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14 Attorneys for Respondent, DON BARNES,
15 in his official capacity as Sheriff of Orange County, California
16 *Exempt From Filing Fees Pursuant to Gov. Code § 6103*

17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
18 **COUNTY OF ORANGE – CIVIL COMPLEX CENTER**

19 CYNTHIA CAMPBELL, MONIQUE
20 CASTILLO, SANDY GONZALEZ, CECIBEL
21 CARIDAD ORTIZ, MARK TRACE, and DON
22 WAGNER, on behalf of themselves and all
23 others similarly situated,

24 Petitioners,

25 vs.

26 DON BARNES, in his official capacity as
27 Sheriff of Orange County, California

28 Respondent.

CASE NO. 30-2020-01141117-CU-WM-CXC
ASSIGNED FOR ALL PURPOSES TO
HON. PETER WILSON; CX-102

**RESPONDENT’S RETURN TO ORDER
TO SHOW CAUSE RE: PETITION FOR
WRIT OF HABEAS CORPUS;
OPPOSITION TO WRIT OF MANDATE,
INJUNCTIVE AND DECLARATORY
RELIEF; MEMORANUDM OF POINTS
AND AUTHORITIES**

**[FILED CONCURRENTLY WITH
DECLARATIONS OF JOSEPH BALICKI
AND C. HSIEN CHIANG, M.D., AND
RESPONDENT’S EXHIBITS IN
SUPPORT OF RETURN &
OPPOSITION]**

RELATED TO ROA NOS. 107 & 199
DATE: 12/07/2020
TIME: 9:00 A.M.
DEPT. CX-102

DATE PETITION FILED: 06/02/2020
HEARING DATE: 12/07/2020

**TO HONORABLE COURT, PETITIONERS AND THEIR ATTORNEYS OF
RECORD; AND ALL OTHER INTERESTED PARTIES:**

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Respondent, DON BARNES, in his official capacity as Sheriff of Orange County, (“Respondent” or “Sheriff”), hereby submits this Return to the habeas corpus pending before this Court with OSC set for December 7, 2020, and opposition to related claims. This Return and Opposition is made pursuant to Penal Code section, Code of Civil Procedure sections 1089, 1090, 1091 and 1094, Code of Civil Procedure section 527, and Code of Civil Procedure sections 1060 and 1061. It is based on the grounds stated herein, the attached Memorandum of Points and Authorities, the accompanying Exhibits, the files and records of this matter, and any oral or other evidence presented to this Court prior to or at the hearing on the Petition. This Return intends to show cause why Petitioner’s claims are without legal merit on undisputed facts, requiring neither an evidentiary hearing nor the relief requested.

DATED: November 16, 2020 Respectfully submitted,

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D. KEVIN DUNN, SENIOR DEPUTY
REBECCA S. LEEDS, SENIOR DEPUTY
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By: _____/s/_____
D. Kevin Dunn, Senior Deputy

Attorneys for Respondent, DON BARNES

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1 **I. STATEMENT OF THE CASE**

2 **A. Penal Code Section 1480 Statement Regarding Custody**

3 Pursuant to Penal Code section 1480, the Orange County Sheriff's Department reports as
4 follows. This matter is captioned, "CYNTHIA CAMPBELL, MONIQUE CASTILLO, SANDY
5 GONZALEZ, CECIBEL CARIDAD ORTIZ, MARK TRACE, and DON WAGNER, on behalf
6 of themselves and all others similarly situated." (See FAC at p. 1.)

7 The following persons have been released and are no longer in the custody of the Orange
8 County Sheriff's Department: Monique Castillo, Cecibel Caridad Ortiz, Cynthia Campbell and
9 Don Wagner. Cynthia Campbell was transferred to state prison on October 22, 2020, and Don
10 Wagner was transferred to federal prison on August 26, 2020. (Balicki Decl. ¶ 2.)

11 As to Petitioner, Sandy Gonzalez, she is currently in the custody of the Orange County
12 Sheriff at the Women's Central Jail pursuant to a detention/remand order issued by Judge Andre
13 Manssourian, keeping bail set in Orange County Superior Court case number 20NF0814 in the
14 amount of \$50,000 and case number 20NF2543 in the amount of \$25,000, on October 16, 2020.
15 (Balicki Decl. ¶ 3; Exhibits A and B, Vision Case Summary for 20NF0814 and 20NF2543.)
16 Petitioner Mark Trace was released from Orange County Jail on June 23, 2020, but is back in
17 custody at the Jail as of October 13, 2020, for failing to report to probation. (Balicki Decl. ¶ 4.)

18 **B. Initial Pandemic Stages and the Sheriff's Response**

19 Following an initial spike at the onset of the COVID-19 pandemic, as was experienced
20 across all sectors of society, and experiencing the same difficulty in obtaining PPE and other
21 supplies during those early runs on equipment and supplies,¹ the Orange County Sheriff's
22 Department implemented one of the most robust custodial strategies to mitigate to spread of
23 COVID-19 of almost any institution in the United States. Even as the CDC was issuing interim
24 guidelines (Exhibit C, CDC Interim Guidelines, March 23, 2020), the Sheriff's Department was
25 releasing inmates, and (largely through its Correctional Health Services unit) implemented its
26 own broad slate of inmate and staff precautions, mirroring the guidance issued by the CDC.

27 _____
28 ¹ See, e.g., "In California, protective equipment shortage pushes nurses to consider drastic
action," (*NBC News*, March 15, 2020, <https://www.nbcnews.com/health/health-news/california-protective-equipment-shortage-pushes-nurses-consider-drastic-action-n1168976>.)

1 At the earliest part of the pandemic, the Sheriff exercised his discretionary authority
2 under Government Code section 8568 to release inmates, lowering the population by almost
3 50% at one point to maximize possibilities for social distancing. (Exhibit D, March 27, 2020
4 OCSD News Release, “Early release of sentenced inmates from Orange County Jail.”) From
5 OCSD in *March 2020*:

6 The Sheriff’s Department has implemented several changes to jail
7 operations over the past few weeks in response to COVID-19. Actions
8 include requiring enhanced medical screening for all inmates, law
9 enforcement, and staff entering the Orange County Jail; temperature
screening prior to entering any jail facility; temporary suspension of
visiting; and increased access to hygiene and cleaning supplies for
inmates.

10 (*Id.*)

11 The Sheriff teamed with Orange County criminal justice partners, including the Orange
12 County District Attorney and the Orange County Public Defender:

13 The decision for early release was made collaboratively and is
14 absolutely necessary to stop the spread of this virus and preserve
15 lifesaving medical resources,” said Orange County Sheriff-Coroner
16 Don Barnes. “During this unprecedented moment, with substantial
pressure on our health system, we are taking action to protect those in
our custody, reduce the risk to our correctional personnel, and
ultimately preserve our mission to keep the public safe.

17 (Exhibit D, March 27, 2020 OCSD News Release, “Early release of sentenced inmates
18 from Orange County Jail.”)

19 The Sheriff approached the Court with its plan and the presiding Judge of Orange County
20 found the Sheriff’s discretionary plan effective, without the need for any additional grant of
21 authority. (Balicki Decl. ¶ 11; Exhibit E, Ruling re: Authorizing Release of Sentenced Inmates
22 pursuant to Government Code section 8658, March 27, 2020, Judge Nakamura, Presiding
23 Judge.) In OCSD’s application to the presiding judge, OCSD 1) *accepts* their role, 2)
24 *acknowledges* the burgeoning pandemic, 3) *describes* measures that need to be taken, 4) *informs*
25 the court of the plan to radically reduce the inmate population, and 5) *requests* ratification:

26 OCSD is entrusted with the care and custody of all inmates and staff
27 within the Orange County Jail. I am aware that the Governor, the
28 Center for Disease Control and the Health Officer for the County of
Orange have recommended distancing guidelines of six (6) feet
between individuals to prevent the spread of COVID-19. Inmates in
the Orange County Jail live, work, eat and recreate within a close

1 environment where it is not feasible to maintain six (6) feet of
2 distance between each inmate. I am informed and believe that this
heightens the potential for COVID-19 to spread once introduced.

3 I am informed and believe that OCSD desires to preserve County
4 emergency
5 resources to the extent possible and wants to avoid a public health
emergency inside the Orange County Jail that would utilize those
resources.

6 In order for OCSD to implement the recommended distancing
7 guidelines in the
8 Orange County Jail, OCSD is requesting that sentenced inmates with
less than sixty (60) days left on their sentence be released from
custody. This should not include inmates who have been convicted of,
or are serving a sentence for any of the following crimes. . . .

9 (*Id.*)

10 The Sheriff has taken significant precautions since March 2020 to combat COVID-19
11 throughout the Jail in line with CDC Guidelines, which provide “*interim guidance*” to
12 correctional and detention facilities. (Exhibit C, CDC Interim Guidelines, March 23, 2020),
13 (“This guidance will not necessarily address every possible custodial setting and ... may need to
14 be adapted based on individual facilities’ physical space, staffing, population, operations, and
15 other resources and conditions.”) These CDC Interim Guidelines, which continuously change
16 (Exhibit F, CDC Guidelines, November 4, 2020), recognize the wide variety of custodial
17 institutions and unique, “space, staffing, population, operations, and other resources and
18 conditions” at varying institutions. (*Id.*)

19 At the very outset, the Sheriff released thousands of inmates to allow for social
20 distancing, developed a thorough testing/quarantine protocol, provided personal protective
21 equipment (“PPE”), enhanced medical screening for anyone entering the Jail, suspended non-
22 essential visits, and dramatically increased access to hygiene and cleaning supplies. (Balicki
23 Decl. ¶ 11; Exhibit E, March 27, 2020 OCSD News Release, “Early release of sentenced
24 inmates from Orange County Jail.”) The Sheriff has successfully implemented the CDC
25 Guidelines within the “space, staffing, population, operations, and other resources and
26 conditions” at the Jail—which is precisely what the CDC Guidelines require.

27 The Sheriff’s Department’s *Herculean* response drove down the inmate infection
28 numbers from a daily rate from a 7-day average positivity rate of 50.6 percent on May 1, to a

1 current 7-day average positivity rate of 1.2 percent. (Declaration of Dr. Chiang at ¶ 5.) The
2 current total of infected individuals across all custodial institutions at the Orange County Jail is
3 six (“6”). Of that, **5 are new bookings**, not under the control of the Orange County Sheriff.
4 Society is experiencing a *third wave*,² but the jail has barely had spiked in contagion.

5 All public visiting has been suspended since March 13, 2020. (Balicki Decl. ¶ 12; see
6 also Exhibit G – press release dated March 13, 2020.) Anyone entering the Jail is temperature
7 screened. (Balicki Decl. ¶ 18.) Arrestees that enter the Jail are screened for COVID-19 and are
8 isolated for 14 days to ensure there is no transmission within the jail. (*Id.* at ¶ 11; Chiang Decl.
9 at ¶ 13.) They are tested upon the end of their 14-day isolation period before entering general
10 inmate population. (*Id.*) Once in general population, they have PPE, unlimited soap and hand
11 sanitizer. (Balicki Decl. ¶¶ 15-16.) The cleaning and disinfection regimen is second to none.
12 Inmates only program with their cohort to prevent cross-exposure within the jail, even when
13 there are no active cases. (*Id.* ¶ 19.) In other words, once a cell block is COVID-free—much as
14 seen in New Zealand—that group may interact within normal jail operating rules (*with, of*
15 *course, PPE and distancing*) because they are not at risk of infecting each other.³

16 On October 29, 2020, this Court heard oral argument and issued its ruling. The Court
17 determined that it was proceeding on habeas corpus and not a class action. The only remaining
18 individual petitioner still in custody is Sandy Gonzalez (See *supra* and fn.4.).

19 C. *The Trajectory of COVID-19 Generally with Corresponding Sheriff’s Actions*

20 **January 8**—First cases of a novel Coronavirus reported out of Wuhan, China.⁴

21 **February 25**—CDC says COVID-19 meets 2 of the 3 required factors for a pandemic.

22 **March 4**—Governor Gavin Newsom declares a state of emergency.⁵

23
24 ² “U.S. Crosses 10 million COVID-19 Cases as Third Wave of Infections Surges,” *Reuters*,
Anurag Maan, Shaina Ahluwalia, Nov. 8, 2020, (<https://www.reuters.com/article/us-health-coronavirus-usa-records-idUSKBN27P00U>.)

25 ³ (See Exhibit H, “New Zealand’s Advance Preview of a Post-Virus World,” *The New York*
26 *Times*, <https://www.nytimes.com/2020/10/30/world/asia/new-zealand-post-covid.html>, Oct. 30, 2020.)

27 ⁴ “WHO Says Mysterious Illness in China Likely Being Caused by New Virus,” H. Branswell,
Stat News, Jan. 8, 2020 (<https://www.statnews.com/2020/01/08/who-says-mysterious-illness-in-china-likely-being-caused-by-new-virus/>.)

28 ⁵ “Governor Newsom Declares State of Emergency to Help State Prepare for Broader Spread of
COVID-19”. *Office of the Governor*. March 5, 2020. (<https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/>).

1 **March 6 – 21**—21 people aboard a cruise ship off California carrying more than 3500 people
2 test positive for COVID-19. The ship is held at sea while testing is conducted.⁶

3 Sheriff begins discretionary release of inmates under Government Code section 8568.
4 Sheriff implements changes to custody operations, including requiring enhanced medical
5 screening for all inmates, law enforcement, and staff entering the Orange County Jail;
6 temperature screening prior to entering any jail facility; temporary suspension of visiting; and
7 increased access to hygiene and cleaning supplies for inmates. (See Exhibit D and Balicki
8 Decl.)

9 **March 11**—WHO Declares COVID-19 a Pandemic.⁷

10 **March 13**—White House declares COVID-19 a National Emergency; issues a travel ban on
11 non-Americans who visited 26 European countries within 14 days of coming to the United
12 States.⁸

13 **March 19**—California Issues Statewide Stay-at-Home order, except to go to an essential job or
14 shop for essential needs; instructs health care systems to prioritize those who are sickest.⁹

15 **March 23**—CDC issues interim guidelines for correctional institutions. (Exhibit C.)

16 Sheriff continues discretionary releases of inmates under government code section 8568.
17 Sheriff continues to implement pandemic plan throughout custody operations. (Exhibit E.)

18 **March 26**—Senate passes the Coronavirus Aid, Relief, and Economic Security (CARES) Act,
19 providing \$2 trillion in aid to hospitals, small businesses, and state and local governments.¹⁰

20 //

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22 _____
23 ⁶ “21 Positive for Coronavirus on Cruise Ship off California,” *Associated Press*, O. Rodriguez,
24 March 6, 2020 (<https://apnews.com/article/61a4efa966c02cbda9584f7266b99802>).)

25 ⁷ “WHO declares coronavirus a pandemic, urges aggressive action,” *Associated Press*, March 11,
26 2020, J. Keaten, M. Cheng, J. Leicester
(<https://apnews.com/article/52e12ca90c55b6e0c398d134a2cc286e>).

27 ⁸ “COVID-19 Roundup: Coronavirus Now a National Emergency, with Plans to Increase
28 Testing,” March 13, 2020, *Am. J. Managed Care*, (<https://www.ajmc.com/view/covid19-roundup2>).

⁹ “Executive Order 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>).

¹⁰ “Greenstein: Relief Package Includes Important Aid, But More Needed to Meet Urgent
Needs,” March 26, 2020, *Center for Budget and Policy Priorities*,
(<https://www.cbpp.org/press/statements/greenstein-relief-package-includes-important-aid-but-more-needed-to-meet-urgent>).

1 **March 27**—The House of Representatives approves the CARES act, and President signs it into
2 law. There are widespread “dire shortages” of PPE and hand sanitizer.¹¹

3 **March 27**—Sheriff files in Superior Court informing Court of ongoing inmate releases.
4 (Exhibit E.)

5 **March 31**—A report in JAMA Ophthalmology finds that patients can catch the virus through
6 the eye, despite low prevalence of the virus in tears.¹²

7 **April 16**—The White House releases broad guidelines for how people could return to work,
8 church, restaurants and other venues. The “gating criteria,” which call for states or metropolitan
9 areas to achieve benchmarks in reducing COVID-19 cases or deaths before taking the next step
10 toward reopening.¹³

11 **April 30**—ACLU files in federal court

12 **May 1**--Sheriff’s COVID-19 numbers reach highpoint at 50 infected inmates in custody. (See
13 Exhibit I showing COVID positivity rate from March 20, 2020 to October 30, 2020.)

14 **May 9**—The FDA broadens authorization of saliva-based test to detect COVID-19 infection,
15 allowing for those who are ill, quarantined, or at high risk of infection due to their age or
16 comorbidities to get tested, including.¹⁴

17 **May 11**--Sheriff’s Covid-19 numbers down to 25 infected in custody and a handful of new
18 bookings. (Exhibit I)

19 **May 26**--ACLU obtains preliminary injunction in federal court (See Exhibit J, federal court
20 ruling dated May 26, 2020.)

21 **May 28**— CDC says US COVID-19 Deaths Pass 100,000 Mark.¹⁵

22 **June 1**—ACLU files in State Court. (See Complaint.)

23
24 ¹¹ “National Survey Shows Dire Shortages of PPE, Hand Sanitizer Across the U.S.,” *Association
for Professionals in Infection Control and Epidemiology* (APIC), March 27, 2020
(<https://apic.org/news/national-survey-shows-dire-shortages-of-ppe-hand-sanitizer-across-the-u-s/>.)

25 ¹² “Characteristics of Ocular Findings of Patients with Coronavirus Disease 2019 (COVID-19) in
26 Hubei Province, China,” March 31, 2020, P. Wu, F. Duan, C. Luo, et al., *JAMA Ophthalmol.*
2020;138(5):575-578 (<https://jamanetwork.com/journals/jamaophthalmology/fullarticle/2764083>.)

27 ¹³ See generally, <https://www.whitehouse.gov/openingamerica/>.

28 ¹⁴ “FDA Approves First At-Home Saliva Collection Test for Coronavirus,” May 8, 2020, *Rutgers
Today* (<https://www.rutgers.edu/news/fda-approves-first-home-saliva-collection-test-coronavirus>.)

¹⁵ “United States Coronavirus (COVID-19) Death Toll Surpasses 100,000,” March 28, 2020, *Am.
J. Managed Care* (<https://www.cdc.gov/media/releases/2020/s0528-coronavirus-death-toll.html>.)

1 **June 1**--Sheriff's COVID-19 numbers down to one (1) infected in custody and one (1) new
2 booking positive. (Exhibit I)

3 **June 3**—Sheriff achieves zero COVID-19 in the Jail. (Exhibit I)

4 **June 10**— US COVID-19 Cases hit 2 million as new infections continue to rise in 20 states.
5 Cases spike as states ease social distancing restrictions.¹⁶

6 **June 10**—Sheriff maintains zero (0) infected in custody with only new bookings positive and
7 quarantined (Exhibit I)

8 **June 22**—A study suggests that as many as 80% of Americans who sought care for flu-like
9 illnesses in March were actually infected with COVID-19.

10 **June 26**—The White House Coronavirus Task Force holds a briefing on the rising number of
11 cases and growing positive test rate in some states. Texas and Florida both halt the reopenings as
12 each state records growing numbers of cases.

13 **June 26**—Sheriff continues to maintain zero (0) infected in custody with only new bookings
14 positive and quarantined (Exhibit I.)

15 **June 30** —Dr. Fauci warns Congress that the current daily number of new cases in the United
16 States is around 40,000, but could reach as high as 100,000 new cases per day given the
17 trajectory.¹⁷

18 (Am. J. Man. Care, date, [https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-](https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020)
19 2020.)

20 **July 23**—Spike in cases in a housing unit due to human error in premature release from
21 quarantine to general population, and a handful of new bookings. (See July 24, 2020
22 Compliance Report attached hereto as Exhibit K submitted in federal court detailing the
23 incident.)

24
25
26 ¹⁶ “U.S. Hits 2 Million Coronavirus Cases as Many States See a Surge of Patients,” June 10,
27 2020, *National Public Radio* ([https://www.npr.org/sections/coronavirus-live-](https://www.npr.org/sections/coronavirus-live-updates/2020/06/10/873473805/u-s-hits-2-million-coronavirus-cases-as-many-states-see-a-surge-of-patients?utm_campaign)
28 updates/2020/06/10/873473805/u-s-hits-2-million-coronavirus-cases-as-many-states-see-a-surge-of-
patients?utm_campaign.)

¹⁷ “U.S. could see 100,000 new Covid-19 cases per day, Fauci says,” June 30, 2020, *Stat News*
([https://www.statnews.com/2020/06/30/u-s-could-see-100000-new-covid-19-cases-per-day-fauci-](https://www.statnews.com/2020/06/30/u-s-could-see-100000-new-covid-19-cases-per-day-fauci-says/)
says/).

1 **August 5**—Stay from Supreme Court of federal case (*Barnes v. Ahlman* 591 U.S. __ (2020) No.
2 20419.

3 **August 9**—Sheriff again achieves zero infections in custody with only the usual isolated new
4 bookings. (Exhibit I.)

5 **August 9 through November 4**—Sheriff maintains under two (2) infected in custody, along
6 with new bookings, much of the time with zero (0) infected in custody. (Exhibit I.)

7 **November 13**—U.S. records over 100,000 daily infections for a week, and hits record number
8 of infections on multiple days.¹⁸

9 Sheriff has one (1) jail transmission of COVID-19 due to a dentist testing positive. All
10 individuals were contact traced and tested resulting in one positive. Sheriff continues isolating
11 new bookings for 14 days and testing before entry into general population. All COVID-19
12 precautions described herein continue unabated. (Chiang Decl. ¶ 5.)

13 **II. PETITIONERS' CONTENTIONS**

14 **A. *Petitioners' Habeas Claims***

15 Petitioners allege that, "Respondent has not ensured social distancing at the Jail." (FAC
16 at 24, para 51.)

17 "The OCSD's response has been inadequate to prevent the rampant spread of COVID-19
18 through the Jail and they have not protected individuals with medical vulnerabilities from
19 contracting the disease. Petitioners and other putative class members are detained in unsafe
20 conditions where they are at intolerable risk of serious illness and death." (FAC at 23, para. 49.)

21 "To prevent further infections and unnecessary fatalities, the Orange County Jail must
22 align its operations with public health principles by immediately releasing or transferring to
23 alternative custody all medically-vulnerable individuals. In light of the scope of the outbreak in
24 the Orange County Jail, release or transfer to a safer setting of all persons with medical
25 vulnerabilities and disabilities is the only way to protect them from their heightened risk of
26 illness and death." (FAC at 5, para. 7.)

27
28 ¹⁸ "The US has reported more than 100,000 new Covid-19 cases for 12 consecutive days,"
November 15, 2020, *CNN* (https://www.cnn.com/world/live-news/coronavirus-pandemic-11-15-20-intl/h_b7e840535c8072f7034c64526d054354).

1 “Although Respondent has implemented a 14-day quarantine of individuals newly
2 booked into the jail, status reports submitted by Respondent in the federal suit make clear that
3 the jail cannot protect medically vulnerable detainees from exposure to COVID-19. On July 3rd,
4 Respondent released a newly-booked individual from medical isolation 1 week early into
5 barrack housing, exposing at least 112 detainees to the virus and infecting at least 4.161
6 Respondent characterized this incident as the kind of “simple human error” which is “expected
7 to occur” and which “no court order could have prevented,” implicitly acknowledging that the
8 jail cannot avoid putting contagious individuals in environments where they can infect
9 others.162”

10 “By continuing to detain members of the Disability Subclass, Respondent’s policies and
11 practices violate state disability statutes.” (FAC at 37, para. 74; Gov. Code, § 11135.) “Release
12 of the Disability Subclasses is the most appropriate modification of the jail’s program.” (FAC at
13 37, para. 75.)

14 Petitioners claim, “unlawful confinement in violation of rights guaranteed to Petitioners,
15 including under article I, sections 7 and 17 of the California Constitution, and Government Code
16 sections 8658 and 11135,” (FAC at 41, para 91.) They assert that, “Under article I, section 7 of
17 the California Constitution, Respondent must provide Petitioners with due process and equal
18 protection under the law As part of the right, the government must provide people held
19 pre-trial with reasonable safety and address serious medical needs that arise in jail, under the
20 same objective deliberate indifference standard that applies to failure-to-protect claims brought
21 by people held pre-trial. Regardless of the subjective intent of Respondent, objective deliberate
22 indifference to the serious risk that COVID-19 poses to members of the Pre-Trial Medically
23 Vulnerable Class violates this right.” (FAC at 41, para 92.) The Petition also avers that, “under
24 article I, section 7 of the California Constitution, persons in pre-trial custody have greater due
25 process protections than those convicted and therefore cannot be punished as part of their
26 detention. Punishment is established if the jailer’s conduct is either not rationally related to a
27 legitimate, nonpunitive, government purpose or excessive in relation to that purpose.” (FAC at
28 41, para 94.)

1 “Under article I, section 17 of the California Constitution, Respondent must not impose
2 cruel or unusual punishment on Petitioners. As part of this right, the government must provide
3 incarcerated persons with reasonable safety and address serious medical needs that arise in jail.
4 Deliberate indifference to the serious risk that COVID-19 poses to members of the Post-
5 Conviction Medically Vulnerable Class infringes on the protection from cruel and unusual
6 punishment.” (FAC at 42, para. 98.)

7 ***B. Petitioners’ Mandate Claims***

8 “California Government Code Section 8658 provides that where an emergency is
9 endangering the lives of inmates of a county correctional institution, the person in charge of the
10 institution ‘shall, if possible, remove’ the inmates ‘to a safe and convenient place and there
11 confine them as long as may be necessary to avoid the danger, or, if that is not possible, may
12 release them.’ 104. The coronavirus is an emergency is endangering the lives of Petitioners, as
13 set forth in the preceding paragraphs, which are incorporated by reference as if fully set forth
14 herein.105. Petitioners have neither been removed to as safe or convenient place, nor released as
15 Government Code Section 8658 requires.” (FAC at 43, paras 103-105.)

16 “Section 11135 of the California Government Code (“§ 11135”) prohibits entities that
17 receive state financial assistance from unlawfully denying benefits to or discriminating against
18 any person on the basis of age, physical or mental disability, or medical condition.” (FAC at 43,
19 para 106.) Petitioners allege they are “illegally confined in violation of § 11135 through
20 Respondent’s failure to make the reasonable modifications necessary to ensure equal access to
21 adjudication, jail services, and release for people with disabilities who face high risk of
22 complications or death in the event of COVID-19 infection. The Disability Subclasses are
23 further confined in violation of § 11135 given Respondents employing methods of
24 administration (including a policy of non-release even in the face of COVID-19) that tend to
25 discriminate against people with disabilities by placing them at heightened risk of severe illness
26 and death.” (FAC at 44, para 110.)

27 ***C. Petitioners’ Injunctive Relief Claims***

28 Petitioners aver that they will suffer irreparable harm, and are likely to succeed on the

1 merits of their claims, and as such this Court should issue preliminary injunctive relief. (FAC at
2 14, para. 26.) The factual allegations are the same as for the prior claims. Every cause seeks to
3 vindicate the same right, specifically, the declaratory relief and injunctive claims, by their terms,
4 seek to vindicate the same primary right—the alleged need to be “released” from the Orange
5 County Jail due to an alleged significant risk of exposure to COVID-19.

6 **D. Petitioners’ Declaratory Relief Claims**

7 Petitioners allege: “There is an actual controversy between Plaintiffs and Respondent
8 concerning their respective rights and duties, in that Plaintiffs contend that the acts of
9 Respondent, as described herein, are in violation of state law, and Respondent contends in all
10 aspects to the contrary.” (FAC at 45, para. 118.)

11 **III. ARGUMENT**

12 “[H]abeas corpus is an extraordinary, limited remedy against a presumptively fair and
13 valid final judgment.” (*In re Reno* (2012) 55 Cal.4th 428, 450.) Courts presume the correctness
14 of a criminal judgment (*Id.*; *In re Lawley* (2008) 42 Cal.4th 1231, 1240), for before the state
15 may obtain such a judgment, “a defendant is afforded counsel and a panoply of procedural
16 protections, including state-funded investigation expenses, in order to ensure that the trial
17 proceedings provide a fair and full opportunity to assess the truth of the charges against the
18 defendant and the appropriate punishment.” (*In re Reno, supra*, at 450; *In re Robbins*, (1998) 18
19 Cal.4th 770, 777.)

20 “This limited nature of the writ of habeas corpus is appropriate because use of the writ
21 tends to undermine society’s legitimate interest in the finality of its criminal judgments, a point
22 this court has emphasized many times.” (*In re Reno, supra*, at 451.) “[T]his court opined that
23 “[o]ur cases have long emphasized that habeas corpus is an extraordinary remedy ‘and that the
24 availability of the writ properly must be tempered by the necessity of giving due consideration
25 to the interest of the public in the orderly and reasonably prompt implementation of its laws and
26 to the important public interest in the finality of judgments.’ ” (*Id.* at 451; *In re Morgan* (2010)
27 50 Cal.4th 932, 944.) “ “No one, not criminal defendants, not the judicial system, not society
28 as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but

1 tomorrow and every day thereafter his continued incarceration shall be subject to fresh
2 litigation.” ’ ’ ” (*In re Reno, supra*, at 451; *In re Harris* (1993) 5 Cal.4th 813, 831, quoting
3 *Mackey v. United States* (1971) 401 U.S. 667, 691, (conc. & dis. opn. of Harlan, J.))

4 [H]abeas corpus is a separate, collateral proceeding that attacks a
5 presumptively valid judgment. “For purposes of collateral attack, all
6 presumptions favor the truth, accuracy and fairness of the conviction
7 and sentence; defendant thus must undertake the burden of
8 overturning them. Society's interest in the finality of criminal
9 proceedings so demands.... [Citations.]” (*People v. Gonzalez* (1990)
10 51 Cal.3d 1179, 1260, 275 Cal.Rptr. 729, 800 P.2d 1159 [superseded
by statute on other grounds].) This presumption against the validity
of a collateral attack on a conviction and sentence weigh strongly
toward close appellate review of all mixed law and fact
determinations leading to a lower court’s decision to grant relief on
habeas corpus.

11 (*People v. Ault* (2004) 33 Cal.4th 1250, 1268 [footnotes omitted].)

12 Thus, a habeas corpus petitioner bears a heavy burden initially of pleading sufficient
13 grounds for relief, and then **proving** the grounds later. (*People v. Fryhaat* (2019) 35 Cal.App.5th
14 969.)

15 The procedural rules applicable to habeas corpus petitions are thus “a means of protecting
16 the integrity of our own appeal and habeas corpus process” (*In re Reno, supra*, at 451; *In re*
17 *Robbins* (1998) 18 Cal.4th 770, 778, fn.1, italics omitted) and vindicate “the interest of the public
18 in the orderly and reasonably prompt implementation of its laws and to the important public
19 interest in the finality of judgments.” (*In re Reno, supra*, at 451, *In re Robbins, supra*, at 778.)
20 “In short, our procedural rules ‘are necessary ... to deter use of the writ to unjustifiably delay
21 implementation of the law’” (*In re Reno, supra*, at 451.)

22 Most frequently, writs of habeas corpus address **post-conviction review** of violations of a
23 prisoner’s constitutional rights that may have prevented a fair trial and rendered his or her
24 imprisonment illegal. (*In re Bittaker* (1997) 55 Cal.App.4th 1004, 1012.) However, a person
25 may be in constructive custody, which would make that person eligible to file a petition, if a
26 person’s freedom is significantly restrained, such as being on probation or parole. (Pen. Code, §
27 1473.7(a). The primary **pretrial** use for habeas corpus involves the issue of bail. A court’s
28 improper denial of bail or the setting of clearly excessive bail may be remedied on habeas

1 corpus. (See, e.g., *In re Estrada* (1965) 63 Cal.2d 740 (bail hearing ordered).) Here, however,
2 Petitioners do not even assert at all that there was an improper denial of bail or that bail was set
3 excessively.

4 The court may also deny the petition without a hearing if consideration of the written
5 return and matters of record persuade it that the contentions of the petition lack merit. (*People*
6 *v. Karis* (1988) 46 Cal.3d 612, 656–657, abrogated on other grounds in *Payne v. Tennessee*
7 (1991) 501 U.S. 808.) An evidentiary hearing following issuance of an order to show cause is
8 subject to the rules of evidence as codified by the Evidence Code. (*In re Fields* (1990) 51
9 Cal.3d 1063, 1070); see Evid. Code, § 300.) The petitioner has the burden of proof by a
10 preponderance of the evidence. (*Application of Merkle* (1960) 182 Cal.App.2d 46, 48.) After
11 the evidentiary hearing, the court in which the return has been filed may grant or deny relief
12 based on the law and the facts elicited at the hearing. (See Penal Code section 1484.)

13 **A. *There Are No Legitimate Factual Disputes Requiring an Evidentiary Hearing to***
14 ***Resolve, and Therefore the Relief Should Be Denied***

15 At this stage of the proceedings, the Court is looking to determine whether there are any
16 legitimate factual disputes that require an evidentiary hearing to resolve. (See Pen. Code, §
17 1484.) There are not. Petitioners based their case on factual circumstances that may have
18 existed during the early days of the pandemic, if they ever did at all. The allegations do not
19 reflect current Jail circumstances in any way. This Court may deny the petition without a
20 hearing if consideration of the written return and matters of record persuade it that the
21 contentions of the petition lack merit. (*People v. Karis* (1988) 46 Cal.3d 612, 656–657,
22 abrogated on other grounds in *Payne v. Tennessee, supra*, at 808.)

23 The evidence before this Court demonstrates unequivocally that there is: 1) no deliberate
24 indifference (habeas); 2) no abuse of discretion (mandamus); 3) no basis for a declaration of
25 constitutional violation (declaratory); nor any grounds for preliminary equitable relief
26 (injunctive). The evidence shows a responsive Sheriff's Department exceeding the progress at
27 other custodial institutions—and *society at large*—by implementing a robust distancing, testing,
28 isolation/quarantine, sanitation/disinfection and personal protective regimen that stopped the

1 spread of COVID-19 at the jail. The COVID-19 numbers have plunged under implementation
2 of the Sheriff's strategy (and since access to supplies became available). And the numbers have
3 remained at incredible lows at the Jail *for months*. (Exhibit I, Jail COVID-19 Positive Rate
4 Graph, March 20, 2020 through November 4, 2020.) Current there is only one ("1") general
5 population inmate who has COVID-19 and that inmate has isolated from having any contact
6 with other inmates. (Chiang Decl.)

7 Petitioners attempt to portray a *Snidely Whiplash*¹⁹ scene of inmates strapped to the rail
8 tracks with a COVID-19 train bearing down on them. This is not even a remotely accurate
9 representation of the situation at the Orange County Jails. Inmate petitioners want release from
10 custody *in whatever manner it may be achieved*. It is in their interest to make things out in the
11 *worst light possible* to make it appear as if there is an impending emergency. But there is not.
12 The inmates at the Orange County Jail remain protected by a comprehensive custodial strategy
13 to combat and hopefully, eliminate, COVID-19 from the Orange County Jails.

14 Petitioners' acknowledge the circumstances: "As of September 2, 2020 there were
15 712,052 confirmed cases of COVID-19 in California, and 49,142 confirmed cases in the Orange
16 County area. To date, there have been 13,163 deaths from COVID-19 in California alone, with
17 1,007 deaths in Orange County. The Governor of California has declared a statewide
18 emergency, as have local Orange County officials. Governor Newsom directed a statewide stay
19 at home order, requiring all Californians to stay home if not performing essential activities."
20 (FAC at 24, lines 1-2.) Yet, the more Petitioner's highlight the extraordinary rise in the
21 pandemic in the United States, California, and in Orange County, the more it spotlights the stark
22 contrast between the *increasing* numbers outside the Jail and the simultaneously *decreasing*
23 numbers inside the Jail—all the more extraordinary when paddling *against* the current. Perhaps
24 the most telling contrast comes during this litigation—the United States hit record COVID-19

25 //

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27 _____
28 ¹⁹ *Snidely Whiplash* is the stereotypical villain in the style of stock characters found in silent movies and earlier stage melodrama, wearing black clothing and a top hat and with a handlebar moustache.

1 infection numbers on November 11, 2020.²⁰ On November 11, 2020, the Orange County Jail
2 intra-Jail transmission was one (“1”). (See Chiang decl.)

3 **1. First Claim for Relief, Habeas Corpus, Cannot Be Shown**

4 *a. Petitioners’ General Habeas Corpus Allegations Do Not Stand Up*
5 *to Scrutiny*

6 The *Von Staich* case recently reiterated the standard for establishing a constitutional
7 claim based on “deliberate indifference.”

8 The Eighth Amendment to the United States Constitution and article
9 I, section 17 of the California Constitution both require correctional
10 officials to provide inmates adequate medical care. (*Estelle v.*
11 *Gamble, supra*, 429 U.S. at p. 103, 97 S.Ct. 285; *Inmates of the*
12 *Riverside County Jail v. Clark, supra*, 144 Cal.App.3d at p. 859, 192
13 Cal.Rptr. 823.) In order to prevail on a constitutional claim of
14 inadequate care, a prisoner must establish that the responsible prison
15 official treated him with “deliberate indifference to serious medical
16 needs.” (*Estelle*, at p. 104, 97 S.Ct. 285.) “Deliberate indifference” is
17 established where the challenged deficiency is “sufficiently serious,”
18 and prison officials “know[] that inmates face a substantial risk of
19 serious harm and disregard that risk by failing to take reasonable
20 measures to abate it.” (*Farmer, supra*, 511 U.S. at p. 847, 114 S.Ct.
21 1970.) Prison officials may not be “deliberately indifferent to the
22 exposure of inmates to a serious communicable disease” (*Helling v.*
23 *McKinney* (1993) 509 U.S. 25, 33, 113 S.Ct. 2475, 125 L.Ed.2d 22),
24 and the placement of inmates in places to which infectious diseases
25 could easily spread constitutes a constitutional violation. (*Hutto v.*
26 *Finney, supra*, 437 U.S. at p. 682, 98 S.Ct. 2565.) Deliberate
27 indifference may be proven by circumstantial evidence and it may be
28 inferred from “the very fact that the risk was obvious.” (*Farmer*, at p.
842, 114 S.Ct. 1970.)

(*In re Von Staich* (2020) 56 Cal.App.5th 53 at *9.)

Petitioners’ allege that, “Respondent has not ensured social distancing at the Jail.” (FAC at
24, para 51.) Although unsupported any evidence, Petitioners also make up their own standard
not found anywhere, least in the CDC Guidelines, and elevate form over substance.

Social distancing is the practice of increasing the space between
individuals and decreasing their frequency of contact to reduce the
risk of spreading a disease (ideally to maintain at least 6 feet between
all individuals, even those who are asymptomatic). Social distancing
strategies can be applied on an individual level (e.g., avoiding
physical contact), a group level (e.g., canceling group activities where

²⁰ Exhibit _L_, “New Daily Coronavirus Cases in U.S. Rise to 145,000, Latest All-Time High,”
The Washington Post, November 11, 2020, <https://www.washingtonpost.com/nation/2020/11/11/coronavirus-covid-live-updates-us/>).

1 individuals would be in close contact), and an operational level (e.g.,
2 rearranging chairs in the dining hall to increase distance between
them).

3 (Exhibit F, CDC Interim Guidelines 11/4/20.)

4 Transient contact is not considered a “close contact,” even under CDC guidelines. The
5 CDC Guidelines for Correctional Facilities define “close contact” as: “Close contact of
6 someone with COVID-19 – Someone who was within 6 feet of an infected person for a
7 cumulative total of 15 minutes or more over a 24-hour period* starting from 2 days before
8 illness onset (or, for asymptomatic patients, 2 days prior to test specimen collection) until the
9 time the patient is isolated.” (*Id.*) Petitioners do not allege anyone at the Jail has experienced a
10 “close contact” within the meaning of the CDC Interim Guidance. As such, the claim that
11 “Respondent has not ensured social distancing” is nothing but a vague assertion unsupported by
12 evidence, rather than a cogent averment at all.

13 The OCSD’s response has been inadequate to prevent the rampant
14 spread of COVID-19 through the Jail and they have not protected
15 individuals with medical vulnerabilities from contracting the disease.
16 Petitioners and other putative class members are detained in unsafe
conditions where they are at intolerable risk of serious illness and
death.

17 (FAC at 23, para. 49.)

18 Every factual assertion in the forgoing quote is false. In contrast, as demonstrated
19 throughout, OCSD’s response has been *more than adequate* to prevent the rampant spread of
20 COVID-19 through the Jail. It has been exemplary. OCSD *has* protected individuals with
21 medical vulnerabilities from contracting the disease, as shown. Petitioners and other putative
22 class members are, demonstrably, *not detained in unsafe conditions*, nor do they face any
23 “intolerable risk of serious illness and death” as Petitioners’ allege.

24 To prevent further infections and unnecessary fatalities, the Orange
25 County Jail must align its operations with public health principles by
26 immediately releasing or transferring to alternative custody all
27 medically-vulnerable individuals. In light of the scope of the outbreak
in the Orange County Jail, release or transfer to a safer setting of all
persons with medical vulnerabilities and disabilities is the only way
to protect them from their heightened risk of illness and death.

28 (FAC at 5, para. 7.)

1 As demonstrated, the Sheriff has prevented further infections and has prevented all deaths
2 from COVID-19 at the Jail. As discussed more fully, vague “public health principles” are not
3 law, and cannot support the action. Tellingly, Petitioners do not allege that there is actually any
4 “alternative custody” that *is* safer than the Jail. Petitioners seek release to a safer setting, but do
5 not suggest where that might be. As will be shown, “alternative custody” involves *increased*
6 risk to COVID-19.

7 Petitioners claim, “unlawful confinement in violation of rights guaranteed to Petitioners,
8 including under article I, sections 7 and 17 of the California Constitution, and Government Code
9 sections 8658 and 11135.” (FAC at 41, para 91.) They assert that, “Under article I, section 7 of
10 the California Constitution, Respondent must provide Petitioners with due process and equal
11 protection under the law As part of the right, the government must provide people held
12 pre-trial with reasonable safety and address serious medical needs that arise in jail, under the
13 same objective deliberate indifference standard that applies to failure-to-protect claims brought
14 by people held pre-trial. Regardless of the subjective intent of Respondent, objective deliberate
15 indifference to the serious risk that COVID-19 poses to members of the Pre-Trial Medically
16 Vulnerable Class violates this right.” (FAC at 41, para 92.) The Petition also avers that, “under
17 article I, section 7 of the California Constitution, persons in pre-trial custody have greater due
18 process protections than those convicted and therefore cannot be punished as part of their
19 detention. Punishment is established if the jailer’s conduct is either not rationally related to a
20 legitimate, nonpunitive, government purpose or excessive in relation to that purpose.” (FAC at
21 41, para 94.)

22 Not a single contention in the habeas corpus claim is accurately reflective of current Jail
23 circumstances. None of these claims have been shown; indeed, *none of these claims can be*
24 *proven*. Even if, *arguendo*, despite the evidence, that the factual assertions in Plaintiff’s
25 Complaint were true, it would still not give rise to the relief they are requesting. What they
26 present is not a case of deliberate indifference under any standard. It does not rise to a
27 constitutional violation under any theory asserted. There is simply no showing of OCSD
28 “knowingly and unreasonably disregarding an objectively intolerable risk of harm.” (*Von Staich*

1 at * 15, quoting *Farmer v. Brennan* (1994) 511 U.S. 825, 845-846.)

2 Petitioners allege, at least as to pretrial detainees, that it constitutes punishment of a
3 pretrial detainee if the “jailer’s conduct is either not rationally related to a legitimate,
4 nonpunitive, government purpose or excessive in relation to that purpose.” (FAC at 41, para
5 94.) In this context, it is not clear what this might mean. The Sheriff’s publicly stated purpose
6 has been to protect inmates and staff from COVID-19 (see Exhibit D.) Petitioners do not allege
7 that this is not a “legitimate” governmental purpose. Petitioners also do not allege that
8 providing PPE, testing, isolation and increased sanitation is illegitimate or punitive toward
9 inmates. And Petitioners certainly cannot be arguing that the Sheriff’s response was
10 “excessive,” as this would undercut the rest of their claims.

11 Petitioners attempt to capitalize on an incident from July 2020. Petitioners state: “On
12 July 3rd, Respondent released a newly-booked individual from medical isolation 1 week early
13 into barrack housing, exposing at least 112 detainees to the virus and infecting at least 4.161
14 Respondent characterized this incident as the kind of “simple human error” which is “expected
15 to occur” and which “no court order could have prevented,” implicitly acknowledging that the
16 jail cannot avoid putting contagious individuals in environments where they can infect
17 others.162” (FAC at 30, para. 61.) This assertion is specious and inaccurate. First, no entity—
18 not hospitals, none of the legal firms involved here, not the White House, nor this Court—can
19 **guarantee** that COVID-19 will not enter their workplace. We take precautions, but there is also
20 no way for the Jail to **guarantee** that there will not be mistakes, nor newly discovered modes of
21 transmission. Perfection is an unreasonable and unattainable expectation, but more, it is
22 nowhere the legal standard applicable to Respondent. Second, this episode demonstrates the
23 effectiveness of the systems the Sheriff has in place. Upon this incident, it was quickly
24 identified, appropriate testing and isolation followed. The incident was quickly identified,
25 isolated, and remedied, demonstrating the efficacy of the Sheriff’s COVID-19 prevention
26 strategies.

27 Next, Petitioners present a situation that no longer exists, if it ever did. The facts are
28 stale, they are not representative of current circumstances at the Jail and the deteriorated facts

1 cannot support the ambitious relief requested in the Petition. (A more detailed discussion of this
2 issue appears in section 4.B infra.)

3 The harm Petitioners' allege is purely speculative. The trajectory of COVID-19 at the
4 Jail has been positive since the outbreak in May 2020. (Exhibit I.) There is no indication, based
5 on current trendlines or some change in circumstances that Petitioners can point to, that makes
6 their claims of harm anything but pure conjecture. This is insufficient to support the relief they
7 seek. Were Petitioners to come forth with some sort of late claim that the impressive testing
8 numbers at the jail are not indicative because they somehow challenge the level of testing that is
9 occurring, let us be reminded that it is Petitioners' burden, and theirs alone to establish such—
10 **through facts**—which they simply cannot do. The results speak for themselves. Moreover,
11 Petitioner, Sandy Gonzalez, presents **no evidence** she was *specifically* treated with objective
12 deliberate indifference vis-à-vis COVID-19. She presents no evidence she was discriminated
13 against on the basis of disability, nor that she was denied any right or service based on disability
14 or other risk factor making her particularly susceptible to COVID-19.

15 The best demonstration of what is to come is to look at what has been happening. The
16 trend line is extremely positive and in the direction of inmate and staff safety. Every indication
17 is that this will continue in that direction, notwithstanding record COVID-19 infection rates in in
18 the community and a third wave of COVID-19 striking at society generally. (See footnote 2,
19 supra.) The injunction by the federal district court has been stayed since August 5, 2020
20 (*Ahlman v. Barnes* 591 U.S. __ (2020), No. 20A19.) the Orange County Jail COVID-19
21 numbers have continued to precipitously fall (Exhibit I) without any court injunction, oversight,
22 or orders.

23 As the Court in *Von Staich* correctly noted, *Farmer*, in the context of summary judgment
24 on Eighth Amendment “deliberate indifference” equitable claims, declares that:

25 An inmate seeking an injunction on the ground that there is ‘a
26 contemporary violation of a nature likely to continue,’ [citation] must
27 adequately plead such a violation; . . . he must come forward with
28 evidence from which it can be inferred that the defendant-officials
were at the time suit was filed, and are at the time [the court rules] . .
. knowingly and unreasonably disregarding an objectively intolerable
risk of harm, and that they will continue to do so; and . . . the inmate

1 must demonstrate the continuance of that disregard during the
2 remainder of the litigation and into the future.

3 (*Von Staich* at * 15, quoting *Farmer*, *supra*, 511 U.S. at 845–846.)

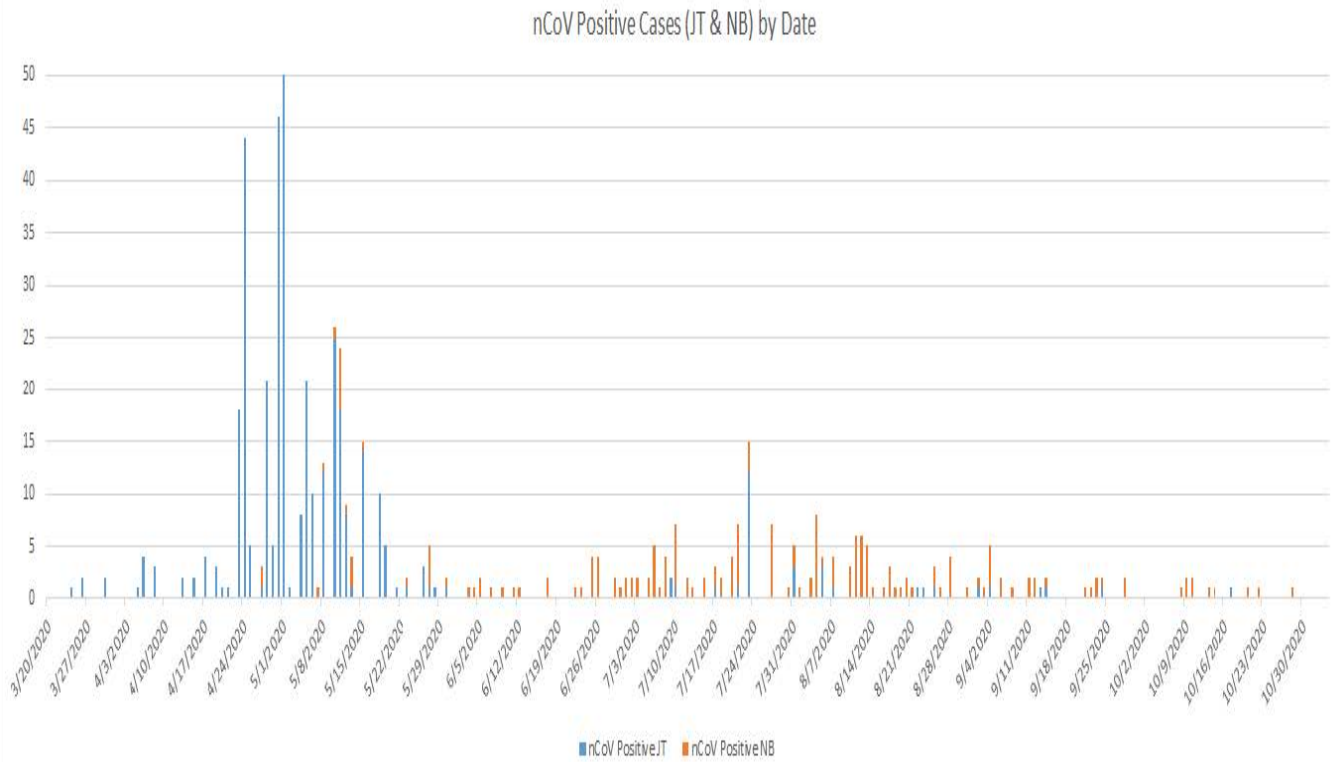
4 This cannot and will not be shown in this proceeding. *Von Staich* also made clear this is
5 dispositive on legal grounds: “The issue before us is simply whether respondents’ disregard of
6 the experts’ conclusion that a 50 percent population reduction is essential constitutes the
7 “deliberate indifference” necessary to sustain petitioner's constitutional claim. That issue is one
8 of law, not fact.” (*In re Von Staich*,, *supra*, at *8.)

9 b. *No Alternative Requested by Petitioners is Actually Safer From a*
10 *COVID-19 Exposure Risk than the Jail*

11 In the absence of outright release, Petitioners seek “release,” including but not limited to
12 supervised release, halfway house, residential placement, transfer to a hospital or other facility,
13 or diversion to alternative community treatment programs. (FAC at 7, fn. 20.) The Petition is,
14 ostensibly, a plea to be released from a putatively *high-prevalence COVID-19 environment* to a
15 *low-prevalence COVID-19 environment*; a *high-risk COVID-19 environment* to a *lower-risk*
16 *covid-19 environment*. Otherwise, there would be no purpose to the Petition. Presumably,
17 Petitioners do not seek release from the Orange County Jails on the basis of an alleged potential
18 risk of COVID-19 exposure only to request placement into a ***higher risk*** environment for
19 COVID-19 exposure. Yet, taking Petitioner’s alternatives to outright release in turn, ***none are***
20 ***safer from COVID-19 than the Orange County Jail.***

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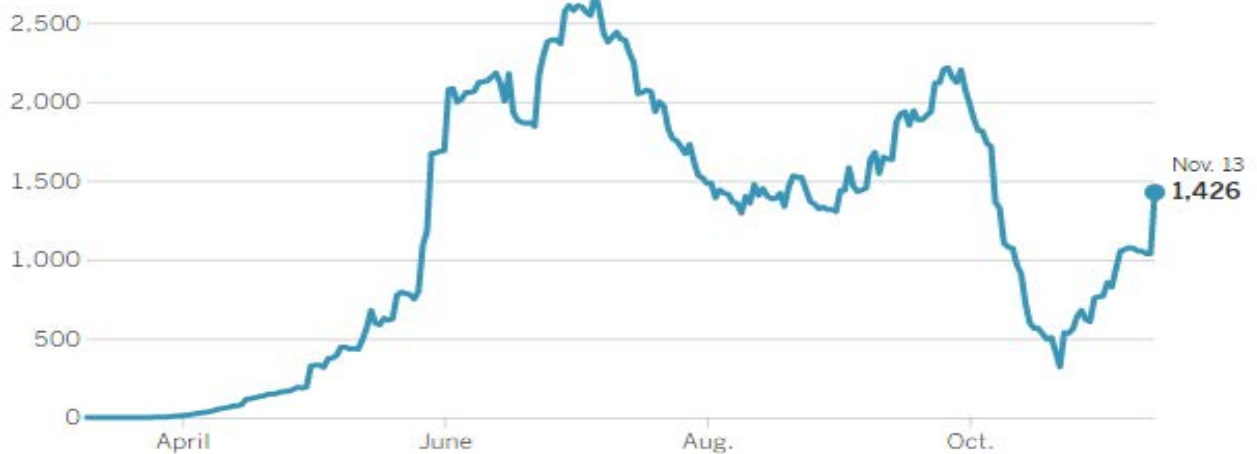
i. The Orange County Jails Are Safer than State Prisons or the Custodial Facilities of Surrounding Counties



The data above represents COVID-19 infections across all facilities of the Orange County Jail from March 20, 2020 through November 4, 2020. “Positive JT” represents “Jail Transmission” and Positive NB” represents “Positive New Bookings.”

Compare the Jail to the performance of the California State Prison system:

Active cases



As of November 6, 2020, the following is the provided data from CDCR:

TOTAL POPULATION: As of Nov. 5, there are 92,482 incarcerated persons in California’s prisons – a reduction of 21,836 since March 11, 2020.

POPULATION CASES: There are 865 incarcerated persons with active cases of COVID-19 statewide. To view more detailed case and testing information, see the CDCR and CCHCS Patient Testing Tracker.

HOSPITALIZATION: There are 20 incarcerated persons receiving medical care at outside health care facilities across the state.

STAFF CASES: There are currently 533 active CDCR/CCHCS employee COVID-19 cases statewide (4,631 cumulative; 4,098 returned to work). See the CDCR/CCHCS COVID-19 Employee Status webpage for a breakdown by location.²¹

Compare the Jail to California generally over the same period.



ii. Inmates Are Demonstrably Safer at the Orange County Jails from COVID-19 than the Rehabilitation Programs or Halfway Houses Petitioners Seek

This is a subterfuge for outright release. Again, presumably by this habeas/mandate petition, Petitioners do not seek to be placed in a *more* dangerous situation regarding COVID than they are currently in. Yet, Petitioners seek release to rehabilitation programs and halfway

²¹ Exhibit M, Calif. Dept. of Corr. & Rehab., Covid-19 Information, November 6, 2020 update (<https://www.cdcr.ca.gov/covid19/#:~:text=COVID%2D19%20Information&text=TOTAL%20POPULATION%3A%20As%20of%20Nov,cases%20of%20COVID%2D19%20statewide.>)

1 houses, which are demonstrably more dangerous from a COVID-19 exposure risk perspective.
2 Congregate community facilities, including those with medical components continue to see
3 substantial COVID-19 exposure risk.²² The raw data maintained by the California Department
4 of Health Services regarding COVID-19 at behavioral health facilities shows statewide that 318
5 resident/clients and 255 staff infected with COVID-19 at substance abuse disorder facilities; the
6 state data shows statewide 189 residents/client and 158 staff infected with COVID-19 at mental
7 health facilities through November 12, 2020.²³

8 Orange County Jail's test positivity rate has decreased significantly from a 7-day average
9 positivity rate of 50.6 percent on May 1, to a current 7-day average positivity rate of 1.2 percent,
10 far lower than positivity rates currently published by the State and the County. Current
11 positivity rate statewide in California is 5.0 percent (<https://covid19.ca.gov/state-dashboard/>),
12 while current positivity rate countywide in Orange County is 4.6 percent ([https://arcg.is/](https://arcg.is/1veXG90)
13 [1veXG90](https://arcg.is/1veXG90)). (Chiang Decl. at para. 5.) Simply put, taking inmates from the relative safety of the
14 Jail setting into the community in California at this point is demonstrably *more dangerous* than
15 their current circumstances.

16 Additionally, Petitioners have not pled or established with evidence that there are
17 openings at rehabilitation programs or halfway houses, what their admission criteria is, whether
18 they are accepting people during the COVID-19 pandemic, nor whether they can provide social
19 distancing, testing, PPE, sanitation and the like, to protect Petitioners. They have not identified
20 any specific location that would be better able to accommodate the alleged disabilities of
21 Petitioners. These are absent entirely absent from Petitioners factual assertions. Petitioners
22 claim that they need to be released from the Jail to a safer location. *That such a location exists*
23 *is nowhere established by facts in this litigation.*

24
25
26 ²² Exhibit N, "Drug Rehabs And Psychiatric Facilities Are an Overlooked COVID-19 Risk,
27 Advocates Say," *Capital Public Radio*, Sammy Caiola, June 16, 2020
([https://www.caprado.org/articles/2020/06/16/drug-rehabs-and-psychiatric-facilities-are-an-overlooked-](https://www.caprado.org/articles/2020/06/16/drug-rehabs-and-psychiatric-facilities-are-an-overlooked-covid-19-risk-advocates-say/)
[covid-19-risk-advocates-say/](https://www.caprado.org/articles/2020/06/16/drug-rehabs-and-psychiatric-facilities-are-an-overlooked-covid-19-risk-advocates-say/)).

28 ²³ Exhibit O, COVID-19 Cases Reported in Behavioral Health Facilities, items 185 and 224,
Department of Health Care Services, ([https://www.dhcs.ca.gov/dataandstats/Pages/COVID-19-DHCS-](https://www.dhcs.ca.gov/dataandstats/Pages/COVID-19-DHCS-BH-Certified-Facilities.aspx)
[BH-Certified-Facilities.aspx](https://www.dhcs.ca.gov/dataandstats/Pages/COVID-19-DHCS-BH-Certified-Facilities.aspx)).

1 that disregard during the remainder of the litigation and into the future.” (*Von Staich, supra*, at *
2 15, quoting *Farmer, supra*, 511 U.S. at 845–846.) This is not shown here. Lastly, the fact that
3 the Sheriff has decreased Jail COVID-19 transmission to *one* while the federal court injunction
4 has been stayed is conclusive evidence that Petitioner’s will not suffer irreparable harm absent
5 an order from this Court.

6 **2. The Second Claim for Relief, Mandate, Fails**

7 Relief based on the mandate action should be denied for failure to establish any right to
8 mandate relief. Petitioner has not presented this Court, even upon the filing of the Amended
9 Petition, any legal basis for issuance of a writ of mandate. A writ of mandate will issue only to
10 compel the performance of an act “specially enjoined by law.” (*California Assn. for Health*
11 *Services at Home v. State Dept. of Health Services* (2007) 148 Cal.App.4th 696.)

12 *a. Petitioners Fail to Show a Clear, Present Legal Duty on the Subject*

13 To obtain writ relief under Code of Civil Procedure section 1085, the
14 petitioner must show there is no other plain, speedy, and adequate
15 remedy; the respondent has a clear, present, and ministerial duty to act
16 in a particular way; and the petitioner has a clear, present and
17 beneficial right to performance of that duty. [Citation.] A ministerial
18 duty is one that is required to be performed in a prescribed manner
19 under the mandate of legal authority without the exercise of discretion
20 or judgment. [Citation.]

21 (*City of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 593.)

22 “As a general proposition courts will not issue a writ of mandate to
23 enforce an abstract right of no practical benefit to petitioner, or where
24 to issue the writ would be useless, unenforceable, or unavailing.”
25 [Citation.] Accordingly, a writ of mandate will not issue where the
26 petitioner’s rights are otherwise protected. [Citations.]

27 (*Id.* at 595-96.)

28 In *City of San Diego*, the Court noted that:

[T]he acts mandated by the writ are not *ministerial* acts that the State
has a clear, present, ministerial duty to perform. “Mandate will not
issue to compel action unless it is shown the duty to do the thing asked
for is plain and unmixed with discretionary power or the exercise of
judgment. [Citation.]” (*Unnamed Physician v. Board of Trustees*
[(2001)] 93 Cal.App.4th [612,] 618, 113 Cal.Rptr.2d 309.)

(*Id.* at 596 [italics in original].)

1 The issues presented in the mandate portion of the Petition were largely addressed as a
2 matter of law in the case of *California Attorneys for Crim. Justice v. Newsom*. In that case, as
3 here:

4 Petitioners allege, with supporting declarations, that these facilities do
5 not practice appropriate social distancing, do not maintain sanitary
6 conditions in dorms and common areas, do not provide adequate
7 medical care to inmates with possible symptoms of infection, and do
8 not provide inmates with masks or supplies for basic hygiene, such as
9 soap or hand sanitizer. Petitioners further allege that state authorities
are aware of the dangerous conditions at these detention facilities but
nonetheless failed to take action to prevent the transfer of noncitizen
inmates to these facilities. Petitioners contend that respondents’
conduct violates their right to due process.

10 (*California Attorneys for Crim. Justice v. Newsom*, Supreme Court of California, En Banc, May
11 13, 2020, 2020 WL 2568388 at *2.) There, as here, “The petition establishes no clear and
12 mandatory duty on the part of the [Respondents] to take the requested action.” (*Id.* at *2.)
13 Petitioners point to no change in the law since the Supreme Court’s *California Attorneys*
14 decision that alters the analysis.

15 Petitioners erroneously assert as the statutory basis for the purported mandatory duty that,
16 “Respondent has a statutory duty to ‘keep the jail and the prisoners in it’. Cal. Gov’t Code §
17 26605.” (FAC at 45, para 113.) That the Government Code requires county sheriffs to maintain
18 a jail and places responsibility for inmates on the Sheriff is not in dispute. But this **does not**
19 **substitute** for a clear statutory requirement that could possibly support mandamus. The statute
20 does not prescribe, in even the vaguest terms, *how* the Sheriff is to “keep” the jail, and
21 Petitioner’s citation to it cannot substitute for the clear, present, mandatory duty, unmixed with
22 discretion that lies at the heart of any mandamus action.

23 Petitioners’ only other statutory support for any putative “clear mandatory duty” asserts
24 that, “Respondent further has a statutory duty to exercise his authority to remove ‘if possible,’ or
25 release detainees when an emergency that engenders their lives is imminent or occurring. Cal.
26 Gov’t Code § 8686. Respondent’s failure to release or transfer medically vulnerable and
27 disabled individuals out of the Jail is an abrogation of that duty in light of the significant threat
28 posed by the extensive outbreak of COVID-19 in the Jail.” (FAC at 45, para. 114.) First, the

1 statute on its face includes the language “if possible” indicating a grant of *discretion* rather than
2 mandate in the statute. Second, there is an additional layer of discretion built into the statute, in
3 that clearly, it is the Sheriff that determines whether such an action is “possible.” Third, this is,
4 indisputably, precisely what the Sheriff did here, released inmates to approximately 50% to
5 increase social distancing. Finally, the assertion that the claim stands, “in light of the significant
6 threat posed by the extensive outbreak of COVID-19 in the Jail,” which, as established
7 thoroughly herein, and is repeated only for continuity of argument, the current infection rate at
8 the Orange County Jail is one (“1”). Factually, there simply is no “significant threat,” because
9 there is no “extensive outbreak” at the Jail.

10 In a rare instance, a court may entertain a writ of mandate based on an abuse of discretion
11 in a “quasi-legislative” act, “*but only* if the action taken is so palpably unreasonable and
12 arbitrary as to show an abuse of discretion as a matter of law; this test is highly deferential.”
13 (*Carrancho v. California Air Resources Bd.* (2003) 111 Cal.App.4th 1255, 1265 [emphasis in
14 original].) In such a review, “extra-record evidence amounting to nothing more than
15 contradictory expert testimony designed to question the wisdom and accuracy of an agency’s
16 decision generally is not admissible, because the issue would tend to become whether the
17 decision was wise in light of such evidence, not whether it was a prejudicial abuse of
18 discretion.” (*Coachella Valley Unif. Sch. Dist. v. State of California* (2009) 176 Cal.App.4th 93,
19 125.)

20 Petitioner has asserted only an abstract right, rather than asserting that Respondents have any
21 *specific* duty on this subject at all, let alone that such duty is clear, present, ministerial,
22 “specially enjoined by law,” and unmixed with discretion. Moreover, nowhere does the
23 Amended Petition assert that any Respondent has any legal duty as to the specific type of
24 response that is required in the face of a pandemic from a heretofore unknown novel
25 coronavirus. Because the “petition establishes no clear and mandatory duty on the part of the
26 [Respondents] to take the requested action” (*Cal. Attorneys* at *2), it must fail.

27 *b. Any Duty Was Not “Ministerial”*

28 For a mandate action to lie, the duty must be “ministerial.”

1 “A ministerial act is an act that a public officer is required to perform
2 in a prescribed manner in obedience to the mandate of legal authority
3 and without regard to his own judgment or opinion concerning such
4 act’s propriety or impropriety, when a given state of facts exists.
5 Discretion, on the other hand, is the power conferred on public
6 functionaries to act officially according to the dictates of their own
7 judgment.” (*Rodriguez [v. Solis (1991)]* 1 Cal.App.4th [495,] 501–
8 502, 2 Cal.Rptr.2d 50 (italics added); *Transdyn/Cresci [JV v. City and
County of San Francisco (1999)]* 72 Cal.App.4th [749,] 752, 85
9 Cal.Rptr.2d 512.) Thus, “[w]here a statute or ordinance clearly defines
the specific duties or course of conduct that a governing body must
take, that course of conduct becomes mandatory and eliminates any
element of discretion.” (*Great Western Sav. & Loan Assn. v. City of
Los Angeles (1973)* 31 Cal.App.3d 403, 413, 107 Cal.Rptr. 359.)

9 (*Carrancho, supra*, at 1267.)

10 A ministerial duty was not involved here. Petitioners have cited to no “statute or
11 ordinance clearly defines the specific duties or course of conduct that a governing body must
12 take” (*Id.*) in response to a global pandemic of a new virus. Petitioners have pointed to no
13 statute or ordinance that specifies the particular manner in which a jail is to respond to a once-
14 in-a-lifetime global pandemic of a “novel coronavirus” first discovered in January 2020. In fact,
15 there is no legal provision that *dictates* the manner in which COVID-19 was to be mitigated. To
16 the extent that information became available, these were implemented rapidly at the Jail. The
17 alleged duty here is *discretionary*, and cannot be considered “ministerial” such that a writ of
18 mandate will lie. There is no particular manner prescribed by law for any of the actions at issue.
19 “Mandate will not issue if the duty is not plain or is mixed with discretionary power or the
20 exercise of judgment.” (*Los Angeles County Prof. Peace Officers’ Assn. v. County of Los
21 Angeles (2004)* 11 Cal.App.4th 866, 869.)

22 The “act which will be compelled by mandamus must be one to the performance of
23 which the complaining party is entitled at the institution of his proceeding. It is the refusal or
24 neglect to perform an act which is enjoined by the law as a present duty that serves as the very
25 foundation for the proceeding.” (*Palmer v. Fox (1953)* 118 Cal.App.2d 453, 456, quoting
26 *McGinnis v. Mayor & Common Council (1908)* 153 Cal. 711, 715.) That showing is entirely
27 absent here. Petitioners’ action falls short on each element of Code of Civil Procedure section
28 1085 mandate.

1 To the extent that Petitioners will point to the CDC Interim Guidelines, a number of
2 points must be made. The CDC Interim Guidelines are themselves discretionary and require
3 adaptation to particular facilities. (Exhibit F.) The CDC Interim Guidelines have been amended
4 as new information about COVID-19 is developed. And lastly, the CDC Interim Guidelines are
5 not a statute or regulatory mandate at all, and as such acts there are not “specifically enjoined by
6 law.” Petitioners’ vaguely claim, without citing to *any* authority, that “the Orange County Jail
7 must align its operations with public health principles” and release or transfer all medically-
8 vulnerable inmates. (FAC at 5, para. 7.) Vague “public health principles” are not the clear legal
9 dictate required to support mandamus.

10 3. The Third Claim, Injunctive Relief, Should Be Denied

11 Under California’s primary rights doctrine, the invasion of one primary right gives rise to
12 a single cause of action. (*R&A Vending Servs. v. City of Los Angeles* (1985) 172 Cal.App.3d
13 1188, 1193-1194.) Here, although Petitioner couched various claims in multiple causes of
14 action, they share a common nucleus of fact and law. *R&A Vending Services* held that the
15 superior court’s denial of a petition for writ of mandate regarding an alleged right to be chosen
16 as highest responsible bidder for a city project barred declaratory and injunctive relief claims
17 seeking to vindicate the same right. (*Id.* at p. 1194.) The court reasoned that resolution of the
18 writ claim in the city’s favor disposed of the remaining claims, including a declaratory relief
19 claim based upon the same facts. The court said:

20 [T]he single issue underlying all three causes of action, i.e., whether
21 City had discretion in awarding the lease, was resolved against R&A.
22 The trial court had before it one lawsuit seeking three different
23 remedies. It did not have three separate causes of actions or potentially
24 three separate lawsuits. In determining the existence of a cause of
25 action, California subscribes to the primary rights theory [citation.]
26 Under the theory, the invasion of one primary right gives rise to a
27 single cause of action, [citations.] It is the right sought to be
28 established, not the remedy or relief, which determines the nature and
substance of the cause of action, [citation.]”)

26 (*Id.*)

27 Every claim here seeks to vindicate the same right, specifically, the declaratory relief and
28 injunctive causes of action by their terms seek to vindicate the same primary right—the alleged

1 need to be “released” from the Orange County Jail due to an alleged significant risk of exposure
2 to COVID-19. (See FAC *passim*.) Because the primary right sought to be established by the
3 mandate action cannot be maintained, the declaratory and injunctive relief claims must also fall.
4 Nothing remains to be litigated.

5 In any event, Petitioner’s injunctive and declaratory relief actions independently suffer
6 from fatal defects when scrutinized under the specific requirements for those actions. The
7 general purpose of an injunction is the preservation of the *status quo* until a final determination
8 of the merits of the action. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 529.) “In
9 making [its] determination the court will consider the probability of the plaintiff’s ultimately
10 prevailing in the case and, it has been said, will deny a preliminary injunction unless there is a
11 reasonable probability that plaintiff will be successful in the assertion of his rights.” (*Id.*, at p.
12 528, citing *Lagunitas W. Co. v. Marin County W. Co.* (1912) 163 Cal. 332, 336-337, and other
13 cases.) Respondents incorporate their arguments, *supra*, regarding the habeas and mandate
14 actions. Petitioners do not have a likelihood of success on the merits in this action for the
15 reasons as thoroughly described here. Moreover, given that the “general purpose of such an
16 injunction is the preservation of the status quo until a final determination of the merits of the
17 action,” it would make no sense here. Contrary to the purposes of a preliminary injunction,
18 Petitioners seek to *change* the status quo, not preserve it.

19 **4. The Fourth Claim, Declaratory Relief, is Neither Necessary nor Proper**

20 Declaratory relief may be refused where the court’s declaration or determination “is not
21 necessary or proper at the time under all the circumstances.” (Code Civ. Proc., § 1061; see
22 *Meyer v. Sprint Spectrum L.P.* (2008) 45 Cal.4th 634, 648 [declaratory relief properly refused
23 where resolving controversy over future remedies would have little practical effect in terms of
24 altering parties’ behavior].) Under Code of Civil Procedure section 1061, “[i]f an actual
25 controversy exists, it is within the trial court’s discretion to grant or deny declaratory relief
26 [citation], and [the Court of Appeal] will not disturb that exercise of discretion absent abuse.”
27 (*Gilb v. Chiang* (2010) 186 Cal.App.4th 444, 458.) Declaratory relief is neither necessary nor
28 proper here.

1 The controversy that is the subject of declaratory relief “ ‘ ‘ ‘must be
2 of a character which admits of specific and conclusive relief by
3 judgment within the field of judicial determination, as distinguished
4 from an advisory opinion upon a particular or hypothetical state of
5 facts....’ ” ’ ” (*Bame v. City of Del Mar* (2001) 86 Cal.App.4th 1346,
6 1355, 104 Cal.Rptr.2d 183.)

* * *

7 Moreover, declaratory relief “ ‘operates prospectively, and not merely
8 for the redress of past wrongs. It serves to set controversies at rest
9 before they lead to repudiation of obligations, invasion of rights or
10 commission of wrongs; in short, the remedy is to be used in the
11 interests of preventive justice, to declare rights rather than execute
12 them.’ ” (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 848, 92
13 Cal.Rptr. 179, 479 P.2d 379, quoting *Travers v. Louden* (1967) 254
14 Cal.App.2d 926, 931, 62 Cal.Rptr. 654.)

15 (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1403.)

16 Petitioners allege, entirely, as the gravamen of the declaratory relief claim: “There is an
17 actual controversy between Plaintiffs and Respondent concerning their respective rights and
18 duties, in that Plaintiffs contend that the acts of Respondent, as described herein, are in violation
19 of state law, and Respondent contends in all aspects to the contrary.” (FAC. at p.45, para. 118.)

20 Yet, there is no possibility that this Court issuing a declaratory judgment would serve as
21 preventive justice. Nothing will be had by way of a *prospective* declaration of rights.

22 Moreover, given the complete lack of basis for the habeas and mandate actions and the same
23 operative nucleus of facts (there is no current risk to inmates at the Orange County Jail from
24 COVID-19), the declaratory relief action is subject to a similar fate. Petitioners’ declaratory
25 relief claim is a remedy seeking a problem. Presently, there are no prospective rights or duties
26 to declare and there is nothing to prevent by way of a declaratory judgment.

27 **B. *Even if Shown in Declarations From Early 2020, the Issues Are No Longer***
28 ***Present and Are Moot***

This matter is moot as to all individuals released from custody or released to state prison.
Once an individual is no longer in the custody or control of the custodial institution at which
habeas is directed, the claims are moot.

Even in the absence of a private right of action for damages, an
individual may maintain an action for equitable relief for ongoing
violations of the Constitution. (Katzberg, supra, 29 Cal.4th at p. 307,
127 Cal.Rptr.2d 482, 58 P.3d 339.) Here, however, after plaintiff was
paroled the trial court granted defendants’ motion and dismissed
plaintiff’s claims for injunctive and declaratory relief on the ground

1 these claims had become moot. Plaintiff contends this dismissal was
2 error. Again, we disagree.

3 (*Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 257.) The
4 Court went on to caution against advisory opinions:

5 An issue becomes moot when some event has occurred which
6 “deprive[s] the controversy of its life.” (*Bocato v. City of Hermosa*
7 *Beach* (1984) 158 Cal.App.3d 804, 808, 204 Cal.Rptr. 727.) The
8 policy behind a mootness dismissal is that “courts decide justiciable
9 controversies and will normally not render advisory opinions.”
10 (*Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th
11 1174, 1179, 49 Cal.Rptr.3d 825.)

9 (*Id.*)

10 The reason the issues become moot is because after an individual is released, the
11 custodial institution no longer has custody or control of the inmate nor authority over their
12 conditions of confinement.

13 It is clear that upon plaintiff's parole she was no longer under the
14 physical control of CDCR, and the challenged conduct no longer
15 applied to her. Thus, any injunction or declaratory judgment would
16 not impact her. Indeed, plaintiff's arguments in the trial court
17 acknowledged as much.

16 (*Id.*)

17 As described previously, the only individual remaining in the custody of the Orange
18 County Sheriff's Department is Sandy Gonzalez pursuant to a detention and bail order. While it
19 is true that if an individual's liberty is “substantially restrained” by parole or probation
20 conditions, they may still petition for habeas relief, nowhere have Petitioners established that
21 **any** named individual in this lawsuit is substantially restrained **presently** (after release) such that
22 they are a proper habeas corpus petitioner here. This is jurisdictional to the court's ability to
23 provide writ relief. In addition, as the court in *Giraldo* described: “The question was not
24 whether plaintiff remained in CDCR custody, as she argues, but whether there remained a
25 controversy that could be resolved by the court in a manner that would affect her.” (*Id.* at 257-
26 58.)

27 Even when a case is moot, one may claim that a court should exercise its discretion to
28 decide the legal issues presented by the petition because otherwise it is likely that those issues

1 will never be reviewed, where the same problem is likely to arise again³⁶ or where the issue is
2 likely to affect many people and come up over and over again, the case is a good example of the
3 problem and it thoroughly presents the facts and law.³⁷ (*In re Davis* (1979) 25 Cal.3d 384; *In re*
4 *Harrell* (1970) 2 Cal.3d 675, 682.) The circumstances of this case do not warrant such
5 extraordinary discretionary relief, as the gravamen of the claims is not proven.

6 And this matter is moot directly as to Sandy Gonzalez *and all “similarly situated”*
7 because of the demonstrably low COVID-19 exposure risk at the Orange County Jail. Similarly
8 situated individuals to Petitioner, Sandy Gonzalez, would be pretrial detainees held on detention
9 and bail orders. There is no other “representative” before this Court that is in the custody or
10 control of the Sheriff.²⁴ The Court is not proceeding as a class action. And there has been no
11 designation as a class in this case. Even if simply designating the complaint as brought on
12 behalf of all similarly situated were enough, Sandy Gonzalez is at best representative of a
13 handful of inmates at the Jail.

14 **C. *Crime Victims Have a Constitutional Right to Be Present and Heard before Any***
15 ***“Release”***

16 Article I, Section 28, subdivision (a)(5) of the California Constitution provides:

17 Victims of crime have a collectively shared right to expect that
18 persons convicted of committing criminal acts are sufficiently
19 punished in both the manner and the length of the sentences imposed
20 by the courts of the State of California. This right includes the right to
21 expect that the punitive and deterrent effect of custodial sentences
22 imposed by the courts will not be undercut or diminished by the
23 granting of rights and privileges to prisoners that are not required by
24 any provision of the United States Constitution or by the laws of this
25 State to be granted to any person incarcerated in a penal or other
26 custodial facility in this State as a punishment or correction for the
27 commission of a crime.

28 Section 28, subdivision (a)(6) goes on to provide that:

Victims of crime are entitled to finality in their criminal cases.
Lengthy appeals and other post-judgment proceedings that challenge
criminal convictions, frequent and difficult parole hearings that
threaten to release criminal offenders, and the ongoing threat that the
sentences of criminal wrongdoers will be reduced, prolong the
suffering of crime victims for many years after the crimes themselves
have been perpetrated. This prolonged suffering of crime victims and
their families must come to an end.

²⁴ Petitioners may include Mark Trace, who may be back in custody in Orange County.

1 To achieve these purposes, the Constitution provides for numerous rights of victims of
2 crimes. The list of victim rights is found in subsection (b) of Article I, Section 28. These
3 enumerated rights include the following victim rights:

4 (3) To have the safety of the victim and the victim’s family considered
5 in fixing the amount of bail and release conditions for the defendant.

* * *

6 (7) To reasonable notice of all public proceedings, including
7 delinquency proceedings, upon request, at which the defendant and
8 the prosecutor are entitled to be present and of all parole or other post-
conviction release proceedings, and to be present at all such
proceedings.

9 (8) To be heard, upon request, at any proceeding, including any
10 delinquency proceeding, involving a post-arrest release decision, plea,
11 sentencing, post-conviction release decision, or any proceeding in
which a right of the victim is at issue.

12 (9) To a speedy trial and a prompt and final conclusion of the case and
any related post-judgment proceedings.

* * *

14 (12) To be informed, upon request, of the conviction, sentence, place
15 and time of incarceration, or other disposition of the defendant, the
16 scheduled release date of the defendant, and the release of or the
escape by the defendant from custody.

* * *

17 (16) To have the safety of the victim, the victim’s family, and the
18 general public considered before any parole or other post-judgment
19 release decision is made.

20 (17) To be informed of the rights enumerated in paragraphs (1)
through (16).

21 Subdivision (f) of Article I, Section 28 of the California Constitution specifies that the
22 rights enumerated above in subsection (b) are “personally enforceable by victims as provided in
23 subdivision (c).” Subdivision (f) also provides that:

24 [V]ictims of crime have additional rights that are shared with all of
25 the People of the State of California. These collectively held rights
include, but are not limited to, the following:

26 * * *

27 (3) Public Safety Bail. A person may be released on bail by sufficient
28 sureties, except for capital crimes when the facts are evident or the
presumption great. Excessive bail may not be required. In setting,
reducing or denying bail, the judge or magistrate shall take into

1 consideration the protection of the public, the safety of the victim,
2 the seriousness of the offense charged, the previous criminal record
3 of the defendant, and the probability of his or her appearing at the
trial or hearing of the case. Public safety and the safety of the victim
shall be the primary considerations.

4 (Cal. Const., art. I, § 28, subd. (f).)

5 Presently, should the Court be considering “release” of any inmates pursuant to the
6 Petition, it does not appear provisions have been made for compliance with the Constitutional
7 rights of victims as described in Article I, Section 28.

8 **D. *The Orange County Jails Are Not San Quentin. The Orange County Sheriff’s***
9 ***Department is not CDCR. And this case is not Von Staich.***

10 In *Von Staich* the court found it appropriate to wade into habeas relief on entirely different
11 facts than those presented here. Should this Court look to the merits of Petitioners’ allegations
12 in this case and compare them to the facts in *Von Staich*, it will see that the two cases are in
13 sharp factual contrast with one another.

14 First, as of November 13, 2020, there have been 580 total *cumulative* COVID-19 cases
15 and 5,685 cumulative negative cases in the Orange County Jail. (See Balicki Decl. Exhibit P for
16 further detail and up to data.) As of November 13, there are 3,830 inmates housed in the Orange
17 County Jail, and ***only 6 COVID-19 positive cases; 5 are new bookings***, and 1 inmate is from
18 general population. (*Id.*; Chiang Decl.) Moreover, there have been zero inmate deaths to date.

19 Compared to the facts in *Von Staich*, San Quentin housed approximately 3,500 inmates
20 and had 2,200 confirmed cases of COVID-19 and 28 deaths. (*In re Von Staich*, at *3.) At the
21 time the court in *Von Staich* issued its ruling, there were around 3,500 inmates at San Quentin.
22 (*Von Staich* at *4.) The court found that the “infection and mortality rates at San Quentin are
23 higher than the rate for prisons statewide, and considerably higher than the rates for California’s
24 general population.” (*Id.*) The situation at San Quentin is not even comparable to the
25 circumstances at the Orange County Jail. ***As of today, the Orange County Jail is operating at***
26 ***.16% positivity rate***, including the new bookings who enter the Sheriff’s custody already
27 exposed or infected with the virus. (See Petitioners’ App. at 559; Exhibit B for up to date
28 numbers.) San Quentin was operating at a 75% infection rate. (*Von Staich, supra*, at *5.)

1 Second, the Sheriff, on his own, and under his executive authority under Government
2 Code section 8658, did not wait, and implemented a strategy *in March 2020* to reduce the
3 population in the Orange County Jail to allow for as much social distancing as possible, while
4 balancing the need for public safety. (See Petitioners’ App. at 545-546 for more detail.) The
5 Sheriff has maintained a list of all medically vulnerable inmates housed at the Jail and routinely
6 reviews the medically vulnerable list to see if there are sentenced inmates who have 6 months or
7 less remaining on their sentence who qualify for early release. The Sheriff employs the same
8 procedure for non-medically vulnerable inmates with 60 days or less remaining on their
9 sentence. (FAC ¶ 6; Petitioners’ App. at 565.) This procedure has freed up enough housing in
10 the Jail to allow the Sheriff to implement a 14-day day quarantine for all new bookings as well
11 as existing inmates who are confirmed and/or suspected of having COVID-19, all consistent
12 with CDC Guidelines. (FAC ¶¶ 8, 48, 61; see also Petitioners’ App. 545-550 for details on each
13 CDC Guideline being implemented by the Sheriff.)

14 Compared to *Von Staich*, after the COVID-19 outbreak at San Quentin, the facility’s
15 receiver who was appointed in the *Plata* matter, called upon a doctor from the University of
16 California San Francisco to visit San Quentin and provide guidance on how to contain the
17 burgeoning transmission of COVID-19 there. (*In re Von Staich, supra*, at * 4.) The doctor
18 issued an urgent memo recommending that the prison population be reduced to 50% of current
19 capacity. (*Id.*) Yet, San Quentin did not abide by the urgent memo.

20 CDCR did not implement the 50 percent reduction deemed essential
21 by the Urgent Memo solicited in its behalf by the federal receiver, but
22 rather established a “unified command center” at the prison “to
23 coordinate custody and medical response,” established alternative
24 care sites within existing San Quentin facilities, distributed personal
25 protective equipment (PPE) to inmates and staff, implemented inmate
26 and staff testing, increased staffing and cleaning procedures, and
27 reduced its population “through the suspension of intake from county
28 jails, expedited releases and natural releases from the prison.” As of
August 12, 2020, the inmate population at San Quentin had been
reduced to 3,129 from 4,051 in March 2020, a reduction of 922
inmates (or 23%).

(*In re Von Staich, supra*, at *6.)

1 As a result, the court in *Von Staich* found that:

2 If CDCR's most senior physicians, who are deeply involved in
3 CDCR's efforts to contain COVID-19 at San Quentin, or any other
4 qualified scientists, felt the decarceration deemed essential by the UC
5 experts was unnecessary, one would expect the Attorney General to
6 have presented that evidence. He did not, nor does the return allege
7 facts contradicting the experts' conclusions, including the need for a
8 50 percent reduction in the prison population.

9 The situation at San Quentin is clearly exigent, as lives are at stake,
10 and the prompt response of an appellate court ***will enable the Marin
11 County Superior Court to act with greater authority and more
12 expeditiously than it otherwise might.*** The issue before us is simply
13 whether respondents' disregard of the experts' conclusion that a 50
14 percent population reduction is essential constitutes the "deliberate
15 indifference" necessary to sustain petitioner's constitutional claim.
16 That issue is one of law, not fact.

17 (*In re Von Staich, supra*, at *8 [emphasis added])

18 Lastly, the appellate court in *Von Staich* acknowledged that it was acting "with greater
19 authority and more expeditiously than it otherwise might" due to the exigent circumstances at
20 San Quentin. (*Id.*) This demonstrates the unusual situation presented to the court in *Von Staich*.
21 Moreover, the facts at the Orange County Jail are not exigent, as they were in San Quentin.
22 Release up to 50% (we did), when court looked at releasees 60% were lifers or 2d or 3rd strikers
23 not considered for release, they couldn't get to 50% reduction without considering releasing
24 some of this population. We are a different inmate population with more flexibility. All
25 sentenced with six months or 60 days. How many? Use of discretionary authority is not an
26 abuse (expert said release, they said no consideration of 60%) no abuse of discretion or abuse of
27 discretion for failing to "consider" release. This case might be comparable to *Von Staich* if,
28 after meeting with justice partners and the court, recommendation were made or ordered, which
the Sheriff ignored. Instead, the Sheriff has led the charge to get ahead of and mitigate the
impacts of COVID-19 in the institutions that he oversees.

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1 **PROOF OF SERVICE**

2 I declare that I am a citizen of the United States employed in the County of Orange, over
3 18 years old and that my business address is 333 W. Santa Ana Blvd., Suite 407, Santa Ana,
4 California 92701; and my e-mail address is marzette.lair@coco.ocgov.com. I am not a party to
5 the within action.

6 On November 16, 2020, I served the foregoing **RESPONDENT'S RETURN TO**
7 **ORDER TO SHOW CAUSE RE: PETITION FOR WRIT OF HABEAS CORPUS;**
8 **OPPOSITION TO WRIT OF MANDATE, INJUNCTIVE AND DECLARATORY**
9 **RELIEF; MEMORANUDM OF POINTS AND AUTHORITIES** on all other parties to this
10 action by placing a true copy of said document in the following manner:

11 BY ELECTRONIC SERVICE: Pursuant to California Rules of Court, rule 2.251(c)(2) et
12 seq., I caused an electronic version of the document(s) to be sent to the person(s) listed below.

13 I declare under penalty of perjury under the laws of the State of California that the
14 foregoing is true and correct.

15 Dated: November 16, 2020

16 
17 _____
18 Marzette L. Lair

19 **NAMES AND ADDRESSES TO WHOM SERVICE WAS MADE**

20 Attorneys for Petitioners: Monique Castillo, Cynthia Campbell, Sandy Gonzalez, Cecibel
21 Caridad Ortiz, Mark Trace, and Don Wagner:

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28 **PROOF OF SERVICE**