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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **FOR THE COUNTY OF LOS ANGELES**

10 SAVE PV SCHOOLS, LLC, an organization. )

11 *Plaintiff/Petitioner.* )

12 vs. )

13 )  
14 CALIFORNIA DEPARTMENT OF PUBLIC )  
15 HEALTH; CALIFORNIA DEPARTMENT OF )  
16 EDUCATION; LOS ANGELES COUNTY )  
17 DEPARTMENT OF PUBLIC HEALTH; PALOS )  
18 VERDES PENINSULA UNIFIED SCHOOL )  
19 DISTRICT; DOES 1-30. )

20 *Defendants/Respondents.* )

Case No.: 21TRCV00895

**AMENDED VERIFIED PETITION FOR  
WRIT OF MANDATE AND PROHIBITION  
- PEREMPTORY OR ALTERNATIVE;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Judge: Hon. Gary Y. Tanaka  
Location: Torrance Courthouse (Dept. B)  
Action Filed: December 13, 2021  
Hearing Date: Not Set

1 **SUMMARY OF ACTION**

2 With the arrival of the latest Omicron variant, the ongoing impact of the COVID-19  
3 pandemic continues to threaten the lives and livelihoods of Californians and their families. These  
4 challenges continue to raise difficult questions and fundamental policy issues for the State relating  
5 to how best to balance public health concerns with the need to ensure that Californians can continue  
6 to access necessary public services and resources, including, but not limited to, in-person public  
7 education and other essential social infrastructure.

8 Fortunately, the California Legislature has provided a proven and effective process for  
9 public health orders to be issued and implemented with the force of law, even in the most serious  
10 states of public peril, calamity or emergency, when they are supported by science and sound policy.  
11 The California Administrative Procedure Act (APA), first passed in 1945, and relevant amendments  
12 in 1957, 1979, 2000, 2008 and 2011, achieves this purpose through provisions requiring, *inter alia*,  
13 that all agency directives be clear, necessary, nonduplicative, and that emergency orders  
14 demonstrate the “need for the regulation [to] address [the] emergency” by substantial evidence, and  
15 reference “each technical [or] empirical study [or] report [upon which] the agency relies.” (Gov.  
16 Code § 11346.1(b)(2).) Already, agencies such as the California Division of Occupational Safety  
17 and Health (CalOSHA) have used APA rulemaking, on both an emergency and permanent basis, to  
18 establish best practices and ministerial duties regarding the most effective known ways to prevent  
19 against COVID-19. (8 Cal. Code Regs §§ 3205(c)(2)(F), 5142-5144.) (Exhibit B.)

20 These regulations (and the science supporting them) establish and affirm the necessity and  
21 priority of removing hazardous conditions (known as “engineering controls”) *before* personal  
22 protective equipment (PPE) such as masks are required, as part of a layered prevention approach.  
23 (See <https://www.cdc.gov/niosh/topics/hierarchy/>) For COVID-19, an airborne pathogen, the most  
24 relevant engineering control is indoor **ventilation**, and namely improving the heating, ventilation  
25 and air-conditioning (HVAC) system performance, measured by the frequency of air changes per  
26 hour (ACH). Per the CDC, HVAC systems with 6 ACH or more are proven **99%** effective at  
27 removing airborne pathogens, thus making **ventilation** the most effective protection measure  
28 against COVID-19, even compared with the demonstrated effectiveness of N-95 masks, vaccines or

1 any other known prevention method. (Exhibit E, *infra*, pp. 127-129). For this reason, the California  
2 Department of Industrial Safety (CalOSHA) has issued two (2) separate emergency regulations  
3 during the pandemic requiring California employers investigate all available ventilation  
4 improvements as the first step in workplace prevention plans. (8 Cal. Code Regs §§ 3205(c)(2)(F),  
5 5142-5144.) (Exhibit B) Additionally, the State of California has received \$22,199,325,901 (\$22.2  
6 billion) pursuant to the American Rescue Plan (“ARP”) Act of 2021 by agreeing to implement the  
7 federal guidelines set forth by the CDC for COVID-19 mitigation efforts. However, the  
8 implementation has fallen far short, and officials have failed to address these known hazards.

9 SAVE PV SCHOOLS, LLC (herein, “Petitioner”) and its members have suffered discrete  
10 injury and damages proximately caused by Respondents CALIFORNIA DEPARTMENT OF  
11 PUBLIC HEALTH, CALIFORNIA DEPARTMENT OF EDUCATION, LOS ANGELES  
12 COUNTY DEPARTMENT OF PUBLIC HEALTH, and PALOS VERDES PENINSULA  
13 UNIFIED SCHOOL DISTRICT and DOES 1-30’s failure to comply with the ministerial duties  
14 applicable to their office(s), to which Petitioner has a plain and beneficial right.

15 In California schools, ventilation is the primary responsibility of Respondent agencies  
16 California Department of Education and the local educational agency (LEA), in this case  
17 Respondent Palos Verdes Peninsula Unified School District. As shown by judicially-noticeable  
18 facts in the public record, Respondents have failed to correct the egregious ventilation conditions  
19 known to exist across the school district, perform the most basic steps to verify that classroom  
20 ventilation is even adequate under basic building code standards (*i.e.* ACH < 1), let alone ensure the  
21 sufficiently enhanced ventilation required to protect children against COVID-19 (*i.e.* ACH > 6). In  
22 addition to perpetuating this state-created danger, they have manifestly failed to perform the  
23 ministerial legal duties to which Petitioner has a clear beneficial right.

24 While all Respondent agencies have failed in their duties to protect California’s children, the  
25 primary fault in this action lies with Respondent California Department of Public Health (CDPH).  
26 For nearly two (2) full years, CDPH has disregarded relevant data - and its required duties and  
27 procedures under the APA - while publishing a dizzying slew of various ever-evolving “guidance”  
28 documents, all of which purported to have the binding force and effect of law (to some degree),

1 enforceable in California’s schools (as elsewhere). In a real-time demonstration of the APA’s  
2 importance, this veritable library of *ultra vires* orders has increasingly disregarded the most relevant  
3 scientific findings and comprehensive studies, including inexplicably failing to include CDPH’s  
4 own technical studies of the best ways to protect schools from COVID-19, both of which found  
5 ventilation improvements as the most urgent and demonstrably effective measure. (*See, e.g.*  
6 California Department of Public Health (CDPH), Indoor Air Quality Division, “Ventilation and  
7 Filtration to Reduce Long-Range Airborne Transmission of COVID-19 and Other Respiratory  
8 Infections: Considerations for Reopened Schools (July 2021)” (Available at:  
9 [https://www.cdph.ca.gov/Programs/CCDCPHP/DEODC/EHLB/IAQ/CDPH%20Document%20Libra](https://www.cdph.ca.gov/Programs/CCDCPHP/DEODC/EHLB/IAQ/CDPH%20Document%20Library/School_ventilation_and_filtration_ADA.pdf)  
10 [ry/School\\_ventilation\\_and\\_filtration\\_ADA.pdf](https://www.cdph.ca.gov/Programs/CCDCPHP/DEODC/EHLB/IAQ/CDPH%20Document%20Library/School_ventilation_and_filtration_ADA.pdf)). (Also referred to as the “IAQ Study”) (Exhibit C,  
11 *infra*, pp. 76-99)

12 Had Respondents issued the public health “guidance” and associated orders as required  
13 under the APA, accounting for the proven and established scientific necessity of ventilation  
14 improvements prior to lower-level controls, as their own data shows, it is likely they would have  
15 already sufficiently accounted for the concerns of Petitioner sufficient to moot this lawsuit. Since  
16 CDPH’s own modeling demonstrates that ventilation can allow for unmasked occupants to gather  
17 with less risk than fully masked occupants, they know that ventilation improvements not only have  
18 the greatest potential to save lives, but also the potential to obviate the necessity of mask mandates.  
19 (*Ibid.*) As shown by judicially-noticeable facts, much of Respondents’ “guidance” simply fail to  
20 mention ventilation at all, an inexcusable omission under any standard of good governance, let  
21 alone the well-crafted provisions of the APA. Instead of performing the difficult tasks required by  
22 law (and science), Respondents have taken the easy way out, simply ignoring the APA and its clear  
23 commands, putting the State’s children at risk.

24 Under unambiguous legal precedent, and for all of these reasons, Respondents’ attempted  
25 enforcement of the challenged guidance is void as a matter of law. The cumulative impact of  
26 Respondents’ lack of compliance isn’t a mere technical or esoteric procedural concern – it presents  
27 a clear, immediate and present danger to all the state’s school children. In CDPH’s own studies,  
28 data before the pandemic already showed that classroom ventilation is severely below code

1 standards across the state, a deficiency that is already known to increase absences and school  
2 illnesses, and increase the probability of infection up to 500%. While Respondent officials have  
3 apparently forgotten all about the work they have left to do, it's no excuse for them not doing it.

4 Respondents' continuing disregard of the Legislature's clear mandates regarding the  
5 issuance and enforcement of binding "guidance" and other orders and regulations creates the  
6 necessity of this action. These violations not only deprive Petitioner and its members of due  
7 process and other rights to which they are entitled, but ironically put the public health of Petitioner  
8 (and all Californians) at greater risk. While California law vests agency officials with substantial  
9 authority during a pandemic, including the issuance of binding public health regulations, such  
10 official orders may only be enforced in a punitive capacity if officials comply with the requirements  
11 of statutory compliance and due process, as applicable to the specific circumstances under the state  
12 of emergency.

13 By this Amended Verified Petition for Writ of Mandate, Petitioner seeks an order to restore  
14 the proper lines of accountability and due process to the pandemic response as enforced in their  
15 local school district. As part of such accountability, Petitioner requests an order commanding  
16 Respondents follow the applicable, law, regulation, guidance and scientific data requiring  
17 comprehensive ventilation modifications and other engineering controls, as required and  
18 recommended by agencies and experts including (but not limited to) the Centers for Disease Control  
19 (CDC), The National Institute for Occupational Safety and Health (NIOSH), the American  
20 Industrial Hygiene Association (AIHA), the U.S. Occupational Standards and Health Agency  
21 (OSHA), and the state Department of Industrial Relations (CalOSHA), and establishing the  
22 requisite processes to ensure their performance, consistent with due process and educational rights,  
23 throughout the Palos Verdes Peninsula Unified School District as explained further herein.

24  
25 **JURISDICTION AND VENUE**

26 1. This Court has jurisdiction as a Court of general jurisdiction over this matter since all  
27 Defendants reside in California. (Cal. Code of Civ. Proc. § 410.10.) This case is not classified as a  
28

1 limited civil case because the type of relief being sought (declaratory relief) is not available in a  
2 limited civil case. (Cal. Code of Civ. Proc. § 580(b)(2), (4); Cal. Code of Civ. Proc. §§ 85, 86.)

3 2. Venue is proper in the county in which “the cause, or some part of the cause, arose,”  
4 for a suit against a public officer’s act. (Cal. Code of Civ. Proc. § 393(b).) A cause arises where the  
5 petitioner is injured by the official action of which is being complained.

6 3. Venue and jurisdiction is proper in the Superior Court of Los Angeles County, as all  
7 the events occurred within the County jurisdiction, and Superior Courts have primary jurisdiction  
8 for writs of mandate and the other causes action herein alleged.

9  
10 **PARTIES**

11 4. Petitioner SAVE PV SCHOOLS, LLC is a community organization based in Palos  
12 Verdes Peninsula, CA, formed by, and wholly comprised of, parents and families of students  
13 attending Palos Verdes Peninsula Unified School District during the 2021-2022 school year and  
14 who thereby have been directly harmed as a direct and proximate result of Respondents’ mandatory  
15 enforcement of the challenged guidance in such schools. Petitioner and its members satisfy the  
16 requirements of organizational standing sufficient to bring this action.

17 5. Respondent CALIFORNIA DEPARTMENT OF PUBLIC HEALTH (CDPH) is the  
18 state agency responsible for statewide implementation of the challenged public health guidance,  
19 including the K-12 guidance, which are intended or allowed to have the force and effect of law, and  
20 for the enforcement at issue herein.

21 6. Respondent CALIFORNIA DEPARTMENT OF EDUCATION is the state agency  
22 responsible for education policy and the oversight of the Respondent School Districts, including the  
23 official adoption of “nonbinding guidance” regarding program implementation, as well as formal  
24 APA regulations.

25 7. Respondent LOS ANGELES COUNTY DEPARTMENT OF PUBLIC HEALTH is  
26 the local county agency responsible for the issuance and enforcement of the challenged guidance,  
27 including the outdoor mask requirement, most recently modified on January 4, 2022.

28

1 8. Respondent PALOS VERDES PENINSULA UNIFIED SCHOOL DISTRICT  
2 (PVPUSD) is the local educational agency (LEA) responsible for the implementation and  
3 enforcement of related school policies, including the challenged guidance herein.

4 9. Respondents DOES 1-30 are responsible for the acts and omissions alleged, but are  
5 presently unknown to Petitioner and therefore are sued in their fictitious official capacities.

6  
7 **FACTUAL ALLEGATIONS**

8 10. In 2003, the Centers for Disease Control (CDC) issued updated Guidelines for  
9 Environmental Control in Health-Care Facilities, providing a comprehensive formula, originally  
10 established in 1970, for airborne-contaminant removal through ventilation measures in health care  
11 facilities. (<https://www.cdc.gov/infectioncontrol/guidelines/environmental/index.html>)

12 11. In November 2010, the National Institute for Occupational Safety and Health  
13 (NIOSH), a division of the CDC, announced its nationwide “Prevention Through Design” (PtD)  
14 initiative. The purpose of the PtD initiative is to “prevent or reduce occupationally related injuries,  
15 illnesses, fatalities, and exposures” by comprehensively and accurately assessing risk through the  
16 application of a Hierarchy of Controls.” (<https://www.cdc.gov/niosh/topics/hierarchy/default.html>)  
17 (Exhibit A)

18 12. The California Department of Industrial Relations (CalOSHA) codified the  
19 principles of the Hierarchy of Controls, *inter alia*, in regulations contained in Title 8, Subchapter 7,  
20 Group 16, Article 107 (commencing with §5142) of the California Code of Regulations. (Exhibit  
21 B).

22 13. On March 4, 2020, in response to the novel coronavirus, COVID-19, Governor  
23 Newsom declared a state of emergency in California.

24 14. On September 1, 2020, the California Department of Public Health (CDPH)  
25 published a study titled “The Role Of Building Ventilation And Filtration In Reducing Risk Of  
26 Airborne Viral Transmission In Schools, Illustrated With SARS-CoV-2”, finding that classrooms  
27 providing above-code ventilation, Minimum Efficiency Reporting Value (MERV) 13 filters, and  
28 portable air cleaners - yet NOT requiring indoor masking - presented equal or less risk of SARS-

1 CoV-2 infection compared with **fully-masked** occupants in an inadequately-ventilated classroom of  
2 equivalent size and occupancy. (Exhibit C, *infra*, pp. 76-99, scenarios (1)(e), (2)(e), (3)(e), (4)(e)  
3 vs ((1)(b))) The study also referenced two comprehensive studies showing prior research that  
4 demonstrated that many California classrooms are “often substantially below the [applicable]  
5 minimum code requirement,” and in a worst-case scenario increase the risk of infection by 500%.  
6 (Exhibit D)

7 15. On September 9, 2020, the American Industrial Hygiene Association (AIHA) issued  
8 Version 4 of its “Guidance Reducing the Risk of COVID-19 using Engineering Controls,” applying  
9 the CDC/NIOSH Hierarchy of Controls to COVID-19. Using the applicable CDC formula for  
10 airborne-contaminant removal, the AIHA Guidance found that HVAC systems enabling six (6) or  
11 more air changes per hour (ACH) “significantly reduce[d] the spread of infectious airborne  
12 diseases” such as COVID-19 a rate (99%+) superior to all other PPE controls, thereby representing  
13 the single most effective pandemic control measure known to science, and fully consistent with  
14 CDC recommendations and the NIOSH PtD national initiative (Exhibit E, *infra*, pp. 127-129).

15 16. On November 30, 2020, CalOSHA published emergency regulations requiring all  
16 workplaces “evaluate how to maximize the quantity of outdoor air and whether it is possible to  
17 increase filtration efficiency to the highest level compatible with the existing ventilation system.”  
18 (Available at: <https://www.dir.ca.gov/dosh/archive/title8/3205-Nov.30.2020.html>). (8 Cal. Code  
19 Regs §3205.) These emergency regulations supplemented the existing permanent mandates  
20 contained in Title 8, Subchapter 7, Group 16, Article 107 (commencing with §5142) of the  
21 California Code of Regulations. (Exhibit B)

22 17. On March 8, 2021, Respondent PVPUSD issued its School Guidance Checklist, on  
23 the form established by Respondent CDPH. While the Checklist contains a number of details about  
24 COVID-19 response and mitigation plans, it makes no mention of ventilation protocols, other  
25 Engineering Controls, or any applicable issues applying the Hierarchy of Controls to school  
26 buildings, or the public health impact thereof. (Exhibit F)

27 18. On April 6, 2021, Governor Newsom announced that on June 15, 2021, “all sectors”  
28 may return to “usual operations in compliance with CalOSHA requirements and with common-



1 sense public health policies in place.” (Available at: [https://www.gov.ca.gov/2021/04/06/governor-](https://www.gov.ca.gov/2021/04/06/governor-newsom-outlines-the-states-next-step-in-the-covid-19-pandemic-recovery-moving-beyond-the-blueprint/)  
2 [newsom-outlines-the-states-next-step-in-the-covid-19-pandemic-recovery-moving-beyond-the-](https://www.gov.ca.gov/2021/04/06/governor-newsom-outlines-the-states-next-step-in-the-covid-19-pandemic-recovery-moving-beyond-the-blueprint/)  
3 [blueprint/.](https://www.gov.ca.gov/2021/04/06/governor-newsom-outlines-the-states-next-step-in-the-covid-19-pandemic-recovery-moving-beyond-the-blueprint/))

4 19. On June 17, 2021, CalOSHA issued revised regulations applicable to all workplaces,  
5 expanding the required evaluation to specifically include “whether the use of portable or mounted  
6 High Efficiency Particulate Air (HEPA) filtration units, or other air cleaning systems, would reduce  
7 the risk of COVID-19 transmission.” (Available at: <https://www.dir.ca.gov/title8/3205.html>)  
8 (Exhibit B)

9 20. On July 12, 2021, Respondent CDPH issued COVID-19 Public Health Guidance for  
10 K-12 Schools in California” for the 2021-2022 school year. This guidance made no mention of  
11 ventilation, or other Engineering Control Hierarchy, but mandated other PPE measures such as  
12 masking and social distancing. (herein, “Challenged Guidance.”)

13 21. On August 11, 2021, a founding member of Petitioner organization addressed the  
14 Palos Verdes Peninsula Unified School Board regarding the injuries the member’s minor child  
15 suffered, including but not limited, to a bacterial infection, headaches, dizziness, and fatigue, as a  
16 direct and proximate result of wearing a mask 6-8 hours per day at school as mandated by  
17 Respondents in the challenged guidance. Respondents refused to acknowledge or address these  
18 concerns or provide any meaningful accommodation.

19 22. On August 19, 2021, Respondent PVPUSD issued a mask requirement for all district  
20 campuses that required “masking at all times with the exception of eating, drinking or carrying out  
21 activities that preclude use of facemasks.” (herein, “mask guidance”, and with the K-12 Guidance  
22 and implemented documentation, “Challenged Guidance”)

23 23. On August 23, 2021, Respondent CDPH director Tomás J. Aragón published a letter,  
24 “Requirement for Universal Masking Indoors at K-12 Schools,” purporting to “restat[e] long-  
25 standing policy and law” and a “unequivocal scientific consensus” in support of the challenged  
26 mask guidance, and that school officials’ “failure to enforce the mask requirement breaches [their]  
27 legal duty.” The letter failed to mention Ventilation. (Exhibit G)

28

1 (Available at: <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Requirement-for-Universal-Masking-Indoors-at-K-12-Schools.aspx>)

2  
3 24. On October 4 2021, Governor Newsom signed SB 336 (2021), an emergency  
4 measure requiring all state and county public health agencies provide “opportunity for local  
5 communities, businesses, nonprofit organizations, individuals, and others to sign up for an email  
6 distribution list relative to changes” to guidance published on agency websites. (Exhibit H) To  
7 date, neither Respondents CDPH, nor Los Angeles County Public Health, have provided the  
8 applicable email update mechanism on their website(s), prior to issuance and enforcement of the  
9 Challenged Guidance, in violation of this separate statutory requirement under SB 336.

10 25. On October 7, 2021, Respondent CDPH issued “Interim Guidance for Ventilation,  
11 Filtration, and Air Quality in Indoor Environments”, intended to “supplement” the Cal/OSHA ETS  
12 by “recommending practical steps building operators can take to promote better ventilation,  
13 filtration, and air quality in indoor environments for the purpose of reducing the spread of COVID-  
14 19.” The guidance provides an array of practical tools and references for improving ventilation, and  
15 cites the aforementioned resources including the CalOSHA ETS and the AIHA Guidance.  
16 ([https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Interim-Guidance-for-  
17 Ventilation-Filtration-and-Air-Quality-in-Indoor-Environments.aspx#](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Interim-Guidance-for-Ventilation-Filtration-and-Air-Quality-in-Indoor-Environments.aspx#))

18 26. On October 20, 2021, Respondent CDPH affirmed its prior K-12 guidance and  
19 masking requirements. (Available at:  
20 [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/K-12-Guidance-2021-22-School-  
21 Year.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/K-12-Guidance-2021-22-School-Year.aspx))

22 27. On November 28, 2021, the CDC and other public health agencies announced the  
23 rapid emergence of the new Omicron variant of COVID-19, which contained an alarming number  
24 of genetic mutations. While relevant data still is being gathered, the Omicron variant appears less  
25 severe, but more resistant to vaccines, antibodies, and other lower-level controls on the Hierarchy of  
26 Controls. However, because Omicron, like all COVID variants, is an airborne pathogen, it remains  
27 best controlled with the same ventilation measures and engineering controls as cited, and thus such  
28

1 known and future mutations are equally thwarted by effective ventilation protocols and the other  
2 requested engineering measures.

3 28. On December 15, 2021, in response to Omicron, Respondent CDPH announced a  
4 statewide indoor mask “mandate”, via “guidance”, purportedly as a temporary measure. This new  
5 Challenged Guidance did not mention the IEQ study by CDPH, the AIHA Guidance, any relevant  
6 Hierarchy of Controls principle, nor other data sufficient to demonstrate the necessity of the  
7 mandate by substantial evidence.

8 29. On December 31, 2021, Respondent PVPUSD announced a new outdoor mask  
9 requirement in all schools, purportedly “guided by health orders from the LA County Department of  
10 Public Health and from the state.” (Exhibit I)

11 30. On January 4, 2022, Respondent Los Angeles County Department of Public Health  
12 updated its K-12 Guidance to require outdoor masks. Despite the applicable regulatory  
13 requirements, this latest guidance falsely refers to ventilation improvements as being “strongly  
14 recommended.” (Exhibit J)

15 31. On January 5, 2022, on the basis that “Omicron is now here,” Respondent CDPH  
16 extended the latest “mandatory guidance” for indoor masks another 30 days, until February 15,  
17 2022.

18 32. As a proximate result of the vague and ambiguous orders issued and enforced by  
19 Respondents, without compliance with statutory mandates, the challenged guidance lacks sufficient  
20 definiteness for ordinary people can understand what conduct is prohibited, and, or in the  
21 alternative, lacks sufficient protections to discourage arbitrary and discriminatory enforcement.

22 33. Because of Respondents’ failure to provide the requisite regulatory and legal clarity  
23 to enable effective compliance and a science-based pandemic response, Petitioner has no  
24 information on how seemingly conflicting recommendations in the Challenged Guidance should be  
25 addressed.

26 34. Because the Challenged Guidance has not been published pursuant to the  
27 Administrative Procedure Act (APA), Petitioner has no plain, speedy or adequate remedy at law,  
28

1 such as the traditional APA rulemaking petition under Government Code Sections 11340.6 and  
2 11340.7.

3 35. By its failure of APA compliance, the Challenged Guidance constitutes a prohibited  
4 “underground regulation” and its enforcement is void as a matter of law, especially as applied  
5 against Petitioner.

6 36. Based on information and belief, California schools (including, but not limited, to the  
7 schools of Palos Verdes Peninsula USD) have failed to comply with the Interim Guidance for  
8 Ventilation, the applicable ETS and other CalOSHA regulations, and as a consequence of such  
9 failure, there has been no comprehensive evaluation of California school buildings to evaluate  
10 potential ventilation control measures, let alone their relative impact on the corresponding necessity  
11 for lower-level control measures. Nor is there any publicly-accessible data on the performance of  
12 the agencies relevant to this issue. This failure to perform required ministerial duties additionally  
13 contradicts the applicable Hierarchy of Control principles recommended by CDC guidance and  
14 outlined in detail in the AIHA Guidance, and also poses grave harm to Petitioner, its members and  
15 all public school students, families, and staff.

16 37. While the Uniform Complaint Procedures (UCPs) established under the Education  
17 Code and corresponding regulations allow for filing of complaints related to this issue, it is unclear  
18 whether such complaints should be issued at the district or school level, or whether in fact the  
19 procedures should properly be issued through emergency rulemaking by Respondent California  
20 Department of Education or other agenc(ies).

21  
22 **FIRST CAUSE OF ACTION – Writ of Prohibition**

23 **(Cal. Civ. Proc. Code §§ 1102-1103)**

24 38. Petitioner incorporates by reference as if fully set forth all of the allegations in the  
25 preceding paragraphs.

26 39. This court has the legal authority to issue a Writ of Prohibition to order Respondents  
27 to cease the unlawful issuance, interpretation and enforcement of the challenged guidance in a  
28 mandatory capacity against Petitioner and its members.

1           40.     Based on the applicable law and guidance, including but not limited to the CDC  
2 Hierarchy of Controls and the OSHA ETS, Respondents must evaluate the availability of  
3 engineering controls, including, but not limited to, temporary ventilation measures to combat the  
4 spread of COVID-19 in Respondents’ workplaces, namely Palos Verdes Peninsula Unified schools  
5 and every classroom and occupied building therein.

6           41.     Under applicable public health guidance, access to outdoor or clean air is the single  
7 most significant variable impacting public safety, and has a demonstrated effectiveness exceeding  
8 all other control measures in the applicable Guidance. (AIHA Guidance, Exhibit E, *infra*, pp. 127-  
9 129) *See also* American Conference of Government Industrial Hygienists (ACGIH), Industrial  
10 Ventilation Committee, “White Paper on Ventilation for Industrial Settings During the COVID-19  
11 Pandemic”, August 2020.

12           42.     In order to properly apply the Hierarchy of Controls, indoor ventilation must be  
13 assessed and optimized, prior to issuance or enforcement of any PPE requirements.

14           43.     Based on information and belief, Respondents have failed to discharge their  
15 threshold ministerial duties regarding the investigation and implementation of ventilation-based  
16 protocols and other applicable engineering controls consistent with the PtD Hierarchy of Controls.

17           44.     Because the mask guidance and other challenged orders were not issued in  
18 compliance with the Administrative Procedure Act (APA), their enforcement or attempted  
19 enforcement of the challenged guidance is void as a matter of law.

20           45.     Based on the applicable law, including but not limited to the APA, Respondents may  
21 not enforce the challenged guidance in a mandatory capacity, but only as a nonbinding  
22 “performance standard,” and if such guidance allows for modification or alternatives. (Gov. Code  
23 §§ 11340; 11340.570.)

24           46.     Respondents have enforced the challenged guidance in a mandatory capacity as a  
25 “prescriptive standard” against Petitioner and its members, contrary to law.

26           47.     Based on applicable law, Respondents may not enforce the challenged guidance in a  
27 mandatory capacity unless it references the “study or other empirical data” demonstrating the  
28 necessity for the binding order “by substantial evidence.” (Gov. Code §11346.1)

1 48. Respondents have failed to reference any “study or other empirical data”  
2 demonstrating the necessity of enforcing the challenged guidance against Petitioner, let alone  
3 demonstrating the necessity “by substantial evidence.”

4 49. In fact, Respondent CDPH has published two (2) relevant studies demonstrating that  
5 mask mandates cannot be “necessary” unless they first require ventilation improvements as a  
6 threshold determination. (California Department of Public Health (CDPH), “The Role Of Building  
7 Ventilation And Filtration In Reducing Risk Of Airborne Viral Transmission In Schools, Illustrated  
8 With SARS-CoV-2” (September 1, 2020); and “Ventilation and Filtration to Reduce Long-Range  
9 Airborne Transmission of COVID-19 and Other Respiratory Infections: Considerations for  
10 Reopened Schools” (July 2021). Neither study is mentioned or cited in any of the Challenged  
11 Guidance issued by CDPH. (Relevant portions of first IAQ study attached as Exhibit C, p. 76)

12 50. Petitioner and its members have no other plain, speedy, or adequate remedy at law.

13 51. Petitioner and its members have satisfied their burden for a writ of prohibition to  
14 arrest the mandatory enforcement of the challenged guidance by Respondents.

15  
16 **SECOND CAUSE OF ACTION – Writ of Mandate**

17 **(Cal. Civ. Proc. Code § 1085)**

18  
19 52. Petitioner incorporates by reference as if fully set forth all of the allegations in the  
20 preceding paragraphs.

21 53. Respondents have a clear legal obligation and ministerial duty to comply with the  
22 requirements of state law, namely the Administrative Procedure Act (APA), as well as the statutory  
23 and constitutional principles of due process, prior to the pending and threatened enforcement of the  
24 challenged guidance against Petitioner and its members.

25 54. The relevant ministerial duties under the APA, but are not limited to, the requirement  
26 to provide due process, to provide the “empirical study or other data” on which the agency relies,  
27 and to enforce the rule as a “performance standard” when, as present, such flexible enforcement  
28 would achieve the same or better result. (Gov. Code §§ 11346.1; 11340; 11340.570.)







1           72. Respondents lacked the statutory authority to enforce, or threaten to enforce, the  
2 challenged guidance in a mandatory capacity against Petitioner and its members.

3  
4                                   **SIXTH CAUSE OF ACTION – Due Process**  
5                                   **(Cal. Const. Art. I, Sect. 7; U.S. Const., Amends. V, XIV)**

6           73. By their failure to perform the ministerial duties required by regulation and law, to  
7 which Petitioner and its members have a clear and beneficial right, Respondents have failed to  
8 provide due process of law.

9           74. Furthermore, and for like reasons, the challenged guidance is also void for vagueness  
10 as applied.

11           75. The ambiguity regarding whether “guidance” is “recommended” or “mandatory” is  
12 pervasive and has been exploited by the actions and public statements of Respondents for nearly  
13 two (2) full years.

14           76. Because of these ambiguities, Petitioner and its members are unable to reasonably  
15 determine what conduct is allowed and prohibited. Additionally, Petitioner and its members are  
16 unable to identify the proper procedural mechanism, if any exists, to lodge such requests for  
17 guidance modification on behalf of themselves.

18  
19                                   **SEVENTH CAUSE OF ACTION – Violation of Educational Rights**  
20                                   **(Cal. Const. Art. I, Sect. 7; Ed. Code § 200, et seq.)**

21  
22           77. Petitioner hereby alleges and re-incorporates each and every allegation contained in  
23 the Complaint as though fully set forth herein.

24           78. California law guarantees all students equal access to education without  
25 discrimination.

26           79. By their actions, Respondents have violated the educational rights of Petitioner’s  
27 members.

**PRAYER**

WHEREFORE, Petitioner prays for judgment against all Respondents as follows:

1. An order staying Respondents’ attempted enforcement of the challenged Guidance in a mandatory capacity, and directing Respondents to perform the ministerial duties required under law, including, but not limited to implementing and documenting the mandatory CalOSHA regulations, CDC research and guidance, including the National Performance Through Design Initiative, CDPH Interim Ventilation Guidance, and other authorities as alleged herein at the school, district, county, and state levels;

2. A Declaration and finding that Respondents have exceeded lawful authority in pursuing and continuing enforcement of the challenged Guidance without considering the factors and performing the minimum duties as required, including, but not limited to, APA compliance and existing mandates under the Hierarchy of Controls and applicable regulations and law.

3. A Declaration and finding that Ventilation is the most effective pandemic control measure, or at least the highest priority among effective control measures, under applicable regulations, studies, and applicable law.

4. For issuance of a writ of prohibition directing Respondents to suspend any and all activities pursuant to, or in furtherance of, the enforcement of the challenged Guidance, until Respondents have taken all actions necessary to make the findings, determinations, and/or decision processes as requested by Petitioner and required by applicable regulation and law at the school, district, county, and state levels;

5. For issuance of a writ of mandate directing Respondents to perform the necessary findings, determinations, and/or decision processes as requested by Petitioner and required by applicable regulation and law, including, but not limited to: the establishment of all available ventilation changes and other engineering controls in every classroom and occupied building in which the students of Palos Verdes Peninsula Unified School District, with real-time ACH data published in the applicable “COVID-19 Data Dashboard”, the necessary modification of all Challenged Guidance, including, but not limited to, the applicable K-12 Guidance, Reopening Checklists, and related public health orders with the required information and disclosures required

1 by law, including the proper emphasis on ventilation and the Hierarchy of Controls, as well as  
2 provisions for modification or alternative means of compliance and related due process at the  
3 school, district, county, and state levels;

4 6. For issuance of a peremptory or alternative writ of mandate directing Respondents to  
5 provide the relief requested by Petitioner;

6 7. An order of accounting for all government funds, including, but not limited to, those  
7 provided in the ESSER grant funding, which have been used for ventilation improvements to date,  
8 and the remaining availability of funds for such purposes.

9 8. Awarding Petitioner costs and attorneys fees;

10 9. For such other and further relief as the court may deem just and proper.

11  
12 Respectfully Submitted,

13  
14 Dated: January 7, 2022

/s/ Matthew Harrison  
MATTHEW SEAN HARRISON, ESQ.  
Attorney for Petitioner  
Save PV Schools LLC

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**VERIFICATION**

I am the attorney and authorized agent for the above named Petitioner in this proceeding.  
The facts alleged in the above petition are true based on facts within my own knowledge.

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

DATED: January 7, 2022



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MATTHEW SEAN HARRISON  
Attorney for Petitioner

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20 Building Ventilation And Filtration In Reducing Risk Of Airborne Viral Transmission In Schools,

21 Illustrated With SARS-CoV-2”. September 1, 2020.

22           Chan WR, Li X, Singer BC, *et al.* Ventilation rates in California classrooms: Why many

23 recent HVAC retrofits are not delivering sufficient ventilation. *Building and Environment.*

24 2020;167:106426.

25           Mendell MJ, Eliseeva EA, Davies MM, *et al.* Association of classroom ventilation with

26 reduced illness absence: a prospective study in California elementary schools. *Indoor air.*

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28



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3 American Industrial Hygiene Association (AIHA), “Guidance” (Version 4)

## 4 5 II. ARGUMENT

### 6 A. Due to Failure to Perform Required Duties Under the Administrative Procedure 7 Act (APA), Respondents May Not Enforce the Challenged Guidance in a 8 Mandatory Capacity

9 The Administrative Procedure Act (APA), first passed by the California Legislature in 1945  
10 and as amended, provides that no state agency “shall issue, utilize, enforce, or attempt to enforce”  
11 any “guideline”, “instruction”, or other rule subject to the APA, unless it “has been adopted as a  
12 regulation and filed with the Secretary of State pursuant to [the APA]”. (Cal. Gov. Code §  
13 11340.5(a).) The APA defines such orders very broadly to include “every rule, regulation, order, or  
14 [other] standard to implement, interpret, or make specific the law [or] govern [agency] procedure.”  
15 (Cal. Gov. Code § 11342.600.) In repeatedly amending the APA multiple times over the decades,  
16 our Legislature has found that the “imposition of prescriptive standards upon private persons and  
17 entities through regulations where the establishment of performance standards could reasonably be  
18 expected to produce the same result has placed an unnecessary burden on California citizens and  
19 discouraged innovation, research, and development of improved means of achieving desirable social  
20 goals.” (Cal. Gov. Code § 11340(d).)

21 When issuing rules under the APA, agencies shall “actively seek” to avoid enforcing  
22 “prescriptive standards” when “performance standards” would suffice to achieve the same  
23 objective. (Cal. Gov. Code § 11340.1.) "Performance standard" means a regulation that describes  
24 an objective with the criteria stated for achieving the objective.” (Cal. Gov. Code § 11342.570.)  
25 "Prescriptive standard" means a regulation that specifies the sole means of compliance\_ with  
26 a performance standard by specific actions, measurements, or other quantifiable means.” (Cal. Gov.  
27 Code § 11342.590.) “Each regulation adopted, to be effective, shall be within the scope of authority  
28 conferred and in accordance with standards prescribed by other provisions of law.” (Cal. Gov. Code

1 § 11342.1.) Each regulation must also be “reasonably necessary to effectuate the purpose of the  
2 statute.” (Cal. Gov. Code § 11342.2.)

3 The APA establishes “streamlined” requirements for “emergency regulations,” issued during  
4 a “situation that calls for immediate action to avoid serious harm to the public peace, health, safety,  
5 or general welfare.” (Stats 1957, Ch. 1919; *County of San Diego v. Bowen*, 166 Cal.App.4th at 518;  
6 Gov. Code § 11342.545.) Emergency regulations must be filed with a public “statement of  
7 emergency justification” demonstrating, by substantial evidence, the “need for the regulation [to]  
8 address only the demonstrated emergency” and identifying “each technical [or] empirical study [or]  
9 report [upon which] the agency relies.” (Gov. Code § 11346.1(b)(2).)

10 The APA establishes the “minimum procedural requirements” for the “exercise of  
11 [regulatory] power conferred by any statute heretofore or hereafter enacted.” (Gov. Code  
12 §§11371(b); *Armistead v. State Personnel Board* (1978), 22 Cal. 3d 198.) “Any regulation not  
13 properly adopted under the APA is considered invalid.” (*Reilly v. Superior Court* (2013) 57 Cal.4th  
14 641, 649.). Courts will only uphold APA-exempt rulemaking if the process provide “public  
15 protection and participation substantially equivalent” to the APA. (*Voss v. Superior Court* (1996),  
16 46 Cal.App.4th 900, 915.) Examples include “disclosure of pertinent information” by agencies  
17 relating to the rulemaking process, such as the studies and data required by the APA. (*Ibid* at 916.)

18 The Education Code directs Respondent Board of Education to “adopt rules and regulations  
19 not inconsistent with the laws of this state.” (Ed. Code § 33031.) It is uncontested that the  
20 challenged K-12 Guidance, Guidance on Face Coverings, and other orders of Respondents were not  
21 issued as APA-compliant “regulations”, whether on an emergency basis or otherwise.

22 Here, the lack of such procedures (or equivalent) has proximately caused the deprivations as  
23 alleged. If Respondents simply had issued the “guidance” with the requisite clarity regarding its  
24 nonbinding nature (and availability of performance standard-based alternative compliance), with the  
25 due reference to the empirical studies and data on which it relied, Petitioner and members would  
26 have been able to obtain their requested relief prior to the start of the school year, making this action  
27 unnecessary. (*Cf., e.g.* Gov. Code §§ 11340, 11346.1(b)(2)).

28

1 In order to obtain a writ of mandate, a petitioner must plead and prove (1) a clear, present  
2 and usually ministerial duty upon the part of the respondent and (2) a clear, present and beneficial  
3 right of the petitioner to a performance of that duty. (*California Corrections Supervisors Org., Inc.*  
4 *v. Department of Corrections* (2002) 96 Cal.App.4th 824, 825.) “[I]t is not by the office of the  
5 person to whom the writ is directed, but the nature of the thing to be done, that the propriety or  
6 impropriety of issuing a writ of [mandate] is determined.” (*Harpending v. Haight* (1870) 39 Cal.  
7 189, 210, quoting *Marbury v. Madison* (1803), 5 U.S. 137.)

8  
9 **1. The Challenged Guidance is Non-Mandatory and Cannot be Enforced Against**  
10 **Petitioner and its Members**

11 It is well-settled in administrative law that while the “issuance” of agency guidance can be  
12 APA-exempt, no guidance may be "enforced" in a binding capacity. (R. A. Anthony, “Interpretive  
13 Rules, Policy Statements, Guidances, Manuals, and the Like— Should Federal Agencies Use Them  
14 to Bind the Public?”, 41 *Duke L.J.* 1311, 1312, (1992) ("the answer...is no"); R. Levin, "Rulemaking  
15 and the Guidance Exemption," 70 *Admin. L. Rev* 263 (2017) (guidance lacks force of law but  
16 misuse is "continu[ing] challenge...requiring judicial attention"); California Law Revision  
17 Commission, “Advisory Interpretations”, 28 *Cal. L. Revision Comm’n Reports* 657, 669 (1998).  
18 (guidance has “no legal effect”, “cannot prescribe a penalty [or] obligation” and cannot “in any way  
19 bind or compel”).)

20 The *Oxford English Dictionary* defines “guidance” as “advice or information aimed at  
21 resolving a problem or difficulty...the directing of the motion or position of something.”  
22 “Guidance” and related words, used throughout applicable statutes and the California Code of  
23 Regulations, invariably designate a lesser standard of enforceability. (See, e.g., Cal. Code Regs. tit.  
24 5 § 611 (California Department of Education “may issue [an] advisory providing non-binding  
25 guidance [if includes disclaimer that] compliance with the guideline is not mandatory.”); Ed. Code  
26 § 33308.5 (guidelines issued by Department “shall not be prescriptive” and, if formally adopted,  
27 “shall include written notification [that] compliance with the guidelines is not mandatory”).)

1 "If an agency acts as if [a guidance document] [is] controlling in the field...[or] if it bases  
2 enforcement actions on the document, if it leads private parties or State permitting authorities to  
3 believe that it will declare permits invalid unless they comply with the terms of the document, then  
4 [the guidance] is for all practical purposes ‘binding’." (*Appalachian Power Co. v. E.P.A* (2000),  
5 208 F.3d 1015, 1021.)

6 Our Supreme Court has identified “two distinguishing characteristics” of regulations subject  
7 to the APA, viz. (1) they are “intended to apply generally”; and (2) function to ‘implement,  
8 interpret, or make specific the law enforced or administered by [the agency].” (*Tidewater Marine*  
9 *Western, Inc. v. Bradshaw*, 14 Cal.4th 557. 571; *Missionary Guadalupanas of Holy Spirit Inc. v.*  
10 *Rouillard* (2019) 38 Cal.App.5th 421, 432.) “Guidance” is subject to the APA if its “applied  
11 practical effect” satisfies both prongs of the *Tidewater* standard. (*Vasquez v. Dep’t of Pesticide*  
12 *Regulation* (2021), A154922 at \*15, 22.)

13 A rule is subject to the rulemaking procedures of the APA whenever the interpretation “is  
14 required to resolve an ambiguity in the law to be enforced.” (*Capen v. Shewry*, 155 Cal.App.4th at  
15 387.) “An ambiguity arises when language is reasonably susceptible of more than one application to  
16 material facts [or if] no one reading of consequence to the action is ‘patently compelled ....’  
17 (*Morning Star Co.*, 38 Cal.4th at 336-337; *See also* Cal. Gov. Code §§ 11415.20, 11425.10 (“[APA]  
18 will prevail [over] conflicting or inconsistent provision[s]...”).) Otherwise, courts “invade the  
19 province of the Legislature by redefining the elements” of statutory provisions. (*In re James M*  
20 (1973), 9 Cal.3d 517, 522.)

21  
22 **B. Scientific Consensus, Government Data, and Binding Regulations Unambiguously**  
23 **Establish That Indoor Ventilation Is the Proven Most Effective Prevention**  
24 **Measure Against Airborne Pathogens Such As COVID-19**

25 Although not cited in the Challenged Guidance, CDPH has already published multiple  
26 studies affirming the importance of ventilation, through its Indoor Air Quality Division (herein,  
27 “IAQ studies”). Crucially, these studies find that California classrooms with ventilation pose the  
28 single greatest threat to California’s school children (in a worst case, posing an increased infection

1 risk of 500%!), and that universal masking makes far less of an impact than engineering controls  
2 like portable air filters and MERV 13. (Exhibit C, *infra*, pp. 76-99)

3           However, while ignoring its own studies (and the CDC recommendations cited therein)  
4 Respondent CDPH has proceeded to expand its authority with the challenged guidance in a manner  
5 that violates the law and the best scientific practices. Leaving aside the effect vague, ambiguous and  
6 confusing “guidance” missives, CDPH failed in its most important legal mission – science-based  
7 public health orders to protect the public. (*See* Guidance for K-12 Schools, failing to address  
8 ventilation at all, and Respondent K-12 guidance, falsely stating that ventilation improvements are  
9 “strongly recommended,” as opposed to required by binding law and regulation.)

10           The emergency regulations adopted by CalOSHA in November 2020, and revised on June  
11 17 2021, clearly establish a ministerial duty for Respondents to investigate ventilation  
12 improvements and other engineering protocols prior to any enforcement of other non-binding (and  
13 less applicable) public health recommendations, including the mask guidance. “For indoor  
14 locations, [all employers] shall evaluate how to maximize ventilation with outdoor air [to achieve]  
15 the highest level of filtration efficiency compatible with the existing ventilation system [and  
16 specifically] whether the use of portable or mounted High Efficiency Particulate Air (HEPA)  
17 filtration units, or other air cleaning systems, would reduce the risk of COVID-19 transmission.” (8  
18 Cal. Code Regs §3205(c)(2)(E).) More importantly, applicable permanent regulations by  
19 CalOSHA are equally (and additionally) applicable to Respondents. (8 Cal. Code Regs §5144  
20 (respiratory protection against airborne pathogens “shall be accomplished as far as feasible by  
21 accepted engineering control measures [such as] general and local ventilation”, and defining  
22 applicable protection factors of various measures); *See also* 8 Cal. Code Regs §5142-5143.)

23           Additionally, all employers “shall review applicable orders and guidance including [CDPH]  
24 guidance for Ventilation, Filtration, and Air Quality in Indoor Environments [as well as]  
25 information specific to the employer's industry, location, and operations.” (8 Cal. Code Regs  
26 3205(c)(2)(F), 5142-5144; ASHRAE Standard 62.1-2019 (Available at:  
27 [https://ashrae.iwrapper.com/ASHRAE\\_PREVIEW\\_ONLY\\_STANDARDS/STD\\_62.1\\_2019](https://ashrae.iwrapper.com/ASHRAE_PREVIEW_ONLY_STANDARDS/STD_62.1_2019)).)

28 Importantly, these generally applicable regulations regarding building ventilation control measures

1 likewise provide ample legal authority – and ministerial duties – for Respondents to implement the  
2 requested control measures.

3         As stated in CDPH’s IAQ studies, scientific basis for these requirements is well-established.  
4 Applying the formula published by the Centers for Disease Control (CDC) in 2003, the American  
5 Industrial Hygiene Association (AIHA) found that indoor ventilation systems which achieve an  
6 effective air circulation rate per hour (ACH) of at least six (6) ACH (meaning the air is fully  
7 circulated at least six times per hour), “significantly reduce[d] the spread of infectious airborne  
8 diseases” at a rate superior to all other known comparative prevention methods, including (but not  
9 limited to) masks and N-95 ventilators. (Available at: [https://aiha-](https://aiha-assets.sfo2.digitaloceanspaces.com/AIHA/resources/Guidance-Documents/Reducing-the-Risk-of-COVID-19-using-Engineering-Controls-Guidance-Document.pdf)  
10 [assets.sfo2.digitaloceanspaces.com/AIHA/resources/Guidance-Documents/Reducing-the-Risk-of-](https://aiha-assets.sfo2.digitaloceanspaces.com/AIHA/resources/Guidance-Documents/Reducing-the-Risk-of-COVID-19-using-Engineering-Controls-Guidance-Document.pdf)  
11 [COVID-19-using-Engineering-Controls-Guidance-Document.pdf](https://aiha-assets.sfo2.digitaloceanspaces.com/AIHA/resources/Guidance-Documents/Reducing-the-Risk-of-COVID-19-using-Engineering-Controls-Guidance-Document.pdf)). Most encouragingly and  
12 relevant for the instant action (and the pandemic response generally), the AIHA noted that many (if  
13 not most) building systems can be achieve such controls through existing available HVAC  
14 technologies. *Ibid.* (“Standalone high efficiency particulate arrestance (HEPA) air filtering devices  
15 (AFDs) can be used to supplement outdoor air ventilation supplied through HVAC systems in order  
16 to achieve equivalent air ex- change rates (AERs) capable of significantly reducing infectious  
17 aerosol concentrations in workplaces and offices.”) (*See also* CDC Guidelines for Environmental  
18 Control, Appendix Table B-1, Available at:

19 <https://www.cdc.gov/infectioncontrol/guidelines/environmental/appendix/air.html#tableb1>)

20         Under the applicable Hierarchy of Controls, and binding regulations applicable to  
21 Respondents, these Engineering Control approaches are plainly superior to, and should be pursued  
22 prior to, lower-level controls with reduced effectiveness, such as PPE. (Available at:  
23 <https://www.cdc.gov/niosh/topics/hierarchy/>) (*See also* 8 Cal. Code Regs §5144.) In 2010, the  
24 National Institute for Occupational Safety and Health (NIOSH), a division of the CDC, announced  
25 its nationwide “Prevention Through Design” initiative. NIOSH, whose statutory mandate is to  
26 ensure “every man and woman in the Nation safe and healthful working conditions and to preserve  
27 our human resources,” to new knowledge in the field of occupational safety and health, and to

28

1 transfer that knowledge into practice. (Available at:  
2 <https://www.cdc.gov/niosh/topics/ptd/default.html>)

3 It is important that these recommendations are consistent with nearly every relevant  
4 “guidance” standard, including (but not limited to) binding APA-compliant regulations, not to  
5 mention the comprehensive national standard implemented by NIOSH and CDC. Respondents had  
6 a clear ministerial duty (arguably, *multiple* ministerial duties) to investigate these protections in  
7 order to protect Petitioner, its members and the general public. (8 Cal. Code Regs §§ 3205(c)(2)(F),  
8 5142-5144.) In its risk classifications for workplaces under COVID-19, Federal OSHA specifically  
9 lists **outdoor vs. indoor** workplace environments as one of the primary factors distinguishing  
10 moderate (outdoor) from high (indoor) workplace risks for COVID.  
11 ([https://www.osha.gov/coronavirus/hazards#risk\\_classification](https://www.osha.gov/coronavirus/hazards#risk_classification)) Similarly, the applicable Public  
12 Health Guidance for Los Angeles County schools similarly notes that outdoor air is generally  
13 sufficient to remove the mask requirements.

14 Moreover, the state of California was given \$22,199,325,901 (\$22.2 billion) pursuant to the  
15 American Rescue Plan (“ARP”) Act of 2021 by agreeing to implement the federal guidelines set  
16 forth by the CDC for COVID-19 mitigation efforts. Thus, Petitioner has satisfied their burden for  
17 writ of mandate to issue, ordering Respondents to perform the required investigation, including, but  
18 not limited to, the applicable ACH capacity of existing buildings, under existing HVAC operations  
19 in maximum capacity or as supplemented with HEPA filters and other control measures, and how  
20 such results compare to existing benchmarks for safe indoor and outdoor air quality.

21 When required disclosures demonstrate “absence of evidence,” as here, the rule is void,  
22 because courts will not find that APA requirements simply “equat[e] with hypothetical estimates  
23 and projections”. (*W. States Petroleum Ass’n v. State Bd. of Equal.* (2012), 137 Cal. Rptr. 3d 272,  
24 292; *W. States Petroleum Ass’n v. Bd. of Equalization* (2013) 57 Cal.4th 40 (*affirming judgment*).)  
25 “[An] agency must examine the relevant data and articulate a satisfactory explanation for its action  
26 including a rational connection between the facts found and the choice made.” (*Motor Vehicle*  
27 *Manufacturers Assoc. of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29,  
28 43 (1983), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).)

1 “Normally, an agency rule [is] arbitrary and capricious if [an] agency,” as Respondents have,  
2 “entirely failed to consider an important aspect of the [issue before it, or] offered an explanation for  
3 its decision that runs counter to the evidence.” (*Motor Vehicle Manufacturers Assoc. of the United*  
4 *States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). *Cf.* Gov. Code §  
5 11346.1(b)(2). (requiring all emergency regulations reference “each technical [or] empirical study  
6 [or] report [upon which] the agency relies”, and demonstrate necessity for regulation “by substantial  
7 evidence”).)

8  
9 **2. Respondents Have Failed to Satisfy Existing Legal Obligations to Ensure Sufficient**  
10 **Ventilation Improvements In California Schools, Let Alone Quantify Existing**  
11 **Conditions, Prior to, Or Even In Conjunction With, Issuance and Enforcement of**  
12 **the Challenged Mask Guidance**

13 As shown by judicially-noticeable facts in the public record, Respondents have utterly failed  
14 to address the requirements of law. In doing so, they have put all children at risk, and created the  
15 necessity of this action.

16  
17 **3. While Several Existing Procedures Could Theoretically Apply to Petitioner’s**  
18 **Members’ Circumstances, the Unique Circumstances, Including Respondents’**  
19 **Continued Failure to Perform Required Duties Makes Such Existing Remedies**  
20 **Inadequate, Requiring Writ Relief**

21 Because it is unclear whether the applicable “employer” or other responsible party for the  
22 implementation of the mandatory ventilation measures is Respondent Department of Education, or  
23 another agency (or official(s)) presently unknown to Petitioner, the blurred lines of agency  
24 accountability demonstrate why the writ of mandamus is necessary as a matter of law. Aside from  
25 the deficiencies in the above-mentioned forms, and the required procedures and ministerial duties  
26 reflected therein, the basic architecture of governmental accountability has been obfuscated by  
27 Respondents’ actions. (*Cf.* 8 Cal. Code Regs §5144 (requiring efforts to prevent airborne diseases  
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1 “shall be accomplished as far as feasible by accepted engineering control measures” such as  
2 “general and local ventilation”).)

3 Further vexing ambiguities arise with respect with potential administrative remedies  
4 putatively available to Petitioner and its members. Namely, the Legislature has established “a  
5 system of complaint processing, known as the Uniform Complaint Procedures.” (Ed. Code §  
6 33315(a).) With a broad scope, including particular complaints relating to the “conditions of school  
7 facilities,” the Uniform Complaint Procedures (UCPs) on first blush might appear to ostensibly  
8 encompass some of Petitioner’s requests. However, the UCP procedures provide the option of  
9 providing complaints to both the local school principal and the governing superintendent, and it is  
10 unclear that either method, on its own, or even both, would suffice to achieve the requested relief.

11 Additionally, the Legislature has established a number of statutory limits on all school  
12 officials that would likewise be applicable to some degree, providing important statutory guardrails  
13 in support of Petitioner’s request, and thus necessitating this writ of mandate. “Restraint and  
14 seclusion should only be used as a safety measure of last resort, and should never be used as  
15 punishment or discipline or for staff convenience.” (Ed. Code § 49005(c).) Additional provisions  
16 prohibit schools’ use of “behavioral restraint technique that restricts breathing” (Ed. Code §  
17 49005.8.). “All pupils have the right to participate fully in the educational process.” (Ed. Code §  
18 201 (a).) To secure this right for all pupils, “California's public schools have an affirmative  
19 obligation [to] provide equal educational opportunity.” (Ed. Code § 201(b).)

20 In the end, it remains plainly unclear (a problem exacerbated by Respondents’ continuing  
21 flagrant disregard for APA standards) who the responsible agenc(ies) or official(s) are for the  
22 deprivation at issue, let alone any remedy or relief. When a problem of this magnitude exists, and  
23 even when a cause of action is not specifically authorized by statute, a writ of mandate will issue to  
24 restrain the *ultra vires* conduct of an “administrative department of the government” whether by its  
25 “head [or] subordinate officials.” (*School of Magnetic Healing v. McAnnulty* (1902), 187 U.S. 94,  
26 108.)

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1           **C. By Exploiting the Ambiguity Between Binding “Orders” and Non-binding**  
2           **“Guidance”, Respondents’ Actions Against Violated Due Process**

3           A basic requirement of due process is “explicit standards for [officials] who apply [the law]”  
4 to prevent “arbitrary enforcement.” (*People ex Rel. Gallo v. Acuna* (1997), 14 Cal.4th 1090, 1140.)  
5 By allowing “guidance” to be enforced as binding law, throughout the state and its school districts,  
6 Respondents “impermissibly delegate[s] basic policy matters to policemen, judges, and juries for  
7 resolution on an ad hoc and subjective basis, [risking] arbitrary and discriminatory application,” in  
8 violation of due process. (*Ibid.*) “No one may be required at peril of life, liberty or property to  
9 speculate as to the meaning of [the law]... [a]ll are entitled to be informed as to what the State  
10 commands or forbids.” (*Ibid.* at 1115.) Sufficient clarity under due process requires “(1) a standard  
11 of conduct for those whose activities are proscribed and (2) a standard for [punitive] enforcement  
12 and [the] ascertainment of guilt.” (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 269.) The U.S.  
13 Supreme Court has held that a government define an offense with “sufficient definiteness that  
14 ‘ordinary people can understand what conduct is prohibited’ and “in a manner that does not  
15 encourage arbitrary and discriminatory enforcement.” (*Kolender v. Lawson* (1983) 461 U.S. 352.)

16           By perpetuating the ongoing ambiguity whereby “guidance” is interpreted as mandatory, by  
17 intentionally reaping the compliance benefits from such overreach (and chilling of otherwise  
18 permissible conduct, while inhibiting necessary pandemic control measures) and furthermore by  
19 failing to specifically clarify the manner and extent to which it is actually nonbinding and available  
20 for flexible modification, Respondents have facilitated, perpetuated, allowed and carried out an  
21 ongoing due process violation against Petitioner and its members.

22  
23           **D. By Failing to Provide Due Process or Allowing Performance Standards,**  
24           **Respondents’ Attempted Enforcement of the Challenged Guidance Is Void as a**  
25           **Matter of Law**

26           Because the APA enforces the “basic procedural requirements” for agency rulemaking,  
27 denial of its protections constitutes a *per se* violation of due process as a matter of law. (Cal. Const.  
28 Art. I, Sect. 7; U.S. Const., Amends. V, XIV; Cal. Gov. Code § 11445.10 (APA “procedure[s] are

1 intended to satisfy due process”); *Halverson v. Skagit County* (1994), 42 F.3d 1257, 1261 (due  
2 process satisfied "when [agency] officials discharg[e] [statutory] responsibilities [as] prescribed by  
3 law"), quoting *Sierra Lake Reserve v. City of Rocklin* (1991), 938 F.2d 951, 957.)

4 "The fundamental requisite of due process of law is the opportunity to be  
5 heard." (*Grannis v. Ordean*, 234 U.S. 385, 394 (1914).) "It is an opportunity which must be granted  
6 at a meaningful time and in a meaningful manner." (*Armstrong v. Manzo*, 380 U.S. 545, 552  
7 (1965).) Due process requires procedures "be tailored, in light of the decision to be made, to the  
8 capacities and circumstances of those who are to be heard, to insure that they are given a  
9 meaningful opportunity to present their case." (*Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976),  
10 quoting *Goldberg v. Kelly*, 397 U.S. 254 (1970), at 268-269 (footnote omitted).) "Only that would  
11 have restored the petitioner to the position [they] would have occupied had due process of law been  
12 accorded to [them] in the first place" (*Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).)

13 "[Our] Legislature wisely perceived that the party subject to regulation is often in the best  
14 position, and has the greatest incentive, to inform [an] agency about possible unintended  
15 consequences of a proposed regulation [by] direct[ing] the attention of agency [officials] to [those]  
16 they serve, thus providing some security against bureaucratic tyranny. (*Tidewater Marine Western,  
17 Inc. v. Bradshaw*, 14 Cal.4th 557, 569 (1996), quoting *San Diego Nursery Co. v. Agricultural Labor  
18 Relations Bd.* (1979) 100 Cal.App.3d 128, 142-143.)

19 "The requirement of due process is not a fair-weather or timid assurance [but] must be  
20 respected in periods of calm and in times of trouble." (*Joint Anti-Fascist Committee v. McGrath*  
21 (1951), 341 U.S. 123, 162.) Due process principles "should be particularly heeded at times of  
22 agitation and anxiety, when fear and suspicion impregnate the air we breathe." (*Ibid* at 170-71.)

## 24 **II. CONCLUSION**

25 Respondents have failed to perform so many different required ministerial duties and  
26 mandatory functions that this Honorable Court ultimately has its pick among several legal,  
27 regulatory and other bases for its decision. However, all these roads ultimately lead to the same  
28 substantive place – granting Petitioner’s writ and request for relief.

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Respectfully Submitted,

Dated: January 9, 2022

/s/ Matthew Harrison  
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