

1 BENBROOK LAW GROUP, PC
BRADLEY A. BENBROOK (SBN 177786)
2 STEPHEN M. DUVERNAY (SBN 250957)
400 Capitol Mall, Suite 2530
3 Sacramento, CA 95814
Telephone: (916) 447-4900
4 Facsimile: (916) 447-4904

5 Attorneys for Petitioners
Orrin E. Heatlie and
6 California Patriot Coalition –
Recall Governor Gavin Newsom
7

8
9 SUPERIOR COURT OF CALIFORNIA
10 COUNTY OF SACRAMENTO
11

12 ORRIN E. HEATLIE and CALIFORNIA
PATRIOT COALITION – RECALL
13 GOVERNOR GAVIN NEWSOM,

14 Petitioners,

15 v.

16 ALEX PADILLA, in his official capacity as
Secretary of State of the State of California,

17 Respondent.
18
19
20
21
22
23
24

Case No.: 34-2020-80003499

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
VERIFIED PETITION FOR WRIT OF
MANDATE**

**Code Civ. Proc. § 1085; Elections Code §
13314**

**STATEWIDE ELECTION MATTER
IMMEDIATE ACTION REQUESTED**

**ELECTION MATTER ENTITLED TO
CALENDAR PREFERENCE PURSUANT
TO ELECTIONS CODE § 13314(a)(3)**

Hearing Date: TBD

Time: TBD

Department: 17

Petition Filed: October 2, 2020

25 **ELECTION MATTER ENTITLED TO PRIORITY**

26 **ELECTION-RELATED DEADLINE: NOVEMBER 17, 2020**

27 **HEARING REQUESTED BY OCTOBER 30, 2020**
28

TABLE OF CONTENTS

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

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 3

 A. Petitioner Heatlie Initiated A Recall of Governor Newsom In February 2020 3

 B. Governor Newsom And California Counties Impose Widespread Restrictions In Response To Covid-19 4

 C. While Petitioners Have Diligently Pursued Petition Signatures, The State’s Pandemic-Related Restrictions Have Significantly Inhibited Their Efforts 7

III. ARGUMENT 10

 A. Legal Authority to Grant Writ Relief And Declaratory Judgment 10

 B. The People’s Recall Power Must Be Jealously Guarded To Preserve Its Exercise 10

 C. Petitioners Satisfy The Familiar Standards Governing Their First Amendment Claim, So The 160-Day Deadline For Submission of Signatures Should Be Extended 12

 1. The State’s Pandemic-Related Restrictions Have Significantly Inhibited Petitioners’ Ability To Exercise The Recall Power 13

 2. Petitioners Have Diligently Collected Signatures To Qualify The Recall 14

 3. The 160-Day Circulation And Filing Deadline Does Not Satisfy Strict Scrutiny As Applied To Petitioners During The Covid-19 Pandemic 16

 D. Petitioners’ Signature-Gathering Deadline Should Be Extended Proportionately To Account For The Effect Of The Government’s Restrictions 18

III. CONCLUSION 19

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

TABLE OF AUTHORITIES

Cases

Angle v. Miller,
673 F.3d 1122 (9th Cir. 2012)..... 2, 12, 15, 16

Associated Home Builders etc., Inc. v. City of Livermore,
18 Cal.3d 582 (1976) 11

Brosnahan v. Brown,
32 Cal.3d 236 (1982) 11

Brown v. Pitchess,
13 Cal.3d 518 (1975) 10

Buckley v. Am. Constitutional Law Found.,
525 U.S. 182 (1999)..... 11, 12

City of Santa Monica v. Stewart,
126 Cal.App.4th 43 (2005) 11

Fair Maps Nevada v. Cegavske,
2020 WL 2798018 (D. Nev. May 29, 2020)..... *passim*

Flint v. Dennison,
488 F.3d 816 (9th Cir. 2007)..... 10

Haywood v. Drown,
556 U.S. 729 (2009)..... 10

Hoffman v. State Bar of Cal.,
113 Cal.App.4th 630 (2003) 10

Jackson v. Cty. of Los Angeles,
60 Cal.App.4th 171 (1997) 14

Laam v. McLaren,
28 Cal.App. 632 (1915)..... 11

Meyer v. Grant,
486 U.S. 414 (1988)..... 11, 12

Mission Hosp. Reg'l Med. Ctr. v. Shewry,
168 Cal.App.4th 460 (2008) 10

Molar v. Gates,
98 Cal.App.3d 1 (1979)..... 10

Robins v. Pruneyard Shopping Ctr.,
23 Cal.3d 899 (1979) 11, 16

Wenke v. Hitchcock,
6 Cal.3d 746 (1972) 10

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

Will v. Mich. Dep't of State Police,
491 U.S. 58 (1989)..... 10

Constitutional Provisions and Statutes

42 U.S.C. § 1983 10

Cal. Const., art. 2, § 15(a), (b) 17

Cal. Const., art. II, § 13 10

Cal. Const., art. II, § 14(a), (b)..... 1, 3, 4

Code Civ. Proc. § 1085 10

Elec. Code § 104 13

Elec. Code § 9014(b) 12

Elec. Code § 11006 3

Elec. Code § 11020 3

Elec. Code § 11021 3

Elec. Code § 11022 3

Elec. Code § 11046 13

Elec. Code § 13314(a)(1)..... 10

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

I. INTRODUCTION

In February 2020, Petitioner Orrin E. Heatlie filed a notice of intention to recall Governor Gavin Newsom with Respondent Secretary of State. The notice highlights several objections to Governor Newsom’s leadership, and Petitioners contend that the Governor’s response to the Covid-19 pandemic only heightens the urgency of a recall, as the Governor has massively constrained Californians’ civil liberties. But these very same pandemic restrictions have frustrated the First Amendment rights of Petitioners and their supporters by imposing substantial hurdles on their ability to gather the number of signatures required to initiate a recall election within the applicable deadlines.

California law gives recall proponents 160 days to collect and file sufficient signatures to qualify a recall. To initiate a recall of a statewide officer, a proponent must collect signatures from registered voters equivalent to 12 percent of the last vote for the office. Cal. Const., art. II, § 14(b). (The current threshold to recall the Governor is 1,495,709 signatures.) The Secretary of State’s office approved the recall petitions for circulation on June 10, 2020. Under the 160-day rule, Petitioners have until November 17 to collect nearly 1.5 million valid signatures to qualify the recall.

But the ongoing restrictions imposed by the government in response to the Covid-19 pandemic have severely inhibited Petitioners’ ability to circulate petitions and gather signatures in support of the recall effort. Many of the traditional places to gather signatures – shopping malls, sporting events, concerts, festivals, fairs, and political rallies – are unavailable. Large social gatherings are prohibited. Many “non-essential” businesses remain closed, and the State’s orders continue to restrict many of the most common day-to-day interactions. The few businesses that are allowed to open do so with limited capacity and are subject to physical distancing requirements. More fundamentally, our citizens have been told to remain socially distant from everyone other than members of their household, which makes it virtually impossible to conduct in-person signature gathering at the scale required to comply with the 160-day rule. In short, the government restrictions make it practically impossible for Petitioners to collect sufficient signatures to initiate a recall by the 160-day deadline.

1 Respondent Secretary of State recognized that applying the signature-gathering deadlines
2 to two initiative campaigns would constitute violations of the First Amendment in light of all of
3 these burdens. *Macarro v. Padilla*, Case No. 34-2020-80003404, and *Sangiaco v. Padilla*, Case
4 No. 34-2020-80003413. Indeed, Respondent stipulated to 180-day extensions in those cases. The
5 Court granted extensions in July 2020. When the *Macarro* petitioners asked the Court a second
6 time for an additional extension, Respondent stipulated that the government’s Covid-19
7 “restrictions [since the July 2020 judgment] have continued to make it extremely difficult for
8 petitioners to engage in signature-gathering activities for their proposed initiative,” and the Court
9 granted further relief on that basis.

10 Faced with a challenge to a powerful Governor in this case, however, the Secretary of State
11 – the officer charged with administering California’s election laws on a neutral basis – has refused
12 to say whether it will oppose Petitioners’ request for relief. But the legal test does not turn on the
13 political purpose of the signature-gathering, so the result should be the same here.

14 The signature-gathering deadline is unconstitutional and unenforceable as applied to
15 Petitioners for the same reasons the Secretary of State agreed in *Macarro* and *Sangiaco*:
16 applying signature-gathering deadlines in light of the pandemic-related government orders
17 burdening signature gathering would deprive Petitioners of their right to petition under the First
18 Amendment and their right to initiate a recall as provided in the California Constitution.
19 Petitioners satisfy *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012), because they have been
20 diligent – they have obtained nearly 700,000 signatures – and the government’s Covid-19
21 restrictions have “significantly inhibited” their ability to qualify the recall. As a result, the
22 deadline is subject to strict scrutiny, and, just as this Court recognized in *Macarro* and
23 *Sangiaco*, the signature-gathering deadline cannot meet this standard.

24 Petitioners respectfully ask the Court to preserve their First Amendment rights by
25 extending the 160-day deadline to allow Petitioners additional time, consistent with the relief
26 granted in the related cases, to circulate and file recall petitions. If a hearing is necessary,
27 Petitioners respectfully request that such a hearing be held by October 30.

28

1 **II. FACTUAL BACKGROUND**

2 **A. Petitioner Heatlie Initiated A Recall of Governor Newsom In February 2020.**

3 On February 20, 2020, Petitioner Orrin E. Heatlie filed a Notice of Intent to Circulate a
4 Recall Petition against Governor Gavin Newsom with the Secretary of State. See Elec. Code §§
5 11006, 11020, 11021, 11022. Section 11020(b) requires a “statement, not exceeding 200 words in
6 length, of the reasons for the proposed recall.” Petitioner’s notice identified the following reasons:

7 Governor Newsom has implemented laws which are detrimental to the citizens of
8 this state and our way of life. Laws he endorsed favor foreign nationals, in our
9 country illegally, over that of our own citizens. People in this state suffer the
10 highest taxes in the nation, the highest homelessness rates, and the lowest quality of
11 life as a result. He has imposed sanctuary state status and fails to enforce
12 immigration laws. He unilaterally over-ruled the will of the people regarding the
death penalty. He seeks to impose additional burdens on our state by the following;
removing the protections of Proposition 13, rationing our water use, increasing
taxes and restricting parental rights. Having no other recourse, we the people have
come together to take this action, remedy these misdeeds and prevent further
injustices.

13 Heatlie Decl., ¶ 3. Because the recall was launched before the Covid-19 pandemic, the statement
14 of reasons did not include the Governor’s subsequent curtailment of Californians’ civil liberties in
15 response to the pandemic did not appear in the reasons. But those measures have taken a central
16 importance to the recall campaign. *Id.*, ¶ 4.

17 On or about March 2, 2020, Governor Newsom filed his answer with the Secretary of State.
18 *Id.*, ¶ 5. Between March and early June, Heatlie was in contact with Respondent Padilla’s office
19 regarding the content of the recall petition, and submitted several drafts of the petition for the
20 Secretary of State’s approval. *Id.*

21 On June 10, 2020, the Secretary of State approved petitions for circulation for the recall of
22 Governor Newsom. Heatlie Decl., ¶ 6. Proponents have 160 days from June 10 – that is, until
23 November 17, 2020 – to circulate petitions and collect sufficient signatures to initiate a recall
24 election. Cal. Const., art. II, § 14(a). In his memorandum setting the recall calendar here,
25 available online at <https://elections.cdn.sos.ca.gov/recalls/newsom-calendar.pdf>, the Secretary of
26 State confirmed that Petitioners must collect 1,495,709 signatures (12 percent of the 12,464,235
27 votes cast for Governor in the November 2018 Statewide General Election) to initiate a recall
28 election. This substantial undertaking is heightened by a geographic distribution requirement:

1 California law requires a proponent to demonstrate baseline support by collecting signatures
2 equivalent to at least 1 percent of the last vote for the office in at least 5 different counties. Cal.
3 Const., art. II, § 14(b).

4 **B. Governor Newsom And California Counties Impose Widespread Restrictions In**
5 **Response To Covid-19.**

6 Between Heatlie’s filing of the notice of intent in February and the Secretary of State’s
7 approval of the petition for circulation four months later, California’s societal landscape was
8 completely upended by the Covid-19 pandemic – and by the State’s response to it. The relevant
9 timeline is as follows:

10 **March 4, 2020: Governor Proclaims a State of Emergency.** In response to the
11 pandemic, Governor Newsom proclaimed a State of Emergency to exist in California as a result of
12 the threat of Covid-19. RJN Ex. 1.

13 **March 19, 2020: Governor Issues a “Stay at Home” Order and Closed All “Non-**
14 **Essential” Businesses.** Executive Order N-33-20 directs all Californians to stay home except to
15 go to an essential job or to shop for essential needs. RJN Ex. 2. The State Public Health Officer
16 follows suit with a complementary stay-at-home order. RJN Ex. 3.

17 **May 4, 2020: Governor Issues Order Outlining Gradual Reopening Process.**
18 Executive Order N-60-20 permits local jurisdictions to gradually reopen non-essential businesses
19 consistent with the so-called “Stage 2” (of four stages) reopening criteria and guidance developed
20 by the State Public Health Officer. RJN Ex. 4. A few days later, the State Public Health Officer
21 issues an order authorizing local jurisdictions to proceed with Stage 2 reopening subject to their
22 compliance with criteria published by the California Department of Public Health. RJN Ex. 5.

23 **June 5, 2020: California Department of Public Health Announces “Stage 3”**
24 **Reopening Criteria.** The California Department of Public Health issues a press release and
25 guidelines for counties to begin moving to “Stage 3” starting June 12. RJN Ex. 6.

26 **June 9, 2020: Initiative Proponents File *Macarro* Writ Petition.** Writ petition requests
27 an extension of circulation deadline because the government’s Covid-19 restrictions significantly
28

1 inhibited their ability to gather signatures. *Macarro v. Padilla*, Sacramento Cty. Super. Ct. Case
2 No. 34-2020-80003404.

3 **June 10, 2020: Secretary of State Approves Recall Petitions for Circulation.**

4 **June 23, 2020: Initiative Proponents File *Sangiaco* Writ Petition.** Writ petition
5 requests an extension of circulation deadline because the government’s Covid-19 restrictions
6 significantly inhibited their ability to gather signatures. *Sangiaco v. Padilla*, Sacramento Cty.
7 Super. Ct. Case No. 34-2020-80003413.

8 **July 1, 2020: Governor Expands Restrictions for Counties on the State’s “Monitoring
9 List.”** The Governor and Department of Public Health direct counties on the “Monitoring List” to
10 close indoor operations in several sectors: dining, movie theaters, entertainment centers, zoos, and
11 museums. These orders extended to many of the state’s most populous counties (including Los
12 Angeles, Orange, Riverside, San Bernardino, Santa Clara, Sacramento, Contra Costa, Fresno, and
13 Kern). RJN Ex. 7. This followed the Governor’s June 28 order closing bars and brewpubs in
14 counties on the list. RJN Ex. 8.

15 **July 2, 2020: This Court Grants Petitions in *Macarro* and *Sangiaco*, Extending the
16 Petition Circulation Deadlines by 84 Days in Each Case.**

17 **July 13, 2020: Governor and Department of Public Health Expand Restrictions Yet
18 Again, Sweeping In 29 Counties and 80 Percent of California’s Population.** These sweeping
19 orders closed shopping malls, churches, indoor dining, movie theaters, entertainment centers, zoos,
20 museums, and “non-critical infrastructure” for the 29 counties on the Monitoring List, which cover
21 80 percent of Californians. RJN Ex. 9; *see also* Cal. Dep’t of Public Health, Press Release,
22 *California Orders Additional Restrictions to Slow Transmissions of COVID-19* (July 13, 2020),
23 <https://www.cdph.ca.gov/Programs/OPA/Pages/NR20-158.aspx>.

24 **August 26, 2020: Governor Issues Executive Order Addressing The Pandemic’s
25 Impact on the State’s Election System.** Executive Order N-76-20 extended the deadlines for
26 county elections officials to certify signatures for pending initiatives seeking to qualify for the
27 November 2022 ballot. RJN, Ex. 10. The Order references this Court’s orders extending the
28 circulation deadlines in *Macarro* and *Sangiaco*, and notes that suspending the statutory

1 deadlines to process signatures was necessary to preserve “elections officials’ ability to prepare for
2 the November 2020 election amid the COVID-19 pandemic, particularly given the ongoing
3 impacts of the COVID-19 pandemic on county elections’ officials own operations.”

4 **August 28, 2020: Governor Replaces Reopening Framework.** On August 28, 2020, the
5 State abandoned its four-stage reopening plan and replaced it with a four-tiered system that
6 evaluates counties based on weekly Covid-19 testing data. Specifically, the scope of permitted
7 activities in each county is determined based on each jurisdiction’s “risk level,” which is defined
8 by four color-coded tiers. The tiers range from “minimal” in Tier 4 (less than 1 daily new case per
9 100,000 residents) to “widespread” in Tier 1 (more than 7 daily cases per 100,000 residents).
10 Progressing up through the tiers toward largescale reopening is a slow, deliberate process:
11 Counties are required to remain in each tier for a minimum of three weeks, and must meet the next
12 tier’s criteria for two consecutive weeks before moving forward. RJN Ex. 11; *see* Blueprint for a
13 Safer Economy, available at <https://covid19.ca.gov/safer-economy/>. This new framework placed
14 over 99% of Californians in the two strictest tiers: 38 counties, representing 87% of California’s
15 population, were in Tier 1, and an additional 9 counties, representing another 12% of the State’s
16 population, were in Tier 2. Sophie Alexander, *California Retools Reopening Framework After*
17 *Summer Virus Surge*, Bloomberg Business (Aug. 28, 2020); Alexei Koseff & Catherine Ho,
18 *California’s new rules for coronavirus reopenings: It’s not all or nothing*, S.F. Chronicle (Aug.
19 28. 2020).

20 **September 15, 2020: This Court Extends the *Macarro* Petition Circulation Deadline**
21 **by Two More Months.** Based on the parties’ stipulation detailing the continuing impact of
22 government restrictions on signature gathering, this Court granted a stipulation extending the
23 circulation deadline by an additional 62 days, bringing the total extension to 146 days – nearly
24 doubling the time permitted by statute to qualify an initiative.

25 **Late September 2020: The Vast Majority of California Remains Shut Down.** The
26 current restrictions for the two highest-risk tiers (“widespread” and “substantial”) contain
27 significant limitations on commercial and social activity. Many businesses are only permitted to
28 operate on a limited basis, restaurants are subject to severe restrictions, and large gatherings

1 remain prohibited. As of September 21, 2020, of the State’s 15 most populous counties, 11 are
2 currently slotted in the “widespread” risk tier – representing nearly 25 million Californians, or
3 approximately 60% of California’s total population.¹ Duvernay Decl., ¶ 20. The other four
4 counties – another 9 million or so Californians – are categorized in the second-highest tier
5 (“substantial” risk).² And only 9 of California’s 58 counties are at a “moderate” risk level; only
6 two counties (Alpine and Modoc), which have a combined population of approximately 10,000
7 people, are at a “minimal” risk level. *Id.*, ¶ 21.

8 **C. While Petitioners Have Diligently Pursued Petition Signatures, The State’s Pandemic-**
9 **Related Restrictions Have Significantly Inhibited Their Efforts.**

10 Signature gathering usually requires going to places where the public congregates in large
11 numbers. Olson Decl., ¶¶ 9–10; Blanning Weber Decl., ¶ 8. Indeed, Petitioners launched this
12 recall in February with the aim of receiving approval from the Secretary of State in time to
13 circulate recall petitions in the spring and summer, since it would have given them access to
14 carnivals, music festivals, concerts, county fairs, and the state fair. Heatlie Decl., ¶ 7. But the
15 government’s Covid-19 restrictions ultimately prohibited all of these events. *Id.* The restrictions
16 have shuttered commercial spaces and prohibited large public events of any kind.

17 Even in those places that remained accessible, the pandemic restrictions and government
18 guidance made it more difficult for Petitioners to collect signatures. In multiple instances between
19 June and August, for instance, Petitioners’ volunteers were asked to cease signature-gathering
20 efforts in front of grocery stores after management received complaints from customers who did
21 not feel comfortable having signature gatherers on premises because of physical-distancing
22 concerns. Heatlie Decl., ¶ 10. In the places where citizen-to-citizen interaction is possible, many
23 voters are wary of engaging with a stranger in public; gathering petition signatures inherently

24 ¹ As of September 21, 2020, the Counties of Los Angeles, Riverside, San Bernardino,
25 Alameda, Sacramento, Contra Costa, Fresno, Kern, Ventura, San Mateo, and San Joaquin were
26 classified in the “widespread” risk tier. Duvernay Decl., ¶ 20. County population data based on
27 the U.S. Census Bureau’s annual estimate of the resident population for California’s counties as of
28 July 1, 2019. U.S. Census Bureau, *County Population Totals: 2010-2019*,
<https://www.census.gov/data/tables/time-series/demo/popest/2010s-counties-total.html>. *Id.*, ¶ 19.

² As of September 21, 2020, the Counties of San Diego, Orange, Santa Clara, and San
Francisco were classified in the “substantial” risk tier. Duvernay Decl., ¶ 20.

1 strains social-distancing requirements, and many feel uncomfortable engaging to the point of
2 touching a clipboard or a pen to sign a petition. Olson Decl., ¶ 9.

3 The government restrictions have also impacted Petitioners’ ability to file petitions with
4 county elections officials. In early October, the campaign team contacted each county registrar to
5 schedule an appointment to turn in petitions. Heatlie Decl., ¶ 13. Multiple officials expressed
6 concern because they were overwhelmed by work related to the upcoming general election.
7 Several of these officials asked the campaign to delay or reschedule filing. *Id.*

8 Despite the many burdens imposed by the government’s shutdown orders, Petitioners have
9 been diligent in gathering signatures in support of the recall. The recall campaign built a large
10 network of volunteers to support its signature-gathering efforts. Heatlie Decl., ¶ 12. The
11 campaign has a team of regional and county chairpersons overseeing a network of several hundred
12 volunteers managing petition circulation and drop-off locations throughout the state. *Id.* There are
13 currently 17 regional managers, 139 county-level administrators, and dozens of additional
14 volunteers serving in a managerial or supervisory capacity as “authorized personnel” to help
15 organize the campaign’s on-the-ground operations. *Id.* The recall campaign is actively relying on
16 the more than 5,000 volunteers who have registered with the campaign as it continues its work to
17 collect and process signatures. *Id.* In addition, the campaign has several political professionals
18 serving as senior advisors to manage fundraising, oversee petition circulation, and validate and file
19 signatures. *See* Heatlie Decl., ¶ 11; Blanning Weber Decl., ¶ 5; Olson Decl., ¶ 15.

20 Shortly after the petitions were approved for circulation, Petitioners hired a political
21 consulting firm to help manage the effort. Heatlie Decl., ¶ 11; Blanning Weber Decl., ¶ 5. The
22 campaign was on the verge of retaining a professional signature gathering firm in early July when
23 the State reversed its reopening efforts and Governor Newsom announced sweeping new
24 restrictions. Blanning Weber Decl., ¶¶ 5–7; Olson Decl., ¶¶ 7–8. Not only did these restrictions
25 mean that many traditional signature-gathering venues would not be available, they severely
26 burdened the campaign’s fundraising ability by prohibiting the sort of in-person rallies and
27 fundraising events that are most commonly used to raise money for political campaigns. Blanning
28 Weber Decl., ¶ 9. Moreover, the difficulties imposed by the government restrictions have driven

1 the per-signature price of retaining a signature-gathering firm to 2.5 to 3 times the cost of
2 signature-gathering in the pre-Covid era. Olson Decl. ¶ 12; Blanning Weber Decl., ¶ 7. As a
3 result, the campaign decided that it would begin collecting signatures in person using volunteers
4 for the time being. Blanning Weber Decl., ¶ 7; Olson Decl., ¶ 13.

5 Because in-person signature gathering has been so stymied by the restrictions, the
6 campaign has been forced to supplement those efforts with direct mail and online solicitations.
7 Given the extent to which these methods rely on the recipient to fill out the petition’s various
8 components, however, they traditionally offer the lowest “yield” of valid signatures among the
9 primary alternatives of signature gathering.³ Olson Decl., ¶ 16. Yet the campaign has been forced
10 to pursue them.

11 To date, Petitioners have obtained approximately 675,000 signatures, and the trajectory of
12 signature gathering has increased through the summer and into the fall. Heatlie Decl., ¶ 14; Olson
13 Decl., ¶¶ 17–18. The campaign collected approximately 50,000 signatures per week over the past
14 month. Olson Decl., ¶ 18. Based on the campaign’s current metrics, it estimates that it will
15 exceed one million signatures by the November 17 deadline, but will nevertheless likely fall short
16 of the 1,495,709 signatures needed to initiate a recall election. Heatlie Decl., ¶ 14; Olson Decl., ¶
17 18-19; Blanning Weber Decl., ¶ 11-13.

18 Based on the previous experience of Petitioners’ consultants – who have successfully
19 qualified several notable statewide measures, including the 2003 recall of Governor Gray Davis
20 – the signature gathering yield is, at best, 25% of what would be expected from comparable efforts
21 in “normal” election cycles. Blanning Weber Decl., ¶ 10; Olson Decl., ¶ 11.

22 Petitioners have brought this writ to obtain the same relief granted in the related *Macarro*
23 and *Sangiaco* cases.

24
25 _____
26 ³ When a campaign solicits signatures by direct mail or through e-mail, they rely on voters to
27 carefully follow instructions to accurately and completely fill out the petition. Olson Decl., ¶ 16.
28 Notably, this requires voters to complete and sign *both* the petition itself *and* the declaration of
circulator verifying the petition. *Id.* This leads to a low return rate (because of the additional
effort required for a voter to print, fill out, and mail a petition) coupled with a high error rate
(because voters often submit incomplete petitions or petitions that are incorrectly signed). *Id.*

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

III. ARGUMENT

A. Legal Authority to Grant Writ Relief And Declaratory Judgment.

A traditional writ of mandate lies “to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station” Code Civ. Proc. § 1085. “The availability of writ relief to compel a public agency to perform an act prescribed by law has long been recognized.” *Mission Hosp. Reg’l Med. Ctr. v. Shewry*, 168 Cal.App.4th 460, 478 (2008). Mandamus is “the correct remedy for compelling an officer to conduct an election according to law,” and “an appropriate vehicle for challenging the constitutionality of . . . official acts.” *Hoffman v. State Bar of Cal.*, 113 Cal.App.4th 630, 639 (2003) (citing *Wenke v. Hitchcock*, 6 Cal.3d 746, 751 (1972)). Petitioners are entitled to relief under section 1085 because Petitioners have a “clear right” to the protection of their state and federal constitutional rights, and Respondent Padilla has a “clear duty” to respect those rights. *Molar v. Gates*, 98 Cal.App.3d 1, 25 (1979). In addition, the Elections Code explicitly authorizes the issuance of a writ of mandate in election-related matters, including where “any neglect of duty has occurred, or is about to occur.” Elec. Code § 13314(a)(1).

This Court likewise has the authority to adjudicate Petitioners’ claim for declaratory relief under 42 U.S.C. section 1983. *Brown v. Pitchess*, 13 Cal.3d 518, 523 (1975); *Haywood v. Drown*, 556 U.S. 729, 731 (2009). Section 1983 provides authority to grant injunctive and equitable relief. *See, e.g., Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007); *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 93 (1989).

Petitioners are entitled to writ relief extending the deadline to circulate and file recall petitions, and a declaratory judgment that the application of the deadline in conjunction with the State’s pandemic-response orders violates Petitioners’ First Amendment rights.

B. The People’s Recall Power Must Be Jealously Guarded To Preserve Its Exercise.

“Recall is the power of the electors to remove an elective officer.” Cal. Const., art. II, § 13. The statewide recall power was added to the California Constitution in 1911, along with the rights of initiative and referendum. Direct democracy is now a key structural element of the California Constitution. Given their shared history, the recall, just as much as the initiative and referendum,

1 is “one of the most precious rights of our democratic process.” *Associated Home Builders etc.,*
2 *Inc. v. City of Livermore*, 18 Cal.3d 582, 591 (1976) (citation omitted). And because it is the “duty
3 of the courts to jealously guard the right of the people,” *id.*, courts construe the people’s direct
4 democracy powers liberally “to promote the democratic process.” *Brosnahan v. Brown*, 32 Cal.3d
5 236, 241 (1982). *See, e.g., Laam v. McLaren*, 28 Cal.App. 632, 638 (1915) (the recall “power is
6 given [to the people] by the constitution and statutes enacted in aid of this power should be
7 liberally construed”).

8 The First Amendment right to petition is intertwined with the people’s recall power
9 because proponents must gather signatures to initiate a recall election. The California Supreme
10 Court has long recognized that circulation of petitions concerning political change plays a central
11 role in the State’s system of government, particularly given California’s robust direct democracy
12 mechanisms. The “right to petition [is] an essential attribute of governing,” which is “vital to a
13 basic process in [California’s] constitutional scheme – direct initiation of change by the citizenry
14 through initiative, referendum, and recall.” *Robins v. Pruneyard Shopping Ctr.*, 23 Cal.3d 899,
15 907–08 (1979); *cf. City of Santa Monica v. Stewart*, 126 Cal.App.4th 43, 73 (2005) (“Advocacy
16 for an Initiative and adoption of the measure are, without question, a fundamental exercise of the
17 First Amendment right to petition.”). And “because of the large number of signatures required to
18 succeed in an initiative, referendum, or recall drive, guaranteeing access to voters is essential to
19 make meaningful the right to mount such a drive.” *Robins*, 23 Cal.3d at 908 n.4.

20 The U.S. Supreme Court has similarly confirmed that the circulation of petitions
21 concerning political change is at the core of the First Amendment’s protections. *Buckley v. Am.*
22 *Constitutional Law Found.*, 525 U.S. 182, 186 (1999) (petition circulation “is ‘core political
23 speech,’ because it involves ‘interactive communication concerning political change’”); *Meyer v.*
24 *Grant*, 486 U.S. 414, 421, 425 (1988) (observing that petition circulation “of necessity involves
25 both the expression of a desire for political change and a discussion of the merits of the proposed
26 change,” and concluding that the First Amendment’s protection of circulation is “at its zenith”).
27 Regulations that “make[] it less likely that [proponents] will garner the number of signatures
28 necessary to place [a] matter on the ballot” implicate First Amendment concerns by “limiting

1 [proponents’] ability to make the matter the focus of statewide discussion.” *Meyer*, 486 U.S. at
2 423. Accordingly, when evaluating ballot-access restrictions in the signature-gathering context,
3 “the First Amendment requires [courts] to be vigilant . . . , to guard against undue hindrances to
4 political conversations and the exchange of ideas.” *Buckley*, 525 U.S. at 192.

5 **C. Petitioners Satisfy The Familiar Standards Governing Their First Amendment Claim,
6 So The 160-Day Deadline For Submission of Signatures Should Be Extended.**

7 Respondent Secretary of State has repeatedly acknowledged that the State’s pandemic-
8 related government orders have imposed such extraordinary burdens on signature gathering that
9 proponents should have additional time to gather them. In the *Macarro* and *Sangiaco* cases
10 brought by initiative proponents challenging the 180-day statutory circulation deadline set out in
11 Elections Code section 9014(b), the Secretary of State stipulated to proposed judgments that would
12 allow the proponents an additional six months to gather signatures to qualify for the 2022 ballot –
13 twice the amount of time authorized by law. RJN Exs. 12 (*Macarro*) & 13 (*Sangiaco*). In each
14 case, this Court issued a writ of mandate extending the circulation period to account for the
15 burdens imposed by the government’s pandemic response. RJN Exs. 14 (*Macarro*) & 15
16 (*Sangiaco*). And when the court-ordered extension proved insufficient to allow sufficiently fair
17 time to gather the needed signatures in *Macarro*, the Secretary stipulated again, just a few weeks
18 ago, to an additional 62 days of time to gather signatures, and the Court granted the additional
19 time. RJN Ex. 16.

20 This Court’s analysis in *Macarro* and *Sangiaco* confirms that Petitioners are entitled to
21 similar relief here. In both cases, the Court looked to the familiar legal test adopted by the Ninth
22 Circuit in *Angle v. Miller*, which held that “ballot access restrictions place a severe burden on core
23 political speech, and trigger strict scrutiny, when they significantly inhibit the ability of initiative
24 proponents to place initiatives on the ballot.” 673 F.3d 1122, 1133 (2012). Under *Angle*, strict
25 scrutiny is required to justify a ballot-access limitation when (1) proponents have been “reasonably
26 diligent” in seeking to qualify for the ballot, and (2) the government restrictions “significantly
27 inhibit” ballot access. *Angle*, 673 F.3d at 1133; see *Fair Maps Nevada v. Cegavske*, 2020 WL
28 2798018 at *11–14 (D. Nev. May 29, 2020) (adopting *Angle* test and applying strict scrutiny to

1 analyze signature-gathering regulations for Nevada’s initiative process in light of the Covid-19
2 pandemic).

3 Petitioners readily meet this standard.

4 **1. The State’s Pandemic-Related Restrictions Have Significantly Inhibited**
5 **Petitioners’ Ability To Exercise The Recall Power.**

6 That California’s Covid-19 restrictions have severely burdened petitioning activity cannot
7 be disputed. California law effectively requires in-person circulation of recall petitions. When
8 obtaining signatures, each section of the petition must contain the name of the person circulating
9 the petition and a statement made under penalty of perjury that the circulator personally witnessed
10 each signature. Elec. Code §§ 11046 & 104. And by its nature, signature gathering involves
11 interactive communications with voters about political change, which is done in close physical
12 proximity. This generally requires interpersonal contact so that voters can review a petition and
13 communicate about its merits, while circulators answer questions about how to sign a petition and
14 witness the voter signing the petition. This level of in-person interaction is obviously
15 compromised by the State’s physical-distancing guidelines.

16 The government’s pandemic response has severely limited Petitioners’ ability to circulate
17 petitions and obtain sufficient signatures to qualify the initiative. The government has prohibited
18 all large gatherings, including the sort of public events that are traditionally used for signature
19 gathering (sporting events, fairs, festivals, concerts, political rallies, and the like). And the
20 government has effectively shuttered traditional commercial spaces (like shopping malls), banned
21 gatherings at churches, and prohibited or severely restricted other activity it has deemed “non-
22 essential” or “non-critical” in the vast majority of the State. The net result is that there are few
23 opportunities for Petitioners’ volunteers to encounter and interact with voters.

24 The showing above and the declarations filed herewith easily establish that the State’s
25 restrictions have significantly burdened Petitioners’ signature-gathering activities. Respondent
26 Secretary of State could not dispute this in any event, as he is bound by judicial estoppel from
27
28

1 changing positions.⁴ The Secretary has already stipulated – three times – to relief because the
2 government’s pandemic-related restrictions significantly inhibit the ability to circulate petitions
3 and gather signatures. RJN Exs. 12, 13, & 16. The last such stipulation re-affirmed the burden
4 just 17 days before this case was filed. RJN Ex. 16, ¶ 6 (“The [government] restrictions described
5 above have continued to make it extremely difficult for petitioners to engage in signature-
6 gathering activities for their proposed initiative.”).

7 The doctrine of judicial estoppel precludes the Secretary of State from changing this
8 position now that he is faced with a petition measure raising a political issue he may not agree
9 with. In both *Macarro* and *Sangiaco*, this Court “accepted . . . as true” the Secretary of State’s
10 position (and the position of the petitioners in those cases) that the government restrictions
11 inhibited signature gathering activity and granted relief on that basis – Respondent cannot change
12 course now and take a “totally inconsistent” position. *Jackson*, 60 Cal.App.4th at 183.

13 2. Petitioners Have Diligently Collected Signatures To Qualify The Recall.

14 Despite the burdens imposed by the government’s shutdown orders, Petitioners have been
15 diligent in gathering signatures in support of the recall. Petitioners have built a huge network of
16 volunteers running grassroots signature-gathering operations throughout the state. They have hired
17 professional political operatives to manage the petition drive. In addition, the campaign has
18 supplemented its in-person efforts with direct mail and e-mail solicitations to gather additional
19 signatures. To date, Petitioners have gathered more than 675,000 signatures.

20 Petitioners’ consultants – who have qualified several notable statewide measures, including
21 the 2003 recall of Governor Gray Davis – have attested to the campaign’s diligence. They
22 estimate that the signature gathering yield is, at best, 25% of what would be expected from
23 comparable efforts in “normal” election cycles. Blanning Weber Decl., ¶ 10; Olson Decl., ¶ 11.
24 And they affirm that the campaign’s signature-gathering efforts would have resulted in the

25 ⁴ The doctrine of judicial estoppel applies when “(1) the same party has taken two positions;
26 (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party
27 was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as
28 true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a
result of ignorance, fraud, or mistake.” *Jackson v. Cty. of Los Angeles*, 60 Cal.App.4th 171, 183
(1997).

1 collection of more than enough signatures to initiate a recall election before the November 17
2 deadline in the absence of the government’s Covid restrictions. Olson Decl., ¶ 19; Blanning Decl.,
3 ¶ 11.

4 Petitioners’ diligence easily surpasses the constitutional baseline required by *Angle*, which
5 evaluates ballot-access burdens based on whether a ballot-access restriction prevents a “reasonably
6 diligent” initiative proponent from qualifying an initiative on the ballot. *Angle*, 673 F.3d at 1133–
7 34 (applying to restriction on initiative the standard used to assess ballot access restrictions on
8 candidates, where “we have held that ‘the burden on plaintiffs’ rights should be measured by
9 whether, in light of the entire statutory scheme regulating ballot access, “reasonably diligent”
10 candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing
11 so”) (citations omitted).⁵

12 Petitioners’ level of diligence far exceeds the level of diligence found sufficient in *Fair*
13 *Maps*, the case on which this Court relied to grant relief in *Macarro* and *Sangiaco*. In *Fair*
14 *Maps*, the district court found that the proponents were “reasonably diligent” despite only
15 collecting 10% of the necessary signatures (10,000 of approximately 100,000) in the two months
16 preceding the pandemic, in part because the proponents continued their work on the initiative
17 campaign even when they stopped gathering signatures because of the pandemic. 2020 WL
18 2798018 at *12–13. Here, Petitioners have continued their campaign throughout the circulation
19 period and adapted their strategy to meet the ever-changing confines of the government
20 restrictions.

21 The experience of the *Macarro* and *Sangiaco* petitioners provides further evidence of
22 the severe burden Petitioners face: Even with a paid team of professional petition circulators, the
23 government restrictions have made it “extremely difficult” to accomplish their signature-gathering
24 goals. *See Angle*, 673 F.3d at 1134 (noting plaintiffs had “not presented any evidence that, despite
25

26 ⁵ The *Fair Maps* court interpreted *Angle* to require a plaintiff to show their diligence
27 “compared to other initiative proponents.” 2020 WL 2798018 at *11. Just like the petitioners in
28 *Macarro* and *Sangiaco*, Petitioners have submitted declarations from their consultants who
provide comparative evidence based on their experience.

1 reasonably diligent efforts, they and other initiative proponents have been unable to qualify
2 initiatives for the ballot as a result of the” government restrictions hindering qualification).

3 Based on the campaign’s current metrics, it estimates that it will exceed one million
4 signatures by the November 17 deadline, but will nevertheless likely fall short of the 1,495,709
5 signatures needed to initiate a recall election. Heatlie Decl., ¶ 14; Olson Decl., ¶¶ 18-19; Blanning
6 Weber Decl., ¶¶ 11-13. Petitioners’ consultants further attest that, but for pandemic-related
7 government orders, Petitioners would have obtained the necessary number of signatures to qualify
8 the recall before the deadline. Olson Decl., ¶ 19; Blanning Weber Decl., ¶ 11.

9 If Petitioners are unable to qualify the recall election, the will of the 1 million or more
10 California voters who sign the recall petition will be frustrated. At best, Petitioners will be forced
11 to initiate a new recall effort from scratch – but even then, the People will have been deprived of
12 their right to effectively wield the recall power. Strict enforcement of the 160-day deadline would
13 pervert the purpose of the recall power by allowing state officials to effectively insulate themselves
14 from removal by passing restrictions that make it impossible for proponents to collect sufficient
15 signatures. As the California Supreme Court has observed, “guaranteeing access to voters is
16 essential to make meaningful the right to mount [a recall] drive.” *Robins*, 23 Cal.3d at 908 n.4.

17 **3. The 160-Day Circulation And Filing Deadline Does Not Satisfy Strict Scrutiny**
18 **As Applied To Petitioners During The Covid-19 Pandemic.**

19 Because Petitioners have been diligent in seeking to obtain signatures and the signature-
20 gathering deadline would prevent Petitioners from initiating a recall election, strict scrutiny
21 applies. Accordingly, Respondent must show that, under the circumstances, the deadline is
22 “narrowly tailored and advance[s] a compelling state interest.” *Angle*, 673 F.3d at 1132; *see Fair*
23 *Maps*, 2020 WL 2798018 at *14.

24 Application of the deadline under the circumstances cannot meet this standard. First, there
25 is no compelling interest in completing the signature-gathering and scheduling a recall election on
26 any particular time frame since qualifying a recall initiates an independent process and timeline for
27
28

1 a special election.⁶ *See* Cal. Const., art. 2, § 15(a). Accordingly, this situation is distinguishable
2 from one where a litigant seeks modification of a deadline that impacts an upcoming election or
3 otherwise disturbs state or county elections officials’ performance of their duties. In other words,
4 the deadline is not necessary to ensure the integrity of the election process. At most, Respondent
5 would be inconvenienced if the deadline were extended, but this is not a compelling interest in
6 light of the circumstances. *See Fair Maps*, 2020 WL 2798018 at *15 (even the government’s
7 “severe[] inconvenience[]” is not “compelling . . . during an unprecedented pandemic”).

8 Indeed, the ongoing government restrictions suggest that an extension would actually ease
9 the burden on Respondent and local elections officials. As noted above, county elections officials
10 have scrambled to accommodate Petitioners’ efforts to submit petitions, and have even asked them
11 to delay or reschedule filing. If anything, delaying a special election until after the November
12 2020 election strongly supports the orderly administration of elections, as the upcoming election
13 may require substantial ongoing efforts by the Secretary of State and county elections officials
14 throughout November as more mail ballots are counted. *See, e.g.*, State of Cal. Exec. Dep’t,
15 Executive Order N-64-20 (May 8, 2020) (executive order directing that all Californians be able to
16 vote by mail in the November election); State of Cal. Exec. Dep’t, Executive Order N-76-20 (Aug.
17 26, 2020) (detailing special procedures for November election, and acknowledging the pandemic’s
18 burden on the State’s election system).

19 But even if it is assumed that the deadline serves a compelling government purpose, it is
20 not narrowly tailored under the circumstances. Again, extending the deadline would not interfere
21 with any scheduled election (and was never going to coincide with the November 2020 election)
22 because, if Petitioners are ultimately successful in their signature gathering efforts, their effort
23 would trigger an independent recall election. *Cf. Fair Maps*, 2020 WL 2798018 at *16 (holding
24 that circulation deadline was not narrowly tailored even with an upcoming election because the
25 government “could accomplish what they normally do [to prepare for an election] in less time than
26

27 ⁶ Though not at issue here, a recall election can be consolidated with a regularly scheduled
28 statewide election if the signatures are certified between 60 and 180 days before that election. Cal.
Const., art. 2, § 15(b).

1 they normally have”). Just like this Court recognized in *Macarro* and *Sangiaco*, the deadline,
2 as applied to current circumstances, is not narrowly tailored. *See also Fair Maps*, 2020 WL
3 2798018 at *15–16 (holding that signature deadline was neither narrowly tailored nor did it serve a
4 compelling interest in light of the pandemic).

5 Finally, because Respondent signed on to the requests for relief in *Macarro* and
6 *Sangiaco*, he is precluded by judicial estoppel from reversing course and claiming that the
7 deadline is narrowly tailored.

8 **D. Petitioners’ Signature-Gathering Deadline Should Be Extended Proportionately To**
9 **Account For The Effect Of The Government’s Restrictions.**

10 Consistent with the relief granted by this Court in *Macarro* and *Sangiaco*, Petitioners
11 request that the deadline be extended proportionately based on the effect of the government’s
12 pandemic-related restrictions on their signature-gathering rate. Petitioners’ consultants estimate
13 that the signature-gathering yield is, at best, 25% of what would be expected from comparable
14 efforts in “normal” election cycles. Olson Decl., ¶ 11; Blanning Weber Decl., ¶ 10. Accordingly,
15 Petitioners’ deadline should be extended to provide an additional 75% of the time period to
16 circulate and file recall petitions.

17 This is the same method the Court used to calculate the post-reopening portion of the
18 extensions in *Macarro* and *Sangiaco*, although the requests in those cases were more aggressive
19 since they were based on the claim that petitioners were gathering signatures at 10 percent of what
20 they would have gathered in the absence of restrictions. *See* RJN Ex. 14, *Macarro* Judgment at 7
21 (extending deadline by 35 days calculated at 90% of the time since reopening because “Petitioners
22 gathered signatures at approximately 10 percent their prior rate . . . notwithstanding their diligent
23 efforts,” based on a finding that “the rate reduction is the result of government restrictions
24 responding to the Covid-19 pandemic”); RJN Ex. 15, *Sangiaco* Judgment at 7 (same). The
25 Court likewise granted a further extension in *Macarro* based on this same formula which,
26 importantly, applied during the very same time period at issue here. RJN Ex. 16, *Macarro* Sept.
27 15 Stip., ¶ 8 & Order, ¶ 2.

1 Based on the Secretary of State's June 10, 2020 approval of the recall petitions for
2 circulation and the current November 17, 2020 deadline, the Court's approach in the related cases
3 yields the following potential extensions:
4


5 Key Date	Days Elapsed	75%	New Deadline
6 Oct. 2, 2020 (Filing)	114	86	February 11, 2021
7 Oct. 30, 2020 (Potential Hearing)	142	107	March 4, 2021
8 Nov. 17, 2020 (Deadline)	160	120	March 17, 2021

9
10 **III. CONCLUSION**

11 For the reasons set forth above, the Court should grant a writ of mandate commanding
12 Respondent Padilla to suspend the November 17, 2020 deadline to circulate and file petitions for
13 the recall of Governor Gavin Newsom, and issue a declaratory judgment that application of the
14 deadline in light of the State's Covid-19 restrictions would violate Petitioners' constitutional rights
15 along with an injunction enjoining Respondent from enforcing the November 17, 2020 deadline.
16 Finally, as in the *Macarro* and *Sangiaco* cases, Petitioners request that the Court retain
17 jurisdiction over this case in the event (as in *Macarro*), modification of the extension is appropriate
18 in light of further government restrictions.
19

20 Dated: October 16, 2020

BENBROOK LAW GROUP, PC

21
22 By 
23 BRADLEY A. BENBROOK
24 Attorneys for Petitioners
25
26
27
28