

April 22, 2020

Kern County Board of Supervisors
Kern County Administrative Office
1115 Truxtun Avenue, Fifth Floor
Bakersfield, CA 93301

Kern County Public Health Department
1800 Mt. Vernon Avenue
Bakersfield, CA 93306

Re: Kern County Public Health Shelter In Place Order Dated April 2, 2020

Dear Sir or Madam:

First and foremost, we the undersigned as residents and business owners in Kern County, want to thank you for your dedication and service to the County of Kern during this difficult time. We cannot even begin to comprehend all the work that is going on behind the scenes to address the COVID-19 issue. COVID-19 is without a doubt a matter that should be taken seriously. However, precautions must be proportionate to the risk, and the pros and cons of every policy must be carefully weighed and considered in light of constitutional limitations. We, as a country, have faced difficult times in the past and currently face difficult and challenging times. Yet, what makes this country unique and special is our commitment to the rule of law and a government predicated on individual, God-given rights. Rights which our Constitution protects. Rights which millions of men and women have sacrificed their lives for.

It is in difficult times like these that we must be certain to honor those sacrifices and do everything we can to protect what sets America apart, our Constitution and the freedom it guarantees. Adversity should not make us quiver in fear and surrender. As Ben Franklin said, "Any society that will give up a little liberty to gain a little security will deserve neither and lose both." In contrast "[a]n unconstitutional statute adopted by a dozen jurisdictions is no less unconstitutional by virtue of its popularity." [*Silveira v. Lockyer*, 312 F.3d 1052, 1091 (9th Cir. 2002).]

With that being said, the purpose of this letter is to address some grave concerns with the Kern County Public Health Department's April 2, 2020 Order effectively enforcing a stay-at-home order on everyone in Kern County (hereinafter referred to as the "Order").

Based on the legal citations presented in the Order and a review of relevant statutory and case law, it appears that the Order is not authorized by law, violates the United States Constitution,

is unduly vague and broad, and very likely could lead to the County of Kern being financially liable for governmental takings and additional legal claims. We feel it is important to bring these issues to your attention, and respectfully request that you rescind and replace the Order for the reasons stated herein.

The Order relies heavily on Division 105 of the Health and Safety Code regarding Communicable Disease Prevention and Control (Cal. Health and Safety Code, §§ 120100, et seq.). In reading the entirety of this Division, it becomes very clear that Division 105 of the Health and Safety Code provides authority to quarantine infected (or likely infected) individuals or personal property, but does not grant a broad power to quarantine the entire County and require healthy residents to shelter-in-place.¹ In fact, absent the local health officer's finding that an individual has the disease or is likely to have the disease, California law does not give the State or a county, including the County Health Official, broad authority to quarantine.² Further evidencing this is the reality that the Order cannot be enforced as it states. The Order relies on Health and Safety Code §120275 to state that "any person who violates this Order is guilty of a misdemeanor." Yet, §120275 requires that "notice" be given prior to enforcing a quarantine order; and §120105 requires that at a minimum such "notice" be given by certified or registered mail signed by the person served.

Nor do other health and safety related statutes, including order of the Governor, provide unlimited discretion to override civil liberties. In one of the leading cases interpreting the Emergency Services Act (Gov. Code, §§ 8550-8669.7), the California Supreme Court opined, "Thus, the Emergency Services Act makes clear that in situations of 'extreme peril' to the public welfare the State may exercise its sovereign authority to the fullest extent possible consistent with individual rights and liberties." [*Macias v. State* (1995) 10 Cal.4th 844, 854.] In a case of similar circumstances, the Court found that a quarantine of 10-12 blocks in response to 9 deaths from the bubonic plague was unreasonable, unjust, and oppressive, and therefore contrary to the laws. [*Jew Ho v. Williamson* (1900) 103 F. 10.] In that case, the court only permitted the quarantine around such places as it may have reason to believe are infected by contagious or infectious diseases, but that the general quarantine of the whole district could not be continued.

¹ See also §120235 requiring every exposed room be treated before the quarantine is lifted. It is indicated in §120215 that when there is a need for strict isolation or quarantine, the health officer shall "Ensure the adequate isolation of each case, and appropriate quarantine of the contacts and premises."

² In interpreting a public health officer's authority to order a quarantine, courts have held: (i) a mere suspicion unsupported by facts giving rise to reasonable or probable cause affords no justification for depriving persons of their liberty and subjecting them to virtual imprisonment under a purported order of quarantine. [*In re Application of Arata* (1921) 52 Cal.App. 380]; (ii) the law requires probable cause that a person held on a morals charge has an infectious disease which is communicable in order to justify the authorities in retaining such person in quarantine. [*In re Application of King* (1932) 128 Cal.App. 27]; (iii) the power of health officers to quarantine carries with it the obligation to exercise such power only when reasonable ground exists to support the belief that the person so held is infected. [*In re Martin* (Cal.App. Jan. 8, 1948) 83 Cal.App.2d 164, 188 P.2d 287, 1948 Cal. App. LEXIS 1064.]

Even more concerning is the very real likelihood that the Order is unconstitutional. The Order attempts to suspend the First Amendment, an amendment that prohibits any law prohibiting the free exercise of religion; abridging the freedom of speech; or the right of the people peaceably to assemble. This past month churches around Kern County were shuttered by a government order, on Easter Sunday no less. It also appears that people are forbidden from gathering in a peaceful protest by the Order, a clear violation of the First Amendment.³

Based on the plain language of the Order, it also infringes on the Second Amendment as the exercising of one's Second Amendment rights are not deemed "essential". Potentially delaying firearms sales indefinitely, and/or a government shutdown of gun stores entirely, as certainly could be interpreted from the Order, is most worrisome. This is happening while governments release inmates into the streets, and issue no-arrest and no-detention orders. Residents of Kern County have a Second Amendment right to protect themselves by gun ownership and the associated items. Based on the plain language of the Order, this right is being violated.

Further, the Order violates the Fifth Amendment. The Fifth Amendment guarantees the right to property without deprivation by due process of law and obligates the government to compensate any such taking.⁴ The Order, as existing, takes property owners' right to earn a living by use of their property for conducting business. This taking of property owners' rights was without due process, without compensation, and clearly infringes on the free market of commerce. Based on a plain reading of the Order, it appears that not only are all "non-essential" healthy Kern County residents placed in quarantine, the U.S. Constitution has also been quarantined.

This Order also violates the freedom of movement, a "fundamental right" as declared by the courts. [See *People v. McKelvy* (1972) 23 Cal.App.3d 1027 at 1035 where the Court held "Freedom of movement is a fundamental right" and its exercise may be restricted only when there is a clear showing of immediate necessity, a most compelling state interest, and it is narrowly tailored.] The Fact that one person can shut down an entire county, outlawing "gatherings", goes against every fabric this great nation was built on. Consider California Constitution Article 1, §1: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy". This is not merely a "reiteration of a truism", but rather a positive protection against government interference with these enumerated rights. In the words of California Chief Justice Hugh Murray, this section "was not lightly incorporated into the Constitution of this State as one of those political dogmas designed to tickle the popular ear, and conveying no substantial meaning or idea; but as one of those fundamental principles of enlightened government, without a rigorous observance of which there could be

³ The order also violates Article 1, §§3-4 of the California Constitution.

⁴ See also California Constitution Article 1, §19.

neither liberty nor safety to the citizen.” We are certain that as public officials it is your desire to uphold your oath by defending and protecting the constitutions of this state and the United States. We ask that you continue to defend those rights, even under this present public health threat (and/or any public issue, for that matter).

Finally, what should be of grave concern to the County, is the County’s potential liability for taking property. The very law the County is relying on as authority for the Order requires compensation for property destroyed [see Health and Saf. Code, §120210]. Further, it is well-founded in California law that a taking of a property interest by the government without compensation, even a temporary taking, is prohibited. The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. [*Armstrong v. United States* (1960) 364 U.S. 40, 49.] This Order has effectively shuttered businesses throughout Kern County that have been deemed “non-essential,” imposing unreasonable restrictions on lawful business and taking the lawful use of one’s property without compensation. Accordingly, business owners will likely have a claim for damages against the County of Kern for this unlawful taking. As taxpayers, we would prefer not to have this massive liability.

All the work that has been done to protect the citizens of Kern County is much appreciated and the countless hours recognized. However, we implore you to also protect our Constitutional rights. We encourage the County to hold fast to an individual’s choice to maintain human relationships, whether with friends or family, and implore you to protect the right to associate under the First Amendment against undue intrusion by the State. Safeguarding this kind of individual freedom is central to our constitutional scheme. Practicing social distancing is prudent, but it should be a matter of personal responsibility rather than an excuse to infringe on basic Constitutional rights. The purpose of the Order can be accomplished by a strong recommendation and encouraged with education rather than placing the entire County under house arrest. For these reasons we, as residents of Kern County, respectfully request that you reconsider the April 2, 2020 Order and rescind and replace it.





Sincerely,

Concerned Residents of Kern County

[Signatures on the Following Page]


Isaac L. St. Lawrence
Clayton D. Campbell
Zack Macpherson
Joe G. Williams


Paul Harman


Cassie Bittle
Andrew Sheffield
Brett Dixon
Leah Lay
Sean Minor
Doug Gosling
Mark Carroll
Eric Steinback
Jordan Little
Mark J. Bigger
Jason Giannelli
Pete Thorne
Samuel Reyna Jr.
Greg Knittel

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