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9 Attorneys for Plaintiffs Tuck's Restaurant and Bar,  
10 Kenneth R. Paige, Chad Page, Buckman Enterprises, LLC,  
11 Robin Buckman, and The Nevada County Restaurant  
12 Coalition

13 **UNITED STATES DISTRICT COURT**  
14 **EASTERN DISTRICT CALIFORNIA**

15 TUCK'S RESTAURANT AND  
16 BAR, a California corporation,  
17 KENNETH R. PAIGE; CHAD  
18 PAIGE; BUCKMAN  
19 ENTERPRISES, LLC, a California  
20 limited liability company; ROBIN  
21 BUCKMAN; and THE NEVADA  
22 COUNTY RESTAURANT  
23 COALITION, an unincorporated  
24 membership association;

25 *plaintiffs,*

26 v.

27 GAVIN NEWSOM, in his capacity  
28 as Governor of the State of  
California; XAVIER BACCERA,  
in his capacity as Attorney General  
of the State of California; MARK  
GHALY, in his capacity as  
Secretary of the California Health  
and Human Services Agency;  
SANDRA SHEWRY, in her  
capacity as Acting Director of the  
California Department of Public  
Health; ERICA PAN, in her  
capacity as Acting State Public  
Health Officer for the California

Case No.

**COMPLAINT**

**JURY TRIAL DEMANDED**

**SUBSTANTIVE DUE PROCESS**  
**(14<sup>th</sup> Amendment)**

**PROCEDURAL DUE PROCESS**  
**(14<sup>th</sup> Amendment)**

**EQUAL PROTECTION**  
**(14<sup>th</sup> Amendment)**

**UNCOMPENSATED TAKINGS**  
**(5<sup>th</sup> Amendment)**

**COMMERCE CLAUSE**  
**(Art. 1, Section 8)**

**FREEDOM OF SPEECH,**  
**ASSEMBLY AND PETITION**  
**(First Amendment)**

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Department of Public Health;  
HEIDI HALL, in her capacity as a  
Member of the Board of  
Supervisors of Nevada County,  
California; ED SCOFIELD, in his  
capacity as a Member of the Board  
of Supervisors of Nevada County,  
California; DAN MILLER, in his  
capacity as a Member of the Board  
of Supervisors of Nevada County,  
California; SUSAN HOEK, in her  
capacity as a Member of the Board  
of Supervisors of Nevada County,  
California; RICHARD  
ANDERSON, in his capacity as a  
Member of the Board of  
Supervisors of Nevada County,  
California; RICHARD O.  
JOHNSON, in his capacity as  
Public Health officer for Nevada  
County, California; AMY IRANI,  
KATHARINE ELLIOTT; and  
DOES 1-10 inclusive,

*defendants.*

**JURISDICTION**

1. This action asserts claims pursuant to 42 U.S.C. § 1983. The court has jurisdiction over this civil action pursuant to 28 U.S.C. §§ 1331 and 1337. Declaratory relief is authorized on the facts alleged pursuant to 28 U.S.C. § 2201. Injunctive relief is authorized pursuant to 28 U.S.C. § 1343(a).

2. Venue of this civil action in the Judicial District for the Eastern District of California is proper pursuant to 28 U.S.C. § 1391 (b) (1) and (2). Defendants maintain offices, exercise their authority in their official capacities, and have taken the actions at issue in this matter in the Judicial District for the Eastern District of California.

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**NATURE OF THE ACTION**

1  
2 3. Plaintiffs bring this action to seek relief from ongoing arbitrary restrictions  
3 imposed and enforced by defendants which violate the fundamental liberties of plaintiffs and  
4 the citizens of the State of California and the United States and threaten them with irreparable  
5 harm.

6 4. On March 19, 2020, in response to the spread of the novel coronavirus and  
7 COVID-19, defendant Gavin Newsom, in his official capacity as Governor of the State of  
8 California, imposed emergency Orders pursuant to the authority granted him by California  
9 law. The emergency Orders issued by Governor Newsom and the restrictions implemented  
10 pursuant to such Orders are unprecedented in their scope and duration. Plaintiffs have, in  
11 addition, been subjected to Orders and enforcement measures implemented under color of state  
12 law by Nevada County, California.

13 5. The Orders and restrictions implemented and enforced by defendants in  
14 response to COVID-19 have imposed widespread population lockdowns, broadly-based and  
15 open-ended business closures and restrictions, and pervasive and ongoing restrictions on the  
16 right of the people to travel, associate, and assemble to pursue otherwise lawful spiritual,  
17 political, economic and social ends. These restrictions are unprecedented in the history of  
18 public health measures.

19 6. While arguably justified in their inception as temporary measures imposed in  
20 the face of limited information, evidence and analysis available since at least May 2020  
21 establish that the Orders and restrictions at issue in this matter cannot be justified as narrowly  
22 tailored to protect public health and have, in fact, resulted in other significant, negative health  
23 outcomes, including lower childhood vaccination rates, worsening cardiovascular disease  
24 outcomes, fewer cancer screenings and deteriorating mental health, leading to greater excess  
25 mortality in years to come. Given the availability of alternative measures that rationally  
26 address all legitimate public health concerns by targeting at risk populations, continued  
27 enforcement of the Orders and restrictions at issue in this matter would be arbitrary and  
28 capricious and would violate the fundamental rights of plaintiffs and the people of the State of

1 California under the Fourteenth Amendment to travel, associate, pursue lawful professions,  
2 engage in lawful business enterprises, and seek gainful employment.

3 7. The Orders and restrictions at issue in this matter were implemented solely  
4 through executive action and without affording plaintiffs and the people of State of California  
5 notice and an opportunity to be heard in violation of their right to procedural due process  
6 under the Fourteenth Amendment to the United States Constitution.

7 8. The Orders and restrictions at issue in this matter are based on arbitrary and  
8 irrational classifications in violation of the right to equal protection guaranteed by the  
9 Fourteenth Amendment. The Orders and restrictions are based on arbitrary classifications of  
10 activities as “essential or “non-essential” that are not rationally related to promoting public  
11 health, promote the interests of favored groups without reference to the impact of the activities  
12 in question on the transmission of COVID-19, and shift the burden of the response to COVID-  
13 19 to a limited class of persons and businesses.

14 9. The Orders and restrictions at issue in this matter have interfered with distinct  
15 investment-based expectations in private property without compensation and have thereby  
16 effected uncompensated takings in violation of the Fifth Amendment to the United States  
17 Constitution.

18 10. The Orders and restrictions at issue in this matter unreasonably burden  
19 interstate commerce in violation of Article I, Section 8, Clause 3 of the Constitution.

20 11. Plaintiffs have been seriously harmed by the Orders and restrictions at issue in  
21 this matter and are and are threatened with irreparable harm if the Orders and restrictions at  
22 issue are not enjoined.

23 12. Plaintiffs Tuck’s Restaurant and Bar dba Friar Tuck’s Restaurant and Bar  
24 (“Friar Tuck’s”) and Buchman Enterprises, LLC dba Old Town Café (“Old Town Café”) are  
25 restaurants located in Nevada County serving the general public. Plaintiff Nevada County  
26 Restaurant Coalition (the “Coalition”) is a membership association of dining and drinking  
27 establishments in Nevada County, California.

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1           13. Plaintiffs have been damaged by the arbitrary and ever-changing Orders and  
2 restrictions at issue. The Orders at issue in this matter initially prohibited plaintiffs from  
3 providing indoor dining service. This restriction threatened to bankrupt plaintiffs. The  
4 restriction on indoor dining was then lifted, but was soon reimposed, once again threatening  
5 plaintiffs' ability to stay in business and depriving plaintiffs of the benefit of their investment  
6 in measures implemented to prevent the spread of COVID-19 upon reopening. Although  
7 plaintiffs' businesses are continuing to operate on a limited basis, they will be unable to  
8 continue as viable going concerns when the onset of fall and winter weather curtails outdoor  
9 dining which under the restrictions currently in place, has allowed them to remain in business.  
10 Moreover, under the legal authority under which they purport to act, defendants are able to  
11 reinstate any previously imposed Orders and restrictions if preliminary and permanent  
12 injunctive relief is not granted.

13           14. Plaintiffs have also been subjected to arbitrary, irrational, and discriminatory  
14 enforcement by Nevada County, California in violation of their right to equal protection under  
15 the Fourteenth Amendment. Nevada County intentionally, irrationally and arbitrarily issued  
16 closure orders as to certain plaintiffs while overlooking violations by similarly situated  
17 businesses.

18           15. Nevada County has also violated plaintiffs' First Amendment rights. Following  
19 the arbitrary closure orders imposed by Nevada County, the other plaintiffs organized the  
20 Coalition, sought redress from the closure orders from Nevada County, and sought to mobilize  
21 public opposition to the Orders and restrictions at issue in this matter. Nevada County  
22 retaliated against plaintiffs' protected, expressive activity by requiring plaintiffs to cease all  
23 such activity as a condition to reducing the fines imposed in connection with the arbitrary  
24 closure orders. This was nothing less than an attempt to directly silence plaintiffs' legitimate  
25 expressive activities in opposition to the Orders and restrictions at issue.

26           16. Defendants' violations of plaintiffs' fundamental rights have inflicted  
27 substantial financial losses upon plaintiffs, unreasonably infringed upon plaintiffs' liberty  
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1 interests, resulted in uncompensated takings, and will result in irreparable harm to plaintiffs if  
2 enforcement of the Orders and restrictions at issue in this matter is not enjoined.

3 **PARTIES**

4 17. Plaintiff Tuck’s Restaurant and Bar (“Friar Tuck’s”) is a for-profit California  
5 corporation operating under the name Friar Tuck’s Restaurant and Bar, which is and was at all  
6 relevant times engaged in providing dining and bar service to customers from a storefront  
7 location in Nevada City, Nevada County, California.

8 18. Plaintiffs Kenneth Paige and Chad Paige are the sole shareholders of Friar  
9 Tuck’s.

10 19. Plaintiff Buckman Enterprises, LLC (“Old Town Café”) is a California limited  
11 liability company operating under the name Old Town Café, which is and was at all relevant  
12 times engaged in providing dining and bar service to customers from a storefront location in  
13 Grass Valley, Nevada County, California.

14 20. Plaintiff Robin Buckman is the sole member of Buckman Enterprises, LLC.

15 21. Plaintiff Nevada County Restaurant Coalition (the “Coalition”) is a membership  
16 association of businesses providing dining and drinking establishments in Nevada County,  
17 California. The Coalition is named as a representative of the interests of its members.

18 22. Defendant Gavin Newsom is the Governor of the State of California. The  
19 California Constitution vests the “supreme executive power of the State” in the Governor, who  
20 “shall see that the law is faithfully executed.” Cal. Const. Art. V, § 1. Governor Newsom is  
21 named in his official capacity.

22 23. Defendant Xavier Becerra is the Attorney General of California. Attorney  
23 General Becerra is named in his official capacity.

24 24. Defendant Mark Ghaly is the Secretary of the California Health and Human  
25 Services Director Agency. The Secretary of the California Health and Human Services Agency  
26 is responsible for overall management and control of the Health and Human Services Agency.  
27 Cal. Govt. Code § 12800 (b). Secretary Ghaly is named in his official capacity.

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1           25. Defendant Sandra Shewry is the acting Director of the California Department of  
2 Public Health. The California Department of Public Health is a subdivision of the California  
3 Health and Human Services Agency. The California Department of Public Health is  
4 responsible for the enforcement of California health and safety laws and regulations. Director  
5 Shewry is named in her official Capacity.

6           26. Defendant Erica Pan is the acting State Public Health Officer for the California  
7 Department of Public Health. Defendant Pan is named in her official capacity.

8           27. The term “State Defendants” as used hereinafter shall refer collectively to  
9 defendants Gavin Newsom, Xavier Bacerra, Mark Ghaly, Sandra Shewry and Erica Pan.

10           28. Defendants Heidi Hall, Ed Scofield, Dan Miller, Susan Hoek and Richard  
11 Anderson are members of the Board of Supervisors for Nevada County, California (“Board of  
12 Supervisors”). The Board of Supervisors is the legislative and executive authority for county  
13 government for Nevada County, California (“Nevada County”).<sup>1</sup> As such, the Board of  
14 Supervisors is the highest policy-making authority for Nevada County. Defendants Heidi Hall,  
15 Ed Scofield, Dan Miller, Susan Hoek and Richard Anderson are named in their official  
16 capacities.

17           29. The term “Supervisor Defendants” as used hereinafter shall refer collectively to  
18 defendants Heidi Hall, Ed Scofield, Dan Miller, Susan Hoek and Richard Anderson.

19           30. Defendant Richard O. Johnson is the Public Health Officer for Nevada County.  
20 Dr. Johnson is named in his official capacity

21           31. Defendant Amy Irani is the Director of Environmental Health for Nevada  
22 County. Defendant Irani is named in her official and personal capacities.

23           32. Defendant Katharine Elliott is County Counsel for Nevada County. Defendant  
24 Elliot is legal counsel for the Supervisor Defendants and Nevada County. Defendant Elliott is  
25 named in her personal and official capacities.

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27 <sup>1</sup> <https://www.mynevadacounty.com/1038/About-the-Board-of-Supervisors#:~:text=The%20Board%20of%20Supervisors%20is%20the%20legislative%20and,seeing%20that%20all%20Federal%20and%20State%20mandated%20> (November 10,  
28 2020).

1           33.     The term “County Defendants” as used hereinafter shall refer collectively to the  
2 Supervisor Defendants, Richard O. Johnson, Amy Irani and Katharine Elliot.

3           **THE INITIAL STATE HEALTH ORDERS IN RESPONSE TO CORNAVIRUS**

4           34.     On or about March 4, 2020, California Governor Gavin Newsom proclaimed a  
5 State of Emergency in response to the spread of COVID-19. Governor Newsom’s emergency  
6 proclamation was issued pursuant to Section 8625 of the California Government Code.

7           35.     On March 19, 2020, Governor Newsom, invoking the authority granted him  
8 under sections 8567, 8627 and 8655 of the California Government Code, issued Executive  
9 Order N-33-20, directing all residents to “immediately heed” the State Public Health Officer’s  
10 directives. The Order further directed all Californians to stay home “except as needed to  
11 maintain continuity of operations of the federal critical infrastructure sectors.” The Order was  
12 issued “to protect the public health”, “mitigate the impact of COVID-19”, “bend the curve, and  
13 disrupt the spread of the virus.”

14           36.     On or about March 19, 2020, Sonia Angell, who was then serving as the  
15 California State Public Health Officer, acting pursuant to the authority conferred by Governor  
16 Newsom’s Orders, issued an Order which designated a list of “Essential Critical Infrastructure  
17 Workers.” The Order incorporated by reference the U.S. Government’s 16 critical  
18 infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are  
19 considered so vital to the United States that their incapacitation or destruction would have a  
20 debilitating effect on security, economic security, public health or safety, or any combination  
21 thereof. The Order provided that “Californians working in these 16 critical infrastructure  
22 sectors [would] continue their work because of the importance of these sectors to Californians’  
23 health and well-being.” All other businesses and organizations were ordered either to cease all  
24 operations or to operate under substantial restrictions. Persons not employed in the 16 critical  
25 infrastructure areas were required to stay home except as necessary to obtain necessities such  
26 food, prescriptions, and healthcare.

27           **THE PLAINTIFF RESTAURANTS ARE REQUIRED TO CEASE INDOOR SERVICE**

28           37.     Plaintiffs Friar Tuck’s, Old Town Café and Coalition members were required to



1 cease providing indoor dining for their customers to comply with the March 19, 2020 Order of  
2 the State Public Health Officer. Plaintiffs were permitted to offer exclusively take-out and  
3 delivery service. A prohibition on providing indoor service to customers would bankrupt Friar  
4 Tuck's, Old Town Café and Coalition members within a few months.

5 38. Friar Tuck's had previously offered both sit down dining and food service in a  
6 bar area. Friar Tuck's has been in business since 1973. Friar Tuck's is located in the historic  
7 downtown district of Nevada City, a small city in a rural area in the heart of the Gold Country.  
8 Friar Tuck's is, and has for decades, been a mainstay of the local community.

9 39. Prior to the implementation of the March 19, 2020 Orders, Old Town Café  
10 offered both sit down dining and food service in a bar or counter area. Old Town Café is the  
11 oldest continuously operating restaurant in Grass Valley, tracing its history back to the 1930's.  
12 Old Town Café specializes in serving breakfast and lunch. Old Town Café also offered dinner  
13 two nights a week. Old Town Café had also hosted the Talk of the Town show every month,  
14 which is a local radio program discussing local politics, businesses, and news. Furthermore,  
15 Old Town Café has for many years been offering free meals during Thanksgiving to 250 to  
16 500 persons, including many homeless persons. This benefit to the community is now in  
17 jeopardy.

18 40. Friar Tuck's and Old Town Café are both long-standing fixtures of the historic  
19 districts in Nevada County, and in addition to operating as restaurants, provided venues for  
20 numerous public and private events over the years.

21 41. As a result of the restrictions prohibiting indoor service, plaintiffs Friar Tuck's  
22 and Old Town Café were forced to cancel numerous previously scheduled reservations and  
23 events.

24 42. As a further result of the restrictions prohibiting indoor service, Friar Tuck's  
25 was required lay off 27 of its 32 employees to remain a solvent going concern.

26 43. Old Town Café was likewise required to lay off employees to remain solvent  
27 during the period in which it was required to cease indoor service by reason of the March 19,  
28 2020 Orders imposed and enforced by defendants.

1           44. Notwithstanding their best efforts to mitigate the effect of the prohibition on  
2 indoor dining, plaintiff Friar Tuck’s, Old Town Café and Coalition members suffered  
3 substantial reductions in revenue during the period between March 15 and May 4, 2020.

4                           **PLAINTIFF RESTAURANTS WERE PERMITTED TO RESUME**  
5 **INDOOR SERVICE AND THEN REQUIRED TO CEASE INDOOR SERVICE AGAIN**

6           45. On May 4, 2020, Governor Newsom, again acting pursuant to emergency  
7 powers under state law, issued Executive Order N-60-20. This Order permitted businesses to  
8 begin reopening in stages, as determined by the State Public Health Officer. It also directed the  
9 State Public Health Officer to develop criteria to determine “whether and how ... local health  
10 officers may ... issue directives less restrictive than measures ... implemented on a statewide  
11 basis pursuant to the statewide directives of the State Public Health Officer.”

12           46. On May 7, 2020, State Public Health Officer Angell issued an Order permitting  
13 the gradual reopening of businesses and activities in California in stages. The Order provided  
14 for four stages of gradual reopening, with the final stage, Stage 4, consisting of an end to all  
15 stay-at-home orders and a full reopening of businesses.

16           47. Under the May 7, 2020 Order, Friar Tuck’s, Old Town Café and Coalition  
17 members were permitted to resume providing indoor dining service.

18           48. In or about May 2020, plaintiffs Friar Tuck’s, Old Town Café and Coalition  
19 members resumed indoor dining service.

20           49. Friar Tuck’s, Old Town Café and Coalition members were required by  
21 defendants to implement numerous additional health and safety practices as a condition to  
22 resuming indoor dining service under the May 7, 2020 Order. Compliance with these  
23 requirements imposed significant costs on Friar Tuck’s, Old Town Café and Coalition  
24 members.

25           50. On July 13, 2020, the State Public Health Officer issued a further Order  
26 directing all restaurants in the State of California to again cease indoor dining service. The  
27 Order applied to all restaurants in Nevada County, despite, on information belief, the fact that  
28 Nevada County—with a population of approximately 100,000—had thus far experienced no

1 shortage of hospital beds or ICU units and had experienced only one death attributed to  
2 COVID-19.

3 51. The July 13, 2020 Order, by reinstating the prohibition on indoor dining  
4 service, substantially diminished plaintiffs' revenues and profits and again threatened their  
5 viability as ongoing business concerns. As a result of the July 13, 2020 Order, Friar Tuck's,  
6 Old Town Café and Coalition members were also unable to recoup the cost of implementing  
7 the safety measures imposed by the May 7, 2020 Order as a condition to offering indoor dining  
8 to their customers.

9 **NEW AND MORE RESTRICTIVE REQUIREMENTS ARE IMPOSED**

10 52. On August 28, 2020, defendant Pan implemented a statewide Order that  
11 abandoned the previous, staged re-opening plan promulgated in the May 7, 2020 Order. The  
12 August 28, 2020 Order remains in effect at the time of the filing of the Complaint with a  
13 September 30, 2020 modification to include an "equity" component.

14 53. The August 28, 2020 Order dictated that counties would be classified according  
15 to a new plan entitled "Blueprint for a Safer Economy" under which a color-coded "tier"  
16 system would be used. Under this system, each county is placed in one of four tiers, Purple,  
17 Red, Orange, and Yellow, ranging from most to least restrictive. Unlike the previous staged  
18 reopening plan under the May 7, 2020 Order, the current "tier" system under the August 28,  
19 2020 Order does not provide any criteria under which California's businesses and economy  
20 would be permitted to fully reopen. Under the August 28, 2020 Order, under the respective  
21 tiers, restaurants are required to 1.) cease all indoor dining (Purple tier); 2.) limit indoor dining  
22 capacity to 25% (Red tier); or 3.) limit indoor dining capacity to 50 % (Orange and Yellow  
23 tiers).

24 54. For counties with populations of 106,000 or greater, the September 30, 2020  
25 equity component incorporated into the Augusts 28, 2020 Order imposes as a condition of  
26 moving to a less restrictive tier a requirement that the test positivity rates in the most  
27 disadvantaged neighborhoods do not significantly lag behind the overall county test positivity  
28

1 rate.<sup>2</sup> It further requires all counties as condition to moving to a lower tier, to submit a plan  
2 that (1) defines its disproportionately impacted populations, (2) specifies the percent of its  
3 COVID-19 cases in these populations, and (3) shows that it plans to invest Epidemiology and  
4 Laboratory Capacity for Prevention and Control of Emerging Infectious Diseases grant funds  
5 at least at that percentage to interrupt disease transmission in these populations.<sup>3</sup>

6 55. Defendant Newsom has indicated his intent to implement these tiered  
7 restrictions for an indefinite period of time, publicly stating that “This Blueprint is statewide,  
8 stringent and slow....We have made notable progress over recent weeks, but the disease is still  
9 too widespread across the state. COVID-19 will be with us for a long time and we all need to  
10 adapt. We need to live differently. And we need to minimize exposure for our health, for our  
11 families and for our communities.” The current statewide Orders therefore include no  
12 provision for fully reopening the economy and by their terms continue for an indefinite period  
13 into the future.

14 **NEVADA COUNTY’S ENFORCEMENT**  
15 **OF STATE AND COUNTY PUBLIC HEALTH ORDERS**

16 56. The County Defendants, acting under color of state law, have enforced and  
17 continue to enforce the arbitrary restrictions imposed by the State Defendants. The County  
18 Defendants have also implemented and enforced arbitrary restrictions on plaintiffs’ businesses  
19 under their own authority under state law. Cal. Constitution. Art. XI, § 7.

20 57. On March 4, 2020, the Director for Emergency Services for Nevada County  
21 entered an Emergency Proclamation of a public health and safety emergency by reason of  
22 COVID-19. The Proclamation invoked the authority of Section 8360 of the California  
23 Government Code, Section A-1112.6 of the County of Nevada Administrative Code, and  
24 Governor Newsom’s March 4, 2020 Emergency Order.

25 58. On March 5, 2020, Ken Cutler, who was then serving as the Public Health  
26 Officer for Nevada County, issued a Declaration of Local Health Emergency pursuant to

27 <sup>2</sup> <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CaliforniaHealthEquityMetric.aspx> (November 10, 2020).

28 <sup>3</sup> *Id.*

1 Section 101080 of the California Health and Safety Code.

2 59. On March 10, 2020, the Board of Supervisors of Nevada County enacted  
3 Resolution 20-062 proclaiming a local emergency by reason of COVID-19. The Proclamation  
4 invoked the authority of Sections 8630 and 54956.5 of the California Government Code.

5 60. On March 24, 2020, Ken Cutler, who was then serving as the Public Health  
6 Officer for Nevada County, acting under color of state law, issued an Order entitled  
7 “Clarification of Governor’s and State Officer’s ‘Stay-at-Home’ Order as related to Lodging  
8 Facilities. The Order was amended on May 21, 2020.

9 61. On April 15, 2020, Ken Cutler, who was then serving as the Public Health  
10 Officer for Nevada County, issued a Stay-at-Home Order pursuant to California Health and  
11 Safety Code sections 101030, 120100, et seq., and Section 2501 of Title 17 of the California  
12 Code of Regulations. The Order invoked and incorporated by reference, among others,  
13 Governor Newsom’s March 4, 2020 Emergency Order and March 19, 2020 Executive Order  
14 N-33-20, and the Supervisor Defendants’ March 10, 2020 Resolution 20-062. Dr. Cutler  
15 issued an Amended Order on April 27, 2020.

16 62. On October 1, 2020, the Nevada County Department of Public Health issued an  
17 Order restricting the conditions under which live music can be presented at bars, restaurants  
18 and wineries.

19 63. The restrictions in place by virtue of the Orders, Proclamations and Resolutions  
20 of the County Defendants and their employees and agents, as alleged above, imposed  
21 restrictions on plaintiffs that were and continue to be at least as restrictive as those imposed by  
22 the Orders and restrictions implemented by the State Defendants.

23 64. The Orders, Proclamations and Resolutions implemented by the County  
24 Defendants and their agents and employees as alleged above were issued on the authority of  
25 the Supervisor Defendants and were the official policy of Nevada County.

26 65. Plaintiffs have repeatedly asked the County Defendants what they can do to  
27 resume their indoor operations safely, only to be rebuffed. Plaintiffs have researched and  
28 discovered multiple effective means of preventing infection and transmission of COVID-19

1 within restaurant businesses. Plaintiffs have requested meetings with the County Defendants to  
2 propose ways in which such means could be utilized to allow restaurants to open safely, but  
3 such requests for meetings have been denied.

4 66. Plaintiffs and other restaurant owners are well-versed in appropriate practices to  
5 prevent the spread of contagion and illnesses within a restaurant setting. Implementing  
6 appropriate sanitary and hygiene practices and to ensure customer safety is an everyday  
7 practice in the restaurant business.

8 67. Restaurants in Nevada County are also subject to regular mandatory health and  
9 safety inspections by both state and local health officials.

10 **NEVADA COUNTY IRRATIONALLY**  
11 **DISCRIMINATED AGAINST PLAINTIFFS IN THE ENFORCEMENT**  
12 **OF HEALTH MEASURES AND USED STATE ACTION TO RETALIATE**  
13 **AGAINST AND SILENCE PLAINTIFFS' PROTECTED EXPRESSIVE ACTIVITY**

14 68. Rather than working with plaintiffs to allow them to resume their full scope of  
15 business activities and exercise their fundamental right to pursue a lawful vocation, the County  
16 Defendants intentionally treated plaintiffs differently than other, similarly situated, restaurant  
17 businesses without any rational basis. The County Defendants have also retaliated against  
18 plaintiffs for exercising their First Amendment rights to free speech and association and to  
19 seek a redress of grievances. The Nevada County defendants have thereby attempted to silence  
20 plaintiff's legitimate expressive activities.

21 69. On July 21, 2020, the County Defendants, acting pursuant to the Orders and  
22 restrictions imposed by the State Defendants and the Nevada County Defendants, as alleged  
23 above, served Friar Tuck's and Old Town Café with orders requiring immediate closure and  
24 threatening the imposition of fines, citing an "imminent and substantial health hazard."  
25 However, no specific finding was provided substantiating the existence of an imminent and  
26 substantial health hazard. The closure orders were arbitrary and capricious and violated these  
27 plaintiffs' due process rights under the Fourteenth Amendment.

28 70. The County Defendants' closure orders also intentionally subjected Friar

1 Tuck's and Old Town Café to differential enforcement of public health measures without any  
2 rational basis. Friar Tuck's and Old Town Café were closed for allegedly failing to follow the  
3 July 13, 2020 Public Health Officer Order requiring restaurants to cease providing indoor  
4 dining service. However, no such closure order was imposed on, Mezé, a restaurant located in  
5 Grass Valley immediately adjacent to Old Town Café, which was operating no differently than  
6 these plaintiffs. The County Defendants also failed to impose closure orders on Grass Valley  
7 Brewing Company and Thirsty Barrel Taphouse and Grill. Both are restaurants in Grass  
8 Valley that were operating what would be considered indoor dining areas under the Orders and  
9 restrictions in place at the time Friar Tuck's and Old Town Café were closed by the County  
10 Defendants.

11 71. When the County Defendants issued the notices of immediate closure, Old  
12 Town Café, in the exercise its constitutional rights to free speech and association to and seek a  
13 redress of grievances, asked patrons, family, and friends to write to the County Defendants to  
14 express opposition to the shutdown of local restaurants.

15 72. Following the imposition of closure orders and the levying of fines on Friar  
16 Tuck's and Old Town Café, these plaintiffs organized the Coalition.

17 73. In response, the County Defendants coerced plaintiffs to forego their First  
18 Amendment rights.

19 74. During discussions and communications with defendant Irani and defendant  
20 Elliott, defendant Elliot stated that as a condition to reinstating the operating permits of, and  
21 reducing the fines imposed on, Friar Tuck's, Old Town Café, and Coalition members,  
22 plaintiffs were "to behave" and stop asking people to write letters to county and local officials.

23 75. The County Defendants and their agents have directly threatened retaliation  
24 against Friar Tuck's, Old Town Café and Coalition members for the exercise of their  
25 constitutional rights by refusing to negotiate reductions in fines. Defendant Elliott stated that  
26 plaintiffs' establishment of the Coalition would be considered as grounds to refuse to negotiate  
27 a lowering of the fines imposed upon Friar Tuck's, Old Town Café and members of the  
28 Coalition.

1           76.     The foregoing retaliation against plaintiffs and efforts to coerce plaintiffs to  
2 forego the exercise of their First Amendment rights were undertaken on behalf of the  
3 Supervisor Defendants and were the official policy of Nevada County.

4           **PLAINTIFFS WILL CONTINUE TO SUFFER SIGNIFICANT HARM FROM**  
5           **IMPLEMENTATION AND ENFORCEMENT OF COVID-19-RELATED ORDERS**

6           77.     After the implementation of the August 28, 2020 Order of the State Public  
7 Health Officer, Friar Tuck's and Old Town Café and members of the Coalition were able to  
8 serve sit down patrons at only 25% of indoor capacity and at outdoor tables, and since  
9 September 22, 2020, have been able to serve sit down patrons at only 50% of indoor capacity  
10 and at outdoor tables.

11           78.     Friar Tuck's and Old Town Café border busy main streets in Nevada City and  
12 Grass Valley, respectively. Requiring these plaintiffs and Coalition members to serve  
13 customers outdoors has exposed their customers and employees to various hazards, including  
14 motor vehicle traffic, exhaust fumes, noise, ambient heat, and rain. These hazards have  
15 diminished the volume of business of these plaintiffs.

16           79.     Nevada County is now entering the Fall Season in which it experiences regular  
17 rain and snowstorms as well as low temperatures during both day and night. These seasonal  
18 weather conditions will soon prevent Friar Tuck's, Old Town Café and Coalition members  
19 from continuing to be able to serve their sit-down customers outdoors. Should Friar Tuck's  
20 and Old Town Café be unable to resume indoor service at full capacity, Friar Tuck's and Old  
21 Town Café will soon cease to be viable economic business enterprises, with resulting damage  
22 to Friar Tuck's, Old Town Café and the plaintiff owners of such enterprises. Members of the  
23 Coalition are also threatened with insolvency should they be unable to resume indoor service  
24 at full capacity before seasonal weather prevents them from serving sit-down customers  
25 outdoors.

26           80.     Furthermore, even if indoor dining is permitted, under the August 28, 2020,  
27 Order issued by the State Public Health Officer, restaurants will at most be permitted to  
28 resume indoor service at only 50% of their previous indoor seating capacities. This restriction



1 further threatens Friar Tuck's, Old Town Café and Coalition members with insolvency.

2 81. Since September 2020, Northern California has experienced widespread and  
3 severe wildfires. These fires have resulted in a significant amount of smoke and other ambient  
4 particulate matter in the Nevada County area, leading to air quality indices considered  
5 hazardous to human health. As a result of the County Defendants' enforcement of the  
6 requirement that Friar Tuck's, Old Town Café and Coalition members limit indoor seating  
7 capacity and serve other sit-down customers only in outdoor areas, customers have been  
8 subjected to the health hazards arising from wildfires. The hazards to which plaintiffs'  
9 customers have been subjected have diminished patronage and the revenues of Friar Tuck's,  
10 Old Town Café and Coalition members

11 82. Nevada County continues to experience the wildfire season as of the filing of  
12 the Complaint in this matter. As a result, Nevada County will almost certainly continue to  
13 experience air quality hazardous to human health. In the event of other future, major fires,  
14 many if not most local evacuees and visiting first responders would be exposed to the hazards  
15 created by the wildfires should they dine at Friar Tuck's, Old Town Café or Coalition  
16 members' businesses while the Orders and restrictions at issue in this matter remain in place  
17 and are enforced by the County Defendants. These reasonably anticipated circumstances,  
18 should they occur, would also reduce the patronage and revenues generated by Friar Tuck's,  
19 Old Town Café and Coalition members.

20 83. Despite the ongoing and anticipated future hazards arising from wildfires, the  
21 County Defendants have refused requests to grant temporary waivers to Friar Tuck's, Old  
22 Town Café and Coalition members permitting them to serve patrons indoors at full capacity.

23 **NEVADA COUNTY HAS EXPERIENCED**

24 **RELATIVELY LITTLE IMPACT FROM COVID-19**

25 84. During the seven-month period since the Governor proclaimed a State of  
26 Emergency, Nevada County has experienced relatively little impact from COVID-19.

27 85. As of November 10, 2020, Nevada County, with a population of approximately  
28 100,000, has on information and belief, experienced a total of 768 cases of COVID-19. On

1 information and belief, of this number, 632 cases have recovered. In addition, on information  
2 and belief, of the 85 current cases of COVID-19 as of October 19, 2020, only 3 cases require  
3 hospitalization.

4 86. Of the total number of COVID-19 cases in Nevada County, there have been 9  
5 deaths attributed to the virus since the State of Emergency was proclaimed. On information  
6 and belief, each of these 9 deaths involved patients of advanced age with multiple  
7 comorbidities or concurrent terminal diseases, including in at least one case, stage 4 cancer.

8 87. During the period May 7 through July 13, 2020, plaintiffs Friar Tuck's and Old  
9 Town Café, Coalition members and other restaurants in Nevada County were fully reopened  
10 for indoor dining. On information and belief, there is no evidence that this resulted in an  
11 increase in COVID-19 cases in Nevada County or elsewhere.

12 88. As of the date of the filing of the Complaint in this matter, defendants have  
13 provided no evidence linking the operation of sit-down dining with the transmission of  
14 COVID-19 in Nevada County.

15 89. On information and belief, as of the filing of the Complaint, there is no  
16 evidence that a case of COVID-19 can be traced to restaurant businesses in Nevada County.

17 **FIRST CAUSE OF ACTION**

18 **(42 U.S.C. § 1983-Fourteenth Amendment Substantive Due Process)**

19 90. Plaintiffs incorporate by reference as if fully restated here the foregoing  
20 allegations.

21 91. The Due Process Clause of the Fourteenth Amendment includes a substantive  
22 component that bars arbitrary wrongful, state action regardless of the fairness of the  
23 procedures employed. *Zinermon v. Bosch*, 494 U.S. 113, 125 (1990).

24 92. The right of citizens to support themselves by engaging in a chosen lawful  
25 occupation or business is deeply rooted in our nation's legal and cultural history and has long  
26 been recognized as a component of the liberty and property interests protected by the  
27 Fourteenth Amendment. *Truax v. Raich*, 239 U.S. 33, 41 (1915); *Piecknick v. Comm of Pa.*, 36  
28 F.3d 1250, 1259 (3d Cir. 1994) (citing *Green v. McElroy*, 360 U.S. 474, 492 (1959); *Truax*,

1 239 U.S. at 41); *Medina v. Rudman*, 545 F.2d 244, 250 (1<sup>st</sup> Cir. 1976). *See also Meyer v.*  
2 *Nebraska*, 262 U.S. 390, 399 (1923).

3 93. The Fourteenth Amendment also prohibits government action that arbitrarily  
4 infringes the fundamental liberty interest of citizens to travel, be out and about in public,  
5 associate, and simply be left alone while otherwise acting in a lawful manner. *City of Chicago*  
6 *v. Morales*, 527 U.S. 41, 53-54 (1999); *Aptheker v. Secretary of State*, 378 U.S. 500, 520  
7 (1964); *Kent v. Dulles*, 357 U.S. 116, 126 (1958) (right to travel includes interstate and  
8 intrastate travel) ; *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990); *See also*  
9 *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

10 94. The substantive due process component of the Fourteenth Amendment forbids  
11 the government from infringing upon fundamental liberty interests regardless of the process  
12 provided unless the infringement survives review under strict scrutiny. *See, e.g. Memorial*  
13 *Hospital v. Maricopa County*, 415 U.S. 250, 257-258 (1974); *Dunn v. Blumstein*, 405 U.S.  
14 330, 339-341 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969), *Maher v. Roe*, 432 U.S.  
15 464, 488 (1977).

16 95. The Orders and restrictions at issue in this matter cannot be sustained even  
17 under the less-exacting standard that the state action in question must be narrowly tailored to  
18 serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 301-302 (1993).

19 96. The imposition of lockdowns requiring vast segments of the population to  
20 remain at home regardless of their status as a carriers of disease is on its face arbitrary and not  
21 narrowly tailored to serve a compelling public interest. Remarkably, despite multiple changes  
22 in the Orders, the State Public Health Officer's stay-at-home order of March 19, 2020 remains  
23 in effect as of the filing of this Complaint. Such broad-ranging and sweeping measures have  
24 never been previously employed to prevent the spread of disease. Mitigation efforts in  
25 response to the Spanish Flu pandemic—the most deadly pandemic in American history—did  
26 not come close to imposing restrictions comparable to the lockdown order and business  
27 closures and restrictions imposed and enforced by defendants. Although this nation has been  
28 faced with many epidemics and pandemics, governments have never responded with

1 lockdowns of entire populations and shutdowns of significant sectors of the economy for  
2 extended and indefinite periods.

3 97. Neither general lockdown measures, wide-ranging business closures nor  
4 prohibitions on public gatherings can be justified as quarantines. Quarantine orders may be  
5 permitted as to infected individuals, but not the public at large. *Robinson v. State of California*,  
6 370 U.S. 660, 666 (1962). “Before exercising their full powers to quarantine, state official  
7 must show that ‘reasonable ground exists to support the belief’ that the person so held is  
8 infected. *In re Martin*, 83 Cal.App.2d 164, 167 (1948) (citation and internal quotes omitted).  
9 Public health officials must be able to show “probable cause to believe the person so held has  
10 an infectious disease ...” *Id.* California courts have found that “a mere suspicion [of a  
11 contagious disease], unsupported by facts giving rise to reasonable or probable cause, will  
12 afford no justification at all for depriving persons of their liberty and subjecting them to virtual  
13 imprisonment under a purported order of quarantine.” *Ex parte Arata*, 52 Cal. App. 380, 383  
14 (1921). The lockdown and business closure and public gathering provisions of the Orders at  
15 issue apply broadly to persons, businesses, and lawful gatherings without any specific showing  
16 of infection or of the probability of transmission.

17 98. Evidence and analysis available since at least May 2020 further establish that  
18 the state actions at issue in this matter—widespread population lockdowns, widespread  
19 business closures and restrictions, and pervasive restrictions on the right of the people to  
20 travel, associate, and assemble to pursue lawful spiritual, political, economic, and social  
21 ends—cannot be justified as rationally necessary to protect public health.

22 99. At a press conference on March 19, 2020, defendant Newsom repeatedly said  
23 the rationale for the March 19, 2020, Order was to “bend the curve” to slow down  
24 transmission of COVID-19 enough to reduce the strain of an expected, large influx of COVID-  
25 19 cases was anticipated to produce.<sup>4</sup> Newsom predicted a 20 percent hospitalization rate and  
26 56 percent infection rate in California. Had these predictions proven accurate, California

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27 <sup>4</sup> The March 19, 2020 press briefing is available at:  
28 <https://www.youtube.com/watch?v=8OeyeK8-S5o> (November 10, 2020). (See also 3/19/20  
EO-N-33-20 and Order of the State Public Health Officer.)

1 would have experienced 25.5 million infections, over 5 million total hospitalizations, nearly  
2 100,000 simultaneous hospitalizations, and a shortfall of 9,336 hospital beds.<sup>5</sup>

3 100. While the March 19, 2020 Order was arguably reasonable as a short term  
4 measure taken with limited information, epidemiological evidence has long since  
5 demonstrated that there is no rational basis for believing that the sweeping restrictions still in  
6 place are necessary to achieve the goal of bending the curve or combating COVID-19.

7 101. As of May 5, 2020, within seven weeks after Newsom's announcement,  
8 the California Department of Public Health reported the total number of confirmed cases  
9 requiring hospitalization—including ICU treatment—was 4,474.<sup>6</sup> As of May 5, 2020,  
10 according to the California Department of Public Health, the total number of suspected  
11 COVID-19 cases requiring hospitalization, including ICU treatment, was 1,622.<sup>7</sup> Adding these  
12 together yields a total of 6,096 patients requiring hospitalization statewide.

13 102. Current hospitalizations, and ICU usage attributable to COVID-19 demonstrate  
14 that the need to bend the curve has not re-emerged. According to data provided by the  
15 California Department of Public Health, as of November 10, 2020, there were 3,001  
16 hospitalizations and 859 patient in ICU units with confirmed cases of COVID-19 and 667  
17 hospitalizations and 102 patient in ICU units with suspected cases of COVID-19.<sup>8</sup> Adding  
18 these figures yields a total of 4,609 patients requiring hospitalization statewide.

19 103. Without minimizing the impact of these cases on the infected individuals, their  
20 families and the community, these numbers are not even in the general vicinity of the  
21 predictions that Governor Newsom relied upon in issuing the March 19, 2020, Order.

22 104. The factual predicates for the March 19, 2020, Order have proven inaccurate by  
23 orders of magnitude. California did not use the hospital ship provided by the United States  
24

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25 <sup>5</sup> *Id.*

26 <sup>6</sup> <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx>  
(May 7, 2020).

27 <sup>7</sup> *Id.*

28 <sup>8</sup> <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx>  
(November 10, 2020).

1 Navy in response to Governor Newsom's March 4, 2020 letter to President Trump. There has  
2 been no shortfall of hospital beds, ICU units, or ventilators. No COVID-19 patient in  
3 California has been denied needed medical attention because the health care system was  
4 overtaxed.

5 105. As early as April 16, 2020, Governor Newsom himself stated that the goal of  
6 bending and arguably flattening the curve had been achieved.<sup>9</sup>

7 106. The grossly exaggerated predictions relied on by Governor Newsom in issuing  
8 the Orders and restrictions at issue appear to have been based on extremely high effective rates  
9 of transmission reported in Wuhan, China, when the virus first emerged.

10 107. In addition, a number of studies of antibody tests conducted as early as April  
11 2020 have concluded that the virus has spread through the population far more widely than is  
12 indicated by positive test results. While none of these studies is conclusive, they have been  
13 consistent in concluding that the virus has spread through the population at rates from ten to  
14 fifty times greater than the incidence of infection derived from positive test results. Higher  
15 overall rates of transmission means that negative outcomes from COVID-19 -hospitalizations,  
16 ICU use and deaths- are far less frequent as a percentage of total infections than indicated by  
17 calculating the rate of these outcomes as a percentage of positive test results.

18 108. Effective lowering of the transmission and lethality of the virus can be achieved  
19 by less restrictive means that are narrowly tailored to the risks presented by COVID-19. Eight  
20 in ten deaths from COVID-19 occurred to those age 65 or older, and of those deaths, more  
21 than 50% were 85 or older.<sup>10</sup> Those suffering from preexisting conditions such as diabetes,  
22 hypertension, and heart disease also face grossly disproportionate risks from COVID-19.  
23 Measures to protect vulnerable populations combined with appropriate hygiene measures are  
24 sufficient to combat the spread and negative outcomes of COVID-19. This is demonstrated by

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27 <sup>9</sup>[https://www.rev.com/blog/transcripts/gov-gavin-newsom-california-covid-19-briefing-  
transcript-april-16](https://www.rev.com/blog/transcripts/gov-gavin-newsom-california-covid-19-briefing-transcript-april-16) (November 10, 2020).

28 <sup>10</sup> <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>  
(November 10, 2020).

1 the COVID-19 outcomes achieved in Taiwan and Sweden without implementing sweeping  
2 lockdown measures and business closures and restrictions.

3 109. The wide-ranging restrictions at issue, imposed for extended and indefinite  
4 periods, are not only not narrowly tailored to serve the purpose of promoting public health,  
5 they are also deleterious to public health.

6 110. The irrationality and negative health outcomes associated with the restrictions  
7 at issue are demonstrated by the Great Barrington Declaration, a statement authored by three  
8 respected epidemiologists: Dr. Martin Kulldorf, professor of Medicine at Harvard, Dr. Sunetra  
9 Gupta, professor at Oxford University and Dr. Jay Bhattacharya, professor at Stanford. The  
10 Great Barrington Declaration has since been endorsed by 11,482 medical and public health  
11 scientists and 34,116 medical practitioners.<sup>11</sup> The Great Barrington Declaration merits  
12 quotation in full.

13 As infectious disease epidemiologist and public health scientists we have  
14 grave concerns about the damaging physical and mental health impact of  
15 prevailing COVID-19 policies, and recommend an approach we call Focused  
16 Protection.

17 Coming from both right and left, and around the world, we have devoted our  
18 careers to protecting people. Current lockdown policies are producing  
19 devastating effects on short and long-term public health. The results (to name  
20 a few) include lower childhood vaccination rates, worsening cardiovascular  
21 disease outcomes, fewer cancer screenings and deteriorating mental health-  
22 leading to greater excess mortality in years to come, with the working class  
23 and younger members of society carrying the heaviest burden. Keeping  
24 students out of school is a grave injustice.

25 Keeping these measures in place until a vaccine is available will cause  
26 irreparable damage, with the underprivileged disproportionately harmed.

27 Fortunately, our understanding of the virus is growing. We know that  
28 vulnerability to death from COVID-19 is more than a thousand-fold higher in  
the old and infirm than in the young. Indeed, for children, the threat of  
COVID-19 is less dangerous than many other harms, including influenza.

As immunity builds in the population, the risk of infection to all -including the  
vulnerable- falls. We know that all populations will eventually reach herd  
immunity – i.e. the point at which the rate of new infections is stable – and  
that this can be assisted by (but is not dependent upon) a vaccine. Our goal  
should therefore be to minimize mortality and social harm until we reach herd  
immunity.

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<sup>11</sup> <https://gbdeclaration.org/view-signatures> (November 10, 2020).

1 The most compassionate approach that balances the risks and benefits of  
2 reaching herd immunity, is to allow those who are at minimal risk of death to  
3 lead their lives normally to build up immunity to the virus through natural  
infection, while better protecting those who are at highest risk. We call this  
Focused Protection.

4 Adopting measures to protect the vulnerable should be the central aim of  
5 health responses to COVID-19. By way of example, nursing homes should  
6 use staff with acquired immunity and perform PCR testing of other staff and  
7 all visitors. Staff rotation should be minimized. Retired people living at home  
8 should have groceries and other essentials delivered to their home. When  
possible, they should meet family members outside rather than inside. A  
comprehensive list of measures, including approaches to multigenerational  
households, can be implemented, and is well within the scope and capability  
of public health professionals.

9 Those who are not vulnerable should immediately be allowed to resume life as  
10 normal. Simple hygiene measures, such as hand-washing and staying home  
11 when sick should be practiced by everyone to reduce the herd immunity  
12 threshold. Schools and universities should be open for in-person teaching.  
13 Extracurricular activities, such as sports, should be resumed. Young, low-risk  
adults should work normally, rather than from home. Restaurants and  
businesses should be open. Arts, music, sport and other cultural activities  
should resume. People who are more at risk may participate if they wish,  
while society as a whole enjoys the protections conferred on the vulnerable by  
those who have built up herd immunity.<sup>12</sup>

14 111. A policy that promotes one positive outcome -the reduction of the negative  
15 effects of COVID-19- without considering the countervailing negative effects of the policy  
16 itself is the very definition of arbitrary, particularly when alternative measures are available  
17 that would effectively promote all desired outcomes. There is no reason to believe that the  
18 negative health outcomes associated with the coercive state actions at issue were considered by  
19 defendants in formulating the Orders, restrictions and enforcement measures at issue in this  
20 matter.

21 112. The September 30, 2020 equity metric incorporated in the August 28, 2020  
22 Order is arbitrary insofar as it requires all counties to submit a plan as a condition to moving to  
23 a lower tier, i.e., a lower level of restrictions. The required plan has no bearing on whether the  
24 conditions justifying the exercise of emergency power -the spread of COVID-19 and the  
25 incidence of the resulting negative health effects- prevail at levels justifying a particular level  
26 of restrictions.

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<sup>12</sup> <https://gbdeclaration.org/> (November 20, 2020).



1           113. The indefinite duration of the measures at issue is a further indication that the  
2 measures are arbitrary. Governor Newsom indicated in public remarks in April 2020 that  
3 living under emergency orders is the new normal for the next 12-18 months.<sup>13</sup> Little has  
4 changed in the intervening months to change the picture. The stay-at-home Order imposed on  
5 March 19, 2020, remains in effect. The August 28, 2020, Order, as modified by the September  
6 30, 2020 equity component, is in effect indefinitely. Under this Order, the best plaintiffs can  
7 hope for is reopening their restaurants at 50% capacity.

8           114. The ever-changing requirements imposed on plaintiffs and other businesses and  
9 organizations are a further indication of the arbitrary nature of the measures at issue. Plaintiffs  
10 have been prohibited from offering indoor service, had the restriction lifted subject to  
11 conditions, only to have indoor dining banned again. Condition upon condition is imposed,  
12 with the County Defendants micromanaging the presentation of music at plaintiffs'  
13 restaurants, including a requirement that all singers must be no closer than ten feet to other  
14 musicians or patrons. Perpetually changing and ever-expanding restrictions imposed by  
15 executive fiat are hallmarks of arbitrary rule. Even recourse to political means to modify the  
16 measures at issue has been compromised by the Governor's exercise of emergency powers.  
17 Governor Newsom invoked emergency powers to unilaterally change the state's voting rules  
18 for the November 2020 general election to require that all registered voters be sent vote-by-  
19 mail ballots.<sup>14</sup>

20           115. The designation of essential and non-essential businesses, i.e., those allowed to  
21 operate, under the Orders and restrictions at issue is also characterized by arbitrary  
22 distinctions. While some businesses that have been allowed to operate are clearly critical to  
23 human needs during an emergency, other preferred businesses have been allowed to operate  
24 notwithstanding the fact that they pose risks equal to or greater than other businesses deemed  
25 non-essential. In response to lobbying, the State Defendants amended the list of "essential"  
26 businesses to include cannabis retailers. Under current guidelines, film, television and music  
27

28 <sup>13</sup> <https://www.youtube.com/watch?v=wQW0QGthFV4> (November 10, 2020).

<sup>14</sup> Executive Order N-64-20, May 8, 2020

1 production has been allowed to resume,<sup>15</sup> despite the fact that these activities involve indoor  
2 activity comparable to restaurants and other hospitality and entertainment venues. At the same  
3 time, plaintiffs have been subjected to regulations imposed by the County Defendants that all  
4 but preclude the presentation of live music.

5 116. The designation of essential and non-essential businesses also arbitrarily places  
6 the burden of stopping the spread of COVID-19 on a limited class of persons and businesses.  
7 By way of example, entertainment venues, tourist destinations, restaurants and wineries have  
8 been and continue to be either shutdown or severely circumscribed in their operations.  
9 Businesses providing personal services—such as barbers, cosmetologists, nail salons and even  
10 doctors and other medical professionals not providing treatment for COVID-19—have been  
11 similarly restricted in their operations and completely shut down at times. Meanwhile certain  
12 segments of the economy—such as large discount and hardware retailers—have remained in  
13 operation continuously and have even experienced increases in revenues and profits.  
14 Furthermore, defendants’ restrictions on indoor dining took effect at a time when many  
15 residents of Nevada County were evacuated due to surrounding fires, or when numerous  
16 members of state and local firefighting units were deployed to the area. These residents and  
17 local and visiting firefighters had limited access to personal kitchens or cooking equipment. In  
18 these circumstances, the provision of dining in local restaurants was an essential service.  
19 Defendants nevertheless continued to impose substantial restrictions on plaintiffs’ ability to  
20 serve the needs of these individuals.

21 117. Under the legal authority under which they purport to act, defendants are able to  
22 reinstate any previously imposed Orders and restrictions if preliminary and permanent  
23 injunctive relief is not granted.

24 118. Plaintiffs have been damaged by the unconstitutional Orders and restrictions  
25 imposed and enforced by defendants.

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27 ///

28 \_\_\_\_\_  
<sup>15</sup> <https://covid19.ca.gov/industry-guidance/#music-tv-film> (November 10, 2020).

1 119. Plaintiffs have no adequate remedy at law and will suffer irreparable harm to  
2 their protected liberty and property interests unless the court enjoins enforcement of the  
3 unconstitutional Orders and restrictions imposed by defendants.

4 120. Plaintiffs are entitled to declaratory relief and temporary, preliminary, and  
5 permanent injunctive relief invalidating or restraining enforcement of the unconstitutional  
6 Orders and restrictions imposed by defendants.

7 **SECOND CAUSE OF ACTION**

8 **(42 U.S.C. § 1983-Fourteenth Amendment Procedural Due Process)**

9 121. Plaintiffs incorporate by reference as if fully restated here the foregoing  
10 allegations.

11 122. Procedural protections must be afforded when the government acts to deprive  
12 individuals of protected liberty or property interests. *Mathews v. Eldridge*, 424 U.S. 319, 322  
13 (1976). Procedural due process does not forbid the government from depriving individuals of a  
14 protected interest, but rather requires the government to employ adequate procedures that  
15 ensure the fairness of any deprivation. *See McNabb v. United States*, 318 U.S. 332, 347  
16 (1943). The “involuntary confinement of an individual for any reason, is a deprivation of  
17 liberty which the State cannot accomplish without due process of law.” *O’Connor v.*  
18 *Donaldson*, 422 U.S. 563, 580 (1975).

19 123. Defendants have deprived plaintiffs of their protected liberty and property  
20 interests without providing notice and an opportunity to be heard. Defendants have imposed  
21 Orders and restrictions with the force of law through the exercise of executive power without  
22 providing an opportunity for plaintiffs and other members of the public to contest or challenge  
23 the resulting limitations on their fundamental rights. The Orders and restrictions have been in  
24 place in one form or another for over seven months and remain in effect for an indefinite  
25 period into the future.

26 124. Under the legal authority under which they purport to act, defendants are able to  
27 reinstate any previously imposed Orders and restrictions if preliminary and permanent  
28 injunctive relief is not granted.

1 125. Plaintiffs have been damaged by the unconstitutional Orders and restrictions  
2 imposed and enforced by defendants.

3 126. Plaintiffs have no adequate remedy at law and will suffer irreparable harm to  
4 their protected liberty and property interests unless the court enjoins enforcement of the  
5 unconstitutional Orders and restrictions imposed by defendants.

6 127. Plaintiffs are entitled to declaratory relief and temporary, preliminary and  
7 permanent injunctive relief invalidating or restraining enforcement of the unconstitutional  
8 Orders and restrictions imposed by defendants.

9 **THIRD CAUSE OF ACTION**

10 **(42 U.S.C. § 1983-Fourteenth Amendment Equal Protection)**

11 128. Plaintiffs incorporate by reference as if fully restated here the foregoing  
12 allegations.

13 129. The Fourteenth Amendment to the United States Constitution requires states to  
14 govern impartially. Classifications that subject similarly situated persons or classes of persons  
15 to differing treatment violate the equal protection guarantee of the Fourteenth Amendment.

16 130. Strict scrutiny applies to classifications that impinge on fundamental rights. *San*  
17 *Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

18 131. The Orders and restrictions imposed by defendants impinge on the fundamental  
19 rights of plaintiffs and the people of the State of California to freedom from confinement and  
20 to travel, associate, engage in business and trade, seek gainful employment and generally be  
21 left alone to engage in otherwise lawful pursuits.

22 132. The Orders and restrictions imposed by defendants are based on arbitrary  
23 classifications and criteria that are not rationally related to promoting public health, that  
24 promote the interests of favored groups without reference to the impact of the activities in  
25 question on the transmission of COVID-19 and that shift the burden of the response to  
26 COVID-19 to a limited class of persons and businesses.

27 133. The right to equal protection guaranteed by the Fourteenth Amendment is also  
28 violated by enforcement measures that intentionally, and without rational basis, treat persons

1 or groups differently from others similarly situated. *Vill. of Willowbrook v. Olech*, 528 U.S.  
2 562, 564 (2000) (per curiam); *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir.  
3 2008). The County Defendants have violated plaintiffs’ right to equal protection by  
4 intentionally enforcing health regulations and the Orders and restrictions at issue differently  
5 against Friar Tuck’s and Old Town Café from similarly situated restaurants.

6 134. Under the legal authority under which they purport to act, defendants are able to  
7 reinstate any previously imposed Orders and restrictions if preliminary and permanent  
8 injunctive relief is not granted.

9 135. Plaintiffs have been damaged by the Orders and restrictions imposed and  
10 enforced by defendants.

11 136. Plaintiffs have no adequate remedy at law and will suffer irreparable harm to  
12 their protected liberty and property interests unless the court enjoins enforcement of the  
13 unconstitutional Orders and restrictions imposed by defendants.

14 137. Plaintiffs are entitled to declaratory relief and temporary, preliminary and  
15 permanent injunctive relief invalidating or restraining enforcement of the unconstitutional  
16 Orders and restrictions imposed by defendants.

17 **FOURTH CAUSE OF ACTION**

18 **(42 U.S.C. § 1983-Fifth Amendment)**

19 138. Plaintiffs incorporate by reference as if fully restated here the foregoing  
20 allegations.

21 139. The Takings Clause of the Fifth Amendment of the U.S. Constitution provides  
22 that private property shall not "be taken for public use, without just compensation." U.S.  
23 Const. Amend. V.

24 140. “The Fifth Amendment...was designed to bar Government from forcing people  
25 alone to bear public burdens which, in all fairness and justice, should be borne by the public as  
26 a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

27 141. Defendants’ imposition and enforcement of Orders restricting the operation of  
28 plaintiffs’ businesses for an indefinite period and having no stated end date has caused both a

1 regulatory and physical taking of plaintiffs' property without just compensation. At a  
2 minimum, defendants' Orders and restrictions have effected a partial taking. *See Penn Central*  
3 *Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). Defendants' unprecedented  
4 and highly disruptive Orders and restrictions have significantly reduced plaintiffs' revenues,  
5 profits and income, resulting in significant uncompensated harm to plaintiffs' distinct,  
6 investment-backed expectations in their businesses. If defendants' unconstitutional Orders and  
7 restrictions are not preliminarily and permanently enjoined, plaintiffs are threatened with the  
8 imminent total loss of their protected property interests in their investments, revenues, profits,  
9 income and the value of their businesses.

10 142. Under the legal authority under which they purport to act, defendants are able to  
11 reinstate any previously imposed Orders and restrictions if preliminary and permanent  
12 injunctive relief is not granted.

13 143. Plaintiffs have been damaged by the unconstitutional Orders and restrictions  
14 imposed and enforced by defendants.

15 144. Plaintiffs have no adequate remedy at law and will suffer irreparable harm to  
16 their protected property interests unless the court enjoins enforcement of the unconstitutional  
17 Orders and restrictions imposed by defendants.

18 145. Plaintiffs are entitled to declaratory relief and temporary, preliminary and  
19 permanent injunctive relief invalidating or restraining enforcement of the unconstitutional  
20 Orders and restriction imposed by defendants.

21 **FIFTH CAUSE OF ACTION**

22 **(42 U.S.C. § 1983-Commerce Clause)**

23 146. Plaintiffs incorporate by reference as if fully restated here the foregoing  
24 allegations.

25 147. The Commerce Clause of the United States Constitution provides that the  
26 United States Congress shall have the power "[t]o regulate Commerce with foreign Nations,  
27 and among the several States, and with the Indian Tribes." U.S. Const., Art. I, Section 8,  
28 Clause 3.

1           148. The Commerce Clause prohibits states from exercising sovereign authority that  
2 excessively burdens interstate commerce. "[T]he incantation of a purpose to promote the  
3 public health or safety does not insulate a state law from Commerce Clause attack. Regulations  
4 designed for that salutary purpose nevertheless may further the purpose so marginally, and  
5 interfere with commerce so substantially, as to be invalid under the Commerce Clause."  
6 *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981).

7           149. Friar Tuck's, Old Town Café and Coalition members engage in substantial  
8 interstate commerce and engage in activities that have a substantial effect on interstate  
9 commerce. These plaintiffs purchase goods and services in interstate commerce and serve  
10 travelers who visit California from other states and foreign countries.

11           150. Residents and businesses in the State of California engage in billions, if not  
12 trillions, of dollars of interstate commerce through employment, the purchase and sale of  
13 goods and services, and by serving thousands, if not millions, of travelers who visit California  
14 annually from other states and foreign countries.

15           151. The Orders and restrictions imposed and enforced by defendants excessively  
16 burden interstate commerce by precluding plaintiffs and the people of California from  
17 engaging in substantial and wide-ranging economic, business and employment activities.

18           152. Under the legal authority under which they purport to act, defendants are able to  
19 reinstate any previously imposed Orders and restrictions if preliminary and permanent  
20 injunctive relief is not granted.

21           153. Plaintiffs have been damaged by the unconstitutional Orders and restrictions  
22 imposed and enforced by defendants.

23           154. Plaintiffs have no adequate remedy at law and will suffer irreparable harm to  
24 their protected liberty and property interests unless the court enjoins enforcement of the  
25 unconstitutional Orders and restrictions imposed by defendants.

26           155. Plaintiffs are entitled to declaratory relief and temporary, preliminary and  
27 permanent injunctive relief invalidating or restraining enforcement of the unconstitutional  
28 Orders and restrictions imposed by defendants.

**SIXTH CAUSE OF ACTION**

**(42 U.S.C. § 1983-First Amendment)**

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3 156. Plaintiffs incorporate by reference as if fully restated here the foregoing  
4 allegations.

5 157. The First Amendment to the United States Constitution prohibits states from  
6 infringing the right of the people to free speech and peaceful assembly and to petition the  
7 government for a redress of grievances.

8 158. The County Defendants have retaliated against plaintiffs for the exercise of  
9 their rights to free speech, lawful assembly and to petition the government for a redress of  
10 grievances by refusing to negotiate reductions in fines imposed on Friar Tuck's, Old Town  
11 Café and Coalition members unless plaintiffs cease these protected activities.

12 159. The County Defendants used the threat of fines and continued closures imposed  
13 on Friar Tuck's, Old Town Café and Coalition members to coerce plaintiffs to forego the  
14 exercise of their Constitutional rights to free speech, lawful assembly and to petition the  
15 government for a redress of grievances.

16 160. Plaintiffs have suffered damage to their protected liberty and property interests  
17 -including unwarranted fines, continued restrictions upon and closures of their businesses- by  
18 reason of the County Defendants' retaliation and coercion in violation of plaintiffs' First  
19 Amendment rights.

20 161. Plaintiffs have no adequate remedy at law and will suffer irreparable harm to  
21 their protected liberty and property interests unless the court enjoins the County Defendants'  
22 violations of their First Amendment rights.

23 162. Plaintiffs are entitled to declaratory relief and temporary, preliminary and  
24 permanent injunctive relief invalidating or restraining the County Defendants' violations of  
25 their First Amendment rights.

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**PRAYER**

Plaintiff prays for an Order awarding the following relief against the State Defendants:

A. Preliminary and permanent injunctive relief precluding the enforcement of the following Orders:

1. Governor Newsom’s March 4, 2020 Emergency Order;
2. Governor Newsom’s March 19, 2020 Emergency Order;
3. Governor Newsom’s May 4, 2020 Emergency Order;
4. The State Public Health Officer’s March 19, 2020 Order;
5. The State Public Health Officer’s August 28, 2020 Order;

B. A judicial declaration that the following Orders violate plaintiffs’ rights under the Fourteenth and Fifth Amendments to the United State Constitution:

1. Governor Newsom’s March 4, 2020 Emergency Order;
2. Governor Newsom’s March 19, 2020 Emergency Order;
3. Governor Newsom’s May 4, 2020 Emergency Order;
4. The State Public Health Officer’s March 19, 2020 Order;
5. The State Public Health Officer’s August 28, 2020 Order;

C. Attorney’s fee and costs;

D. All such other relief the court deems just and proper.

Plaintiff prays for an Order awarding the following relief against the County Defendants:

A. Preliminary and permanent injunctive relief precluding the enforcement of the following Orders:

1. Governor Newsom’s March 4, 2020 Emergency Order;
2. Governor Newsom’s March 19, 2020 Emergency Order;
3. Governor Newsom’s May 4, 2020 Emergency Order;
4. The State Public Health Officer’s March 19, 2020 Order;
5. The State Public Health Officer’s August 28, 2020 Order;
6. The Supervisor Defendants’ Resolution 20-062;

1                   7.     The Nevada County Public Health Officer's April 27, 2020 Order;

2                   8.     The Nevada County Public Health Officer's October 1, 2020 Order;

3           B.     Preliminary and permanent injunctive relief prohibiting retaliation based upon,  
4 and coercion to preclude, plaintiffs' exercise of their First Amendment rights to freedom of  
5 speech and assembly and to petition the government for a redress of grievances;

6           C.     A judicial declaration that the following Orders violate plaintiffs' rights under  
7 the Fourteenth and Fifth Amendments to the United State Constitution:

8                   1.     Governor Newsom's March 4, 2020 Emergency Order;

9                   2.     Governor Newsom's March 19, 2020 Emergency Order;

10                  3.     Governor Newsom's May 4, 2020 Emergency Order;

11                  4.     The State Public Health Officer's March 19, 2020 Order;

12                  5.     The State Public Health Officer's August 28, 2020 Order;

13                  6.     The Supervisor Defendants' Resolution 20-062;

14                  7.     The Nevada County Public Health Officer's April 27, 2020 Order;

15                  8.     The Nevada County Public Health Officer's October 1, 2020 Order;

16           D.     Compensatory damages in the amount \$500,000 or such other amount proven at  
17 trial;

18           E.     Attorney's fee and costs;

19           F.     All such other relief the court deems just and proper.

20           Plaintiff prays for an Order awarding the following relief against defendants Amy Irani  
21 and Katharine Elliot:

22           A.     Compensatory damages in the amount \$500,000 or such other amount proven at  
23 trial;

24           B.     Punitive damages in the amount \$1,500,000;

25           C.     Attorney's fee and costs;

26           D.     All such other relief the court deems just and proper.

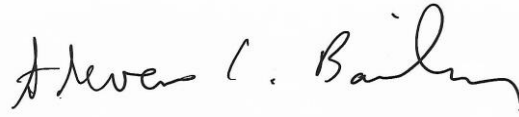
27   **JURY DEMAND**

28           Plaintiffs demand trial by jury.

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Date: November 10, 2020

BAILEY AND ROMERO



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Steven C. Bailey  
*Attorneys for Plaintiffs Tuck's Restaurant and Bar,  
Kenneth R. Paige, Chad Page, Buckman Enterprises,  
LLC, Robin Buckman, and The Nevada County  
Restaurant Coalition*