



May 18, 2020

Governor Gavin Newsom  
1303 10th Street, Suite 1173  
Sacramento, CA 95814

**Via First-Class U.S. Mail and Email**

Napa County Health and Human Services Agency  
c/o Dr. Karen Relucio – Public Health Officer  
2751 Napa Valley Corporate Drive, Building B  
Napa, CA 94558

**Via First-Class U.S. Mail and Email**

Dear Governor Newsom and Napa County officials,

Pacific Legal Foundation (PLF) writes in support of Quent and Linda Cordair, owners of [Quent Cordair Fine Art](#) gallery in Napa County. The Cordairs want to responsibly resume business at their small retail store but are prohibited from doing so because art galleries may not open until “Stage 3” of the current statewide lockdown. The Cordairs fear that the business they have spent decades building will not survive the wait, echoing the concerns of vast numbers of small business owners throughout the State. PLF urges you to amend the State’s Resilience Roadmap<sup>1</sup> and the County’s modified Shelter-at-Home Order<sup>2</sup> to allow the Cordairs and all similarly situated businesses to open where they can operate in conformity with the State’s social-distancing and sanitation protocols.

The State and County orders now in effect arbitrarily distinguish between businesses, allowing some shops to operate while others are shuttered indefinitely. The orders do not address the individual circumstances of each business and they fail to consider less restrictive alternatives to closure. The result is palpably unjust: some businesses may operate freely, finding ways to survive, while others are closed without any rational justification. The Cordairs’ gallery, for example, is located in a county where the spread of COVID-19 has been largely halted. There are zero hospitalizations in Napa today. Moreover, the Cordairs can limit the number of patrons entering their gallery to a few at a time and maintain social distancing and sanitation best practices.

---

<sup>1</sup> The Roadmap identifies four stages of gradual easing of the Governor’s Stay-at-Home order. The State is currently in “early” Stage 2, which permits certain retail establishments to offer curbside or delivery services, while other retail establishments and “essential” businesses remain fully open subject to social-distancing protocols. Art galleries are considered Stage 3, and at present, must stay closed indefinitely. See <https://covid19.ca.gov/roadmap/>.

<sup>2</sup> <https://www.countyofnapa.org/2813/17768/Shelter-at-Home-Order>

They should be afforded the same opportunity to operate as other low-traffic, low-risk businesses in the County.

\* \* \*

[Pacific Legal Foundation](#) is the nation's oldest and most prolific public-interest law firm dedicated to advancing individual rights and limited government. PLF's expertise includes protecting the constitutional right to earn a living and economic freedom. Recently we've heard from many business owners whose livelihoods are threatened by the government's response to the pandemic. While we recognize that these are difficult times and officials are working in an atmosphere of uncertainty about the disease, the Constitution and rule of law apply even in a public health emergency. Government must not deprive people of their constitutional rights, including their ability to earn a living, without sound reasons.

#### **Quent Cordair Fine Art**

Quent Cordair Fine Art is a family-owned art gallery that has been in business since 1996. Over the past 24 years, Quent and his wife Linda have cultivated a collection that emphasizes moments of happiness, joy, and success, and it is their hope that their gallery brings joy and inspiration to others—particularly in difficult times. The Cordairs closed their gallery in March in accordance with the State's efforts to "flatten the curve." As weeks go by, the risk is increasing that they will be forced to close forever, destroying the business they have built and jeopardizing the livelihood of their employees and the 30 artists they represent.

The Cordairs have established strict social-distancing and disinfecting protocols for their gallery to minimize health or safety risks while allowing patrons to browse their art. The 3,000-square-foot gallery is located in a community with few active COVID-19 infections and where hospitals are not overburdened. Consistent with State and County instructions to other businesses,<sup>3</sup> the gallery can limit entry to six people at a time, deny entry to or remove anyone who fails to wear a cloth mask or who exhibits coughing or sneezing, and ensure that visitors who are not from the same household stay six feet apart. Further, they can offer hand sanitizer, provide for either

---

<sup>3</sup> <https://www.countyofnapa.org/DocumentCenter/View/17123/Appendix-A-Social-Distancing-Protocol?bidId=>; <https://covid19.ca.gov/pdf/guidance-retail.pdf>;  
<https://covid19.ca.gov/pdf/checklist-retail.pdf>

contactless payment or disinfectant between payments, and regularly disinfect all surfaces that are touched often (at an art gallery, there are few such surfaces).

In short, the Cordairs can institute the same protocols that the State and County have imposed on other retailers that are now, or will soon be, allowed to open. Permitting the Cordairs to operate in this manner does not create any threat to public health different from those similarly situated businesses. Nonetheless—and despite the serious financial hardship—the Cordairs face fines, imprisonment, or both for reopening their gallery.<sup>4</sup>

### **The State must act in accordance with due process**

While the government may adopt laws to protect public health, its power is not unlimited. Even during a pandemic, the State and County must abide by constitutional limits. As one federal court has ruled, the government may legislate to prevent the spread of infectious diseases, but “it does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state.”<sup>5</sup> And the United States Supreme Court has held that a community’s power to “protect itself against an epidemic” might be exercised “in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.”<sup>6</sup>

Together, principles of due process and equal protection ensure that laws are a rational means for achieving legitimate ends rather than arbitrary restrictions on personal liberties. Due process requires laws to have a means-ends fit, while equal protection ensures that similarly situated people are not treated differently without a legitimate reason. In the context of public health, these principles “guard against the risk that governmental action may be grounded in popular myths, irrational fears, or noxious fallacies rather than well-founded science.”<sup>7</sup> In other words, due process and equal protection ensure that the government’s actions are designed to protect people and not merely to control them.

---

<sup>4</sup> <https://www.countyofnapa.org/DocumentCenter/View/17112/Shelter-at-Home-Order-4-22-2020--?bidId=>

<sup>5</sup> *Jew Ho v. Williamson*, 103 F. 10, 17 (1900) (citation omitted).

<sup>6</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905).

<sup>7</sup> *City of Newark v. J.S.*, 652 A.2d 265, 274 (N.J. Super. Ct. 1993).

Courts regularly scrutinize public health measures to ensure that they meet these requirements. In *Jew Ho v. Williamson*, 103 F. 10, 17 (1900), a federal court of appeal struck down an order quarantining parts of San Francisco because it found that the order was too broad, and therefore arbitrary and “oppressive.” And because the order restricted the liberties of some but not others, it was unconstitutionally discriminatory. In *Jacobson v. Massachusetts*, which upheld a mandatory vaccination law, the Supreme Court likewise stated that a law that “purport[s] to have been enacted to protect the public health” but “has no real or substantial relation to those objects,” would be unconstitutional.<sup>8</sup> Some courts in the current pandemic have already begun to strike down orders that have hallmarks of discrimination or arbitrariness.<sup>9</sup>

Never before has the government locked down entire states without distinguishing between healthy, exposed, and infected persons. Historically, courts have required an individualized assessment of a person’s risk and consideration of less restrictive alternatives before depriving people of freedom of movement or other fundamental rights.<sup>10</sup> The “decisive consideration where personal liberty is involved is that each individual’s fate must be adjudged on the facts of his own case, not on the general characteristics of a ‘class’ to which he may be assigned.”<sup>11</sup>

### **The State and County’s reopening plans are arbitrary and irrational**

Here, the California and Napa County orders are arbitrary and irrational as applied to the Cordairs’ gallery for at least three reasons.

---

<sup>8</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905).

<sup>9</sup> See *Roberts v. Neace*, No. 20-5465, 2020 WL 2316679 (6th Cir. May 9, 2020); *McCarthy v. Baker*, Nos. 20-10701-DPW & 20-40041-DPW, 2020 WL 2297278 (D. Mass. May 7, 2020); *On Fire Christian Ctr., Inc. v. Fischer*, --- F. Supp. 3d ---, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020); *Pre-Term Cleveland v. Att’y Gen. of Cleveland*, No. 20-3365, 2020 WL 1673310 (6th Cir. Apr. 6, 2020).

<sup>10</sup> *Best v. St. Vincents Hosp.*, No. 03 CV.0365, 2003 WL 21518829 (S.D.N.Y. July 2, 2003).

<sup>11</sup> *City of Newark*, 652 A.2d at 274. As a federal court in New York observed, even the fact that an individual may have active tuberculosis does not itself justify involuntary detention; rather, that individual’s circumstances must be analyzed to determine whether he or she would constitute a danger to society. See *Best*, 2003 WL 21518829; see also *People ex rel. Barmore v. Robertson*, 134 N.E. 815, 819 (Ill. 1922) (“A person cannot be quarantined upon mere suspicion that he may have a contagious and infectious disease,” and instead “health authorities must have reliable information on which they have reasonable ground to believe that the public health will be endangered by permitting the person to be at large.”).

First, the State and County cannot explain the disparate treatment of the Cordairs' gallery and other similarly situated businesses. While the government purports to allow some businesses to operate because they are "essential," the definition of essential businesses was adopted wholesale from the federal government's guidelines. The State cannot explain how those sectors—and not others—are important to Californians' "health and well-being."

Many of the occupations deemed "essential"—safety, sanitation, food—appear to meet basic survival needs of the public. But other businesses deemed "essential" are not any more important for the well-being of Californians than businesses forced to remain closed. Why, for example, are technology *retail* establishments "essential," such that they are not limited to e-commerce or curbside activities, while other retailers are forced to close entirely? Similarly, the State fails to provide any reason for declaring the entertainment industry "essential," though one suspects that this declaration arises out of the industry's lobbying power rather than any public health rationale.

Second, the State and County's distinctions between Stage 2 and Stage 3 businesses (like art galleries) is similarly irrational. According to the State, examples of retail businesses that may reopen to some degree now include bookstores, jewelry stores, toy stores, clothing stores, shoe stores, home and furnishing stores, sporting goods stores, antique stores, music stores, and florists. Napa County's list includes bookstores, jewelry stores, and antique stores.<sup>12</sup> As an art dealer, the Cordairs' gallery is analogous to any of these businesses—both in terms of subject matter and ability to open safely. But it is banned from offering curbside services, or from gathering the minimal foot traffic necessary to stay afloat because it has been deemed "Stage 3." There is no rational reason to allow bookstores, jewelry stores, or any other Stage 2 businesses to operate, and yet to deprive the gallery of the same opportunity to safely open its doors.

Third, the State and County plans fail to account for the circumstances of individual businesses. Even among art galleries, not all are the same. Officials may be envisioning packed indoor museums, but the Cordairs' gallery is inherently a low-risk business. There are not many close encounters or high touch surfaces at an art gallery (indeed, customers are discouraged from touching the art, which is not true of the products in many other Stage 2 businesses). And as explained above, the Cordairs have agreed to implement State and County social-distancing and sanitation protocols

---

<sup>12</sup> <https://www.countyofnapa.org/DocumentCenter/View/17136/Shelter-at-Home-Order-FAQs-ENG-PDF?bidId=>

imposed on other businesses that have been allowed to open. Neither the State nor the County has explained why retail establishments must stay closed even if, as the Cordairs propose, they “follow covid-19 public health guidance around physical distancing,” as other businesses must.<sup>13</sup> Any determination of whether the Cordairs are able to open the gallery must depend on these characteristics, rather than arbitrary distinctions between businesses.

The State and County plans also fail to account for the success that Napa and surrounding counties have had limiting exposure to COVID-19.<sup>14</sup> The fact is, Napa hospitals have not been overwhelmed. As of May 18, 2020, Napa County has had 90 total cases of COVID-19 compared to almost 77,000 positive cases statewide.<sup>15</sup> Counties surrounding Napa County also have low cases and deaths—including Sonoma (356 total positive cases, 4 deaths), Lake (7 positive cases, 0 deaths), Yolo (181 positive cases, 22 deaths), and Solano (392 positive cases, 16 deaths).<sup>16</sup> Nearly half of the positive cases (37,352) and more than half the deaths (1,793) in the State arise in Los Angeles County. Yet the gallery is treated the same as a business in a high-risk area. In light the precautions they can take to protect public health, the State and County orders are irrationally depriving the Cordairs of their right to earn a living.

At bottom, the Cordairs want the State and the County to treat them fairly and sensibly—that is, to be given the same freedom allowed to other, similarly situated businesses. They recognize that reopening is no guarantee of success. Even so, what the American system of government guarantees is not success, but the right to work, to build a business, to make the best choices available to them under the circumstances—in short, the right to *pursue* success. That right is always important, but it is indispensable during a crisis. The Cordairs have worked hard for nearly 25 years

---

<sup>13</sup> <https://covid19.ca.gov/essential-workforce/>

<sup>14</sup> While the State allows local jurisdictions to increase the pace at which they advance through Stage 2, it does not allow them to advance into Stage 3 and it denies individual businesses the opportunity to demonstrate their ability to reopen safely in that county. *See* <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-County-Variance-Attestation-Memo.aspx>.

<sup>15</sup> <https://legacy.livestories.com/s/v2/coronavirus-report-for-napa-county-ca/9065d62d-f5a6-445f-b2a9-b7cf30b846dd/>; <https://healthpolicy.usc.edu/evidence-base/hospital-resource-use-for-patients-with-without-coronavirus/>

<sup>16</sup> [https://public.tableau.com/views/COVID-19PublicDashboard/Covid-19Public?:embed=y&:display\\_count=no&:showVizHome=no](https://public.tableau.com/views/COVID-19PublicDashboard/Covid-19Public?:embed=y&:display_count=no&:showVizHome=no)

Governor and Napa County  
May 18, 2020  
Page 7

building a successful art business; they want to be free to work as best they can for the survival of that business now.

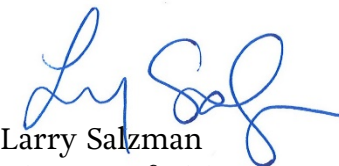
### Conclusion

The Cordairs' request is modest: they seek to reopen their art gallery subject to all state and local social-distancing and disinfecting protocols, and to be treated like other businesses that the State has allowed to open. They believe all similarly situated businesses should be afforded the same liberty. As the Supreme Court of California has held, "Any limitation on opportunity for employment impedes the achievement of economic security, which is essential for the pursuit of life, liberty and happiness."<sup>17</sup> We ask therefore that the State's Resilience Roadmap and the County's modified Shelter-at-Home Order be amended to allow businesses to open where they can do so consistent with State and local safety protocols.

Respectfully,



Anastasia Boden  
Senior Attorney



Larry Salzman  
Director of Litigation

cc: Napa County Board of Supervisors

---

<sup>17</sup> *Purdy and Fitzpatrick v. State*, 71 Cal. 2d 566, 579 (1969).