift, and documented and recorded those results.

25 g. Increased spending on takeout materials (such as disposable tableware and
26 food containers), and delivery fees, in some cases to levels exceeding their monthly rent.

27 h. Purchased additional signage to convey COVID-related safety protocols for
28 employees and customers.

- 1 i. Limited operations to outdoor dining and tasting only.
- 2 j. Reconfigured and built out dining spaces for distancing.
- 3 k. Limited the number of guests per table and required that they be part of the
- 4 same cohort.
- 5 l. Spaced out reservations for restaurants, and operated wineries by
- 6 reservation only to limit capacity.
- 7 m. Invested resources training employees and managers in health and safety
- 8 protocols.
- 9 n. Invested in safe outdoor dining and takeout tools such as touchless menu
- 10 and ordering systems.

11 32. CDC guidelines titled “Considerations for Restaurant and Bar Operators” explain
12 that “[r]estaurants and bars may implement several strategies to maintain healthy
13 environments.” Among those strategies, the CDC recommends that restaurants “[o]ffer drive-
14 through, curbside take out, or delivery options as applicable. ***Prioritize outdoor seating as much***
15 ***as possible***” (emphasis added).¹ This is precisely what Coalition members seek to do: provide
16 safe outdoor dining opportunities where they will “[l]imit seating capacity to allow for social
17 distancing.”

18 33. Collectively, Coalition members have invested millions of dollars adapting to
19 evolving COVID-related state mandates to ensure that they are operating safely, even as they have
20 been deprived of millions of dollars of revenue because of the restrictions.

21 34. Members of the Coalition remain committed to do what is necessary to maintain
22 operations and keep their workplaces and establishments safe. They plan to continue
23 implementing scientifically sound safety guidance so they may keep operating their businesses,
24 caring for their employees, and providing value to their communities.

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27 ¹ Centers for Disease Control and Prevention, *Considerations for Restaurants and Bar Operators*
28 (Dec. 16, 2020) https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html#anchor_1589927199909

1 *The State's December Orders*

2 35. All of these health and safety efforts were swept aside last month, when Defendant
3 Newsom announced that he was imposing a new layer of restrictions on top of the state's existing
4 health orders.

5 36. On December 3, 2020, the then-Acting State Health Officer, acting on authority of
6 Defendant Newsom, issued "The Regional Stay at Home Order," followed by a supplemental
7 order effective December 6 (the "December Orders"). Unlike all prior orders, which considered
8 COVID risk by county, the December Orders divide California into five different "regions." They
9 assign Napa and Sonoma counties to a greater "Bay Area Region."

10 37. The December Orders impose additional restrictions based on a region's overall
11 hospital intensive care unit (ICU) capacity. In any given region, if the total available hospital ICU
12 capacity declines below 15%, the entire region is placed under severe additional restrictions. The
13 restrictions apply to *all* counties within the region, regardless of their individual COVID statistics.

14 38. Once triggered, the December Orders "remain in place for at least three weeks ...
15 and shall continue until CDPH's four-week projections of the Region's total available adult ICU
16 bed capacity is greater than or equal to 15%." During that time, they supersede any conflicting
17 terms in any other California Department of Public Health order, directive or guidance, including
18 the prior "Pandemic Roadmap" and "Blueprint for a Safer Economy."²

19 39. The December Orders impose sweeping new restrictions on private activity,
20 including "prohibit[ing] private gatherings of any size," and closing all "sector operations except
21 for critical infrastructure and retail," including all on-premises restaurants and wine tasting rooms.

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24 ² Per their terms, the December Orders are set to stay in effect for "at least three weeks from the
25 date the order takes effect in a Region and shall continue until CDPH's four-week projections of
26 the Region's total available adult ICU bed capacity is greater than or equal to 15%." Yet at a
27 January 11, 2021 news conference, Defendant Newsom said that "the order will continue
28 *indefinitely* in the Bay Area region." (emphasis added). See Graff, *Mill Valley Officials call for
outdoor dining exemption from COVID Order* (Jan. 12, 2021),
[https://www.sfgate.com/bayarea/article/outdoor-dining-exemption-Mill-Valley-California-
15864003.php?](https://www.sfgate.com/bayarea/article/outdoor-dining-exemption-Mill-Valley-California-15864003.php?)

1 40. On December 17, 2020, the “Bay Area Region” fell within the criteria of the
2 December Orders, triggering these sweeping new restrictions in Napa and Sonoma counties.

3 **The Outdoor Dining and Tasting Ban Is Arbitrary, Capricious, and Untethered to Evidence**

4 41. Among other things, the December Orders purport to ban *all* outdoor dining and
5 tasting—even when conducted with the safety protocols Defendants created.

6 42. These restrictions on outdoor dining and tasting are utterly unprecedented. No
7 other state in the country—including restrictive jurisdictions such as New York, Washington, and
8 Oregon—imposes a total ban on outdoor dining or tasting operations like this.

9 43. There is a good reason they do not: California’s outdoor dining and tasting ban is
10 arbitrary, capricious, and untethered to any evidence.

11 44. When implementing this ban, Defendants apparently did not assess *any* data
12 particular to outdoor dining or wine tasting. Had they done so, they would have found no
13 scientific evidence indicating that when conducted with protective measures, it contributes to the
14 spread of COVID at all.³ To the contrary, a growing body of scientific literature indicates the
15 opposite.⁴

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19 ³ UCSF infectious disease expert Dr. Monica Gandhi stated: “There hasn’t been a study that looks
20 at the impact of outdoor dining ... When I think of places where they’re masked, there’s
21 distancing, ventilation and hand hygiene, I don’t think those are places that are likely to create
22 spread.” *See* Wells, *Did we really need to shut down outdoor dining in the Bay Area? Scientists*
23 *weigh in*, The North Bay Business Journal (Dec. 15, 2020),
24 <https://www.northbaybusinessjournal.com/article/industrynews/did-we-really-need-to-shut-down-outdoor-dining-in-the-bay-area-scientists/>; *see also* Vainshtein, *Outdoor dining is about to shut down in parts of California. Is it really spreading the virus?*, S. F. Chronicle (Dec. 4, 2020),
<https://www.sfchronicle.com/bayarea/article/Is-outdoor-dining-spreading-coronavirus-As-15774639.php>.

25 ⁴ A group of researchers from Stanford University recently concluded: “We do not question the
26 role of all public health interventions, or of coordinated communications about the epidemic, but
27 *we fail to find an additional benefit of stay-at-home orders and business closures.*” Even if such
28 benefits exist, they “may not match the numerous harms of these aggressive measures.”
Bendavid, et al. *Assessing Mandatory Stay-at-Home and Business Closure Effects on the Spread of COVID-19* in *European Journal of Clinical Investigation* (Jan. 5, 2021) (“Bendavid Study”),
<https://onlinelibrary.wiley.com/doi/epdf/10.1111/eci.13484/> (emphasis added).

1 45. Not only does banning outdoor dining and tasting fail to reduce public health risk,
2 it likely *increases* risk because it drives people into indoor home gatherings that have been
3 demonstrated to spread disease.

4 46. Dr. Scott Morrow, the San Mateo County Health Officer, made precisely this
5 observation is his December 7, 2020 statement explaining why San Mateo County would not
6 voluntarily adopt invasive restrictions such as this ban to curb the spread of COVID:

7 I am aware of no data that some of the business activities on which even greater
8 restrictions are being put into place with this new order are the major drivers of
9 transmission. In fact, I think these greater restrictions are likely to drive more activity
10 indoors, a much riskier endeavor I also believe these greater restrictions will
11 result in more job loss, more hunger, more despair and desperation (the structure of
our economy is, for the most part, if you don't work, you don't eat or have a roof
over your head), and more death from causes other than COVID. And I wonder, are
these premature deaths any less worrisome than COVID deaths?⁵

12 47. There is also no indication that Defendants have taken into account the *costs*—in
13 economic, social, and public health terms—of banning outdoor dining and tasting. Sound public
14 health policy evaluates not only *benefits* but also *costs* of proposed policy to justify it on scientific
15 and ethical grounds.

16 48. Here, the costs are enormous. This blanket ban devastates the bedrock industry of
17 Napa's and Sonoma's economy, and the livelihoods of thousands of workers like cooks,
18 dishwashers, waiters, bussers, and pourers that depend on it.

19 49. Thousands of Napa and Sonoma workers have already lost their jobs from the ban.
20 Most others have seen their hours and pay reduced dramatically. Since the advent of COVID-
21 related restrictions, Coalition members have seen their number of full-time-equivalent employees
22 drop by more than 50%.

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⁵ Morrow, *December 7, 2020 Health Officer Statement* (Dec.7, 2020) (“Morrow Statement”), <https://www.smchealth.org/health-officer-updates/december-7-2020-health-officer-statement>; *see also* Bendavid Study, *supra* note 4 (listing scientific studies on the harmful health effects of lockdowns, which include “hunger, opioid-related overdoses, missed vaccinations, increase in non-COVID diseases from missed health services, domestic abuse, mental health and suicidality, as well as a host of economic consequences with health implications”) (internal footnotes and citations omitted).

1 50. Though Defendants’ “Blueprint for a Safer Economy” always contemplated
2 allowing restaurants and tasting rooms to operate outdoors throughout the pandemic, and their
3 approach was supposed to be guided by a “gradual, science-based and data-driven framework,”
4 Defendants have taken exactly the opposite approach.

5 51. Even as they impose this unprecedented ban on one battered sector of the Napa and
6 Sonoma economy, Defendants allow many potentially higher-risk activities, such as indoor retail,
7 to continue. The December Orders did *not* ban any of the following on-premises activities:

- 8 a. Indoor shopping centers
- 9 b. Indoor big-box retail
- 10 c. Indoor home renovations
- 11 d. Film and television set operations, including their food catering
- 12 e. Ski resort operations, including food and alcohol service
- 13 f. Other outdoor recreation such as gyms and mini golf

14 52. In short, there is no rational basis for the distinctions that Defendants have drawn.

15 53. The Coalition does not quarrel with Defendants’ goals of protecting the health and
16 safety of Californians and mitigating the risk of the spread of COVID-19. But in doing so,
17 Defendants must enact rules that are rational and based upon evidence.

18 **The Justification for the Outdoor Dining and Wine Tasting Ban Is Arbitrary**

19 54. Defendants justified the outdoor dining and tasting ban by citing the risk that a
20 surge in COVID cases will cause ICUs to “reach capacity before the end of the year.”

21 55. But many of Defendants’ choices underlying this draconian measure appear to be
22 arbitrary, indiscriminate, and irrational.

23 56. For example, Defendants offer no explanation for why their chosen ICU threshold
24 of 15% is appropriate. When pressed, Defendants have declined to explain their basis for
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1 choosing this figure, how it compares to the state’s *typical* ICU capacity, or why maintaining that
2 figure justifies their specific emergency actions.⁶

3 57. There is reason to doubt that Defendants can provide satisfactory answers to any of
4 these questions. In many ICUs, it is considered “standard” for ICU occupancy to run at 80-90%.⁷
5 It is not economically viable for many ICUs to operate with significant excess capacity. Put
6 another way, an ICU operating in the range of 15% capacity may actually be *typical*, and not a
7 health system catastrophe justifying emergency action, let alone one justifying blanket emergency
8 action banning sectors of business outright.⁸

9 58. Compounding the arbitrary ICU threshold in the December Orders is the cavalier
10 manner in which Defendants are applying it. The December Orders unambiguously provide that
11 their heightened restrictions should be based on a region’s “total available adult ICU bed
12 capacity.” Yet when evaluating a region for restrictions, the CDPH does not actually employ that
13 metric. Instead, it employs a figure of its own invention, which ignores the plain text of its own
14 orders.

15 59. The CDPH “adjusts” the ICU capacity number based on the percentage of COVID
16 patients. “If a region is utilizing more than 30% of its ICU beds for COVID-19 positive patients,
17 then its available ICU capacity is adjusted downward by 0.5% for each 1% over the 30%
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20 ⁶ They also offer no reasoned explanation for why Napa and Sonoma counties should be subjected
21 to the ICU metrics of distant, demographically distinct counties within its assigned “region,” such
22 as Santa Clara and Santa Cruz. In fact, many Coalition members’ businesses are more proximate
to the “Northern California” Region, which is not subject to the outdoor dining and winetasting
ban.

23 ⁷ Bean, *2 healthcare leaders talk ICU capacity: 5 sound bites* (Aug.6, 2020),
24 <https://www.beckershospitalreview.com/patient-flow/2-healthcare-leaders-talk-icu-capacity-5-sound-bites.html>.

25 ⁸ Infections disease expert Dr. Monica Gandhi: “I think we can take a more chiseled approach to
26 our recommendations on what should stay shut and what should stay open nine months into the
27 pandemic, as opposed to completely blunt ... Because nine months later, economic impacts are so
28 great that we are talking about truly some aspects of survival, of people losing their ability to feed
their family” in *Did we really need to shut down outdoor dining in the Bay Area? Scientists weigh in*, n.3 *supra*.

1 threshold.”⁹ As a concrete example, imagine a region with a 100-bed ICU capacity, in which 42
2 beds are being used for COVID treatment, and 38 beds are being used for other purposes. The
3 region’s actual ICU capacity would be 20%, meaning it would avoid the restrictions of the
4 December Order. Its “adjusted” capacity, however, would be 14%, triggering draconian
5 restrictions.

6 60. The Coalition supports the efforts of state public health officials to combat COVID,
7 and does not quarrel with the notion that such types of decisions are difficult. But Defendants’
8 choices must be rational, and Defendants must apply them lawfully. Defendants’ choice of
9 the “15% ICU capacity” metric, and its actual application of that metric, are arbitrary and
10 capricious, and without a clear and rational basis.¹⁰

11 **Coalition Members are Suffering Irreparable Harm that Increases with Each Passing Day**

12 61. The outdoor dining and tasting ban is causing long-term economic hardship on
13 Coalition members’ employees, plunging businesses deeper into debt, and shuttering others
14 permanently, with no end in sight. It compounds the economic devastation of many Coalition
15 businesses already ravaged by the Glass Wildfire and the economic damage of COVID.

16 62. For Coalition members, restaurant sales are down up to 75% as a result of
17 Defendants’ ban on outdoor dining. That loss in revenue, in turn, has resulted in a 50-70%
18 reduction in hours and staffing.

19 63. To take just a few concrete examples, for Coalition member Tre Posti in St. Helena,
20 real revenue lost over the prior year exceeds \$2.2 million. This loss equates to more than \$1.1

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22 ⁹ See Pinho, *ICU capacity explained: What to know about a key coronavirus metric in California*
23 (Dec.11, 2020), <https://www.latimes.com/california/story/2020-12-11/icu-capacity-explained>;
24 Rowan, *How can California have 0% ICU capacity and 1,300 available ICU beds?* (Dec. 29,
2020), <https://www.mercurynews.com/2020/12/29/how-can-california-have-0-icu-capacity-and-1300-available-icu-beds/>.

25 ¹⁰ Indeed, San Mateo County Health Officer Dr. Scott Morrow observed in his December 7, 2020
26 statement that “[t]here is not a good or standard method for understanding ICU capacity on a
27 county level, much less on a regional level. Basing such extreme decisions on non-standardized
28 and poorly understood metrics seems fraught to me.” Morrow, *December 7, 2020 Health Officer*
Statement (Dec.7, 2020), <https://www.smchealth.org/health-officer-updates/december-7-2020-health-officer-statement>.

1 million in lost wages and benefits, and over \$440,000 not spent on food and beverages, often from
2 local suppliers. Projected revenue losses exceed \$3.5 million.

3 64. Tre Posti has been forced to reduce its staff from 97 people to two. Many of these
4 workers have left their jobs permanently, moving instead to retail jobs, or decamping for states
5 outside of California where restaurants can operate. When these workers leave Tre Posti or other
6 Coalition members' businesses, that loss imposes additional future costs on Coalition members as
7 workers become difficult—or impossible—to replace.

8 65. Similarly, Coalition member Pizzeria Tra Vigne projects to lose over \$1 million in
9 revenue in 2020, which translates into more than \$400,000 in lost wages and benefits for its
10 employees and over \$300,000 in foregone food and beverage purchases, much of it from the local
11 community. Pizzeria Tra Vigne has been forced to lay off or furlough many of its employees, and
12 reduce manager salaries to the minimum legal level. These losses impact not only Pizzeria Tra
13 Vigne, but its workers, suppliers, and community.

14 66. Even as they suffer these devastating losses, Coalition members continue to incur
15 certain pre-pandemic level expenses. They pay market rent even when Defendant's ban prevents
16 them from using their square footage. State agencies like the Departments of Environmental
17 Health and Alcoholic Beverage Control continue to impose full fees, even while the ban prevents
18 them from running their businesses.

19 67. Many Napa and Sonoma businesses have closed permanently. Among many
20 others, they include Goose and Gander restaurant in St. Helena, Miminashi in Napa, and Alexis
21 Baking Company and Café in Napa.

22 68. Additionally, draconian restrictions on outdoor dining and wine tasting result in a
23 corrosion of trust in restaurants' and wineries' safety and care for the public. Defendants harm
24 Coalition members' businesses with misleading claims (unsupported by scientific evidence) that
25 eating or tasting wine outside is not as safe as grocery shopping, retail shopping, gathering in
26 parks and playgrounds, or airplane travel.

27 69. Defendants continue to perpetuate these misconceptions every time Coalition
28 members' businesses are targeted in an additional closure, reinforcing the public's belief that

1 restaurants are the source of the spread, despite the lack of supporting data and in spite of
2 continued surges, notwithstanding the ban.

3 70. By their forced closures, Defendants are causing considerable damage to the
4 Coalition’s members: injuries to their businesses, reputations, and relationships with their
5 customers, vendors and employees.

6 71. Neither Defendants nor the State of California have offered compensation to
7 Coalition members in exchange for the regulatory taking of their property.

8 **FIRST CAUSE OF ACTION**

9 **(Violation of the Equal Protection Clause of the California Constitution Article I § 7)**

10 72. The Coalition incorporates by reference and re-alleges each and every allegation set
11 forth in all preceding paragraphs as if fully set forth herein.

12 73. Article 1, Section 7 of the California Constitution provides, in part: “A person may
13 not be . . . denied equal protection of the laws.”

14 74. “The concept of the equal protection of the laws compels recognition of the
15 proposition that persons similarly situated with respect to the legitimate purpose of the law receive
16 like treatment.” *Gray v. Whitmore* (1971) 17 Cal.App.3d 1, 21.

17 75. Here, Defendants’ December Orders, which distinguish between retail business,
18 shopping centers, offices, and entertainment production establishments, on the one hand, and those
19 like the Coalition members’ that operate outdoor dining or wine tastings, on the other hand, are
20 unsupported by any rational reason. Indeed, refusing to permit Coalition members to offer
21 outdoor dining or wine tastings while following CDC-approved cleaning and disinfecting
22 protocols, physical distancing guidelines, and individual control measures and screening, while
23 permitting businesses in the former class to conduct *indoor* retail, lodging, and entertainment
24 production activities likely *increases* the risk of coronavirus transmission.

25 76. Prohibiting Coalition members’ businesses from reopening while allowing
26 similarly-situated businesses to do so, and without recourse or protection from arbitrary
27 enforcement of Defendants’ December Orders, unconstitutionally deprives Coalition members of
28 the equal protection of the law guaranteed under Article I, Section 7 of the California Constitution.

1 limiting its liability to losses that can fairly be attributed to the taking. *Emeryville*
2 *Redevelopment v. Harcros Pigments, Inc.* (2002) 101 Cal.App.4th 1083, 1094.

3 91. Coalition members have property interests in their respective outdoor-service
4 restaurants, wineries, and related businesses. Prohibiting them from reopening for outdoor service
5 while allowing similarly-situated businesses to reopen for indoor customer service, and without
6 recourse or protection from arbitrary enforcement, constitutes a taking of their property under the
7 California Constitution.

8 92. Defendants have deprived Coalition members of the economically beneficial and
9 productive use of their property including, without limitation, their use licenses, business property,
10 and opportunity to sell food, wine, and related services in outdoor areas, already resulting in the
11 involuntary closing of many of its member businesses.

12 93. Defendants' actions have caused a regulatory taking of Coalition members'
13 property without just compensation in violation of the Takings Clause of the California
14 Constitution. At a minimum, the effect of Defendants' December Orders constitutes a "partial"
15 taking under *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 774-775. This
16 violation of the Takings Clause has caused proximate and legal harm to Coalition members.

17 94. The Coalition respectfully seeks a declaration that the December Orders prohibiting
18 outdoor dining and outdoor wine tasting services violates Article I, Section 19 of the California
19 Constitution and that Coalition members are entitled to compensation for their economic loss as a
20 result of the taking.

21 **FOURTH CAUSE OF ACTION**

22 **(Declaratory Relief – Code of Civil Procedure § 1060)**

23 95. The Coalition incorporates by reference and re-alleges each and every allegation set
24 forth in all preceding paragraphs as if fully set forth herein.

25 96. The Coalition contends that Defendants' December Orders banning outdoor dining
26 and wine tasting constitute a violation of the Coalition members' rights under the California
27 Constitution to equal protection and due process, and constitute an unlawful taking without just
28 compensation. Defendants claim that these restrictions are lawful.

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7. For such other and further relief as this Court may deem just and proper.

Dated: January 18, 2021

COBLENTZ PATCH DUFFY & BASS LLP



By: _____

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FOR SAFE REOPENING