

1 Deborah B. Caplan [SBN 196606]
Lance H. Olson [SBN 077634]
2 Emily A. Andrews [SBN 280999]
OLSON REMCHO LLP
3 555 Capitol Mall, Suite 1425
Sacramento, CA 95814
4 Telephone: (916) 442-2952
Facsimile: (916) 442-1280
5 Email: dcaplan@olsonremcho.com

6 James C. Harrison [SBN 161958]
OLSON REMCHO, LLP
7 1901 Harrison Street, Suite 1550
Oakland, CA 94612
8 Phone: (510) 346-6200
Fax: (510) 574-7061
9 Email: harrison@olsonremcho.com

10 Attorneys for Petitioners Mark Macarro,
Edwin “Thorpe” Romero, Anthony Roberts,
11 Jeff L. Grubbe, and Coalition to Authorize
12 Regulated Sports Wagering

13 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF SACRAMENTO

15 (UNLIMITED JURISDICTION)

16 MARK MACARRO, EDWIN “THORPE”
ROMERO, ANTHONY ROBERTS, JEFF L.
17 GRUBBE and COALITION TO AUTHORIZE
REGULATED SPORTS WAGERING,
18 SPONSORED BY CALIFORNIA INDIAN
GAMING TRIBES,

19 Petitioners,

20 vs.

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

23 Respondent.

CASE NO.: _____

Action Filed: June 9, 2020

**VERIFIED PETITION FOR WRIT OF
MANDATE [C.C.P. § 1085; ELECTIONS
CODE § 13314]**

**STATEWIDE ELECTION MATTER –
JULY 20, 2020 DEADLINE**

IMMEDIATE ACTION REQUESTED

Hearing:

Date: TBD
Time: TBD
Dept.: TBD
Judge: TBD

1 Initiative petition will have been frustrated. Expedited scheduling of this writ proceeding is therefore
2 both necessary and appropriate.

3 **THE PEOPLE’S RIGHT OF INITIATIVE IN CALIFORNIA**

4 10. Article IV, section 1 of the California Constitution vests the legislative power of
5 the State in the Legislature, “but the people reserve to themselves the power of initiative and
6 referendum.” Cal. Const. art. IV, § 1. Article I, sections 2 and 3 also protect freedom of speech and
7 the right to petition the government.

8 11. Article II, section 8(a) of the Constitution provides: “The initiative is the power
9 of electors to propose statutes and amendments to the Constitution and to adopt or reject them.” Cal.
10 Const. art. II, § 8(a).

11 12. The California Supreme Court has described the right to act by initiative as “one
12 of the most precious rights of our democratic power.” *Associated Home Builders of Greater Eastbay,*
13 *Inc. v. City of Livermore*, 18 Cal. 3d 582, 591 (1976). “[I]t has long been our judicial policy to apply a
14 liberal construction to this power wherever it is challenged in order that the right be not improperly
15 annulled.” *DaVita v. County of Napa*, 9 Cal. 4th 763, 776 (1995) (quoting *Associated Home Builders*).

16 13. Article II, section 8(b) provides that “an initiative measure may be proposed by
17 presenting to the Secretary of State a petition that sets forth the text of the proposed statute or
18 amendment to the Constitution and is certified to have been signed by electors equal in number to
19 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the
20 votes for all candidates for Governor at the last gubernatorial election.” Cal. Const. art. II, § 8(b).

21 14. This provision would currently require 623,212 signatures for a proposed statute
22 and 997,139 signatures for a proposed constitutional amendment. These numbers are unusually high
23 this year because of record voter turnout at the 2018 election.

24 15. Subdivision (c) of section 8 of article II requires the Secretary of State to submit
25 the measure to voters at the next general election at least 131 days after the measure has qualified or at
26 any special election held prior to the general election. Cal. Const. art. II, § 8(c).

1 16. Section 8 of article II does not limit the period during which a petition may be
2 circulated. Section 10 of article II provides that “[t]he Legislature shall provide for the manner in
3 which a petition shall be circulated, presented, and certified, and the manner in which a measure shall
4 be submitted to voters.” Cal. Const. art. II, § 10.

5 17. Elections Code section 9001 provides that proponents of a proposed initiative
6 measure shall submit the proposed measure to the State Attorney General before circulation. The
7 Attorney General shall post the proposed measure online and allow 30 days for public comment. Cal.
8 Elec. Code § 9002. A proposed measure may be amended within 5 days of the public review period.

9 18. Within 50 days of submission to the Attorney General, the Department of
10 Finance and the Legislative Analyst must prepare a fiscal impact statement. Cal. Elec. Code § 9005.

11 19. Within 15 days of receiving the fiscal impact statement, the Attorney General
12 must prepare a circulating “title and summary” that summarizes the measure’s chief points. The date
13 the title and summary is issued to the proponents is called the “official summary date.” Cal. Elec.
14 Code § 9004. The title and summary must be included in the petition (Cal. Elec. Code § 9008);
15 circulation is not permitted before the official summary date. Cal. Elec. Code § 9014(a).

16 20. Petition signatures must be filed with county elections officials within 180 days
17 of the official summary date, and petitions may not be accepted by county elections officials after that
18 date. Cal. Elec. Code § 9014(b). In the event of a holiday, petitions may be filed the following
19 business day. Cal. Elec. Code § 9014(d).

20 21. When the right of initiative was added to the Constitution in 1911, there were no
21 limits on the circulation period. A 90-day period was added in 1943 and gradually expanded over time
22 to the current 180-day period enacted in 2014.

23 22. If proponents submit petitions facially containing the number required, the
24 county elections officials use a random sampling technique to determine whether the petitions contain
25 sufficient valid signatures. If the random count confirms the validity of less than 110% of the sample,
26 county elections officials must do a time-consuming individual examination of each signature. Cal.
27 Elec. Code § 9030. As a practical matter, proponents assume that they must obtain 110% and usually
28

1 submit more than this amount because there are always some signatures that are disqualified for
2 various reasons (*e.g.*, the signer is not registered to vote).

3 23. In obtaining signatures on an initiative petition, each section of the petition must
4 contain the name of the person circulating the petition and a statement made under penalty of perjury
5 that the circulator personally witnessed each signature. In other words, in-person circulation is a
6 legally required aspect of the initiative process in California.

7 **FEDERAL CONSTITUTIONAL PROTECTIONS FOR THE INITIATIVE PROCESS**

8 24. The First Amendment to the U.S. Constitution, applicable to the states through
9 the Fourteenth Amendment, provides that “Congress shall make no law . . . abridging the freedom of
10 speech, or of the press; or the right of the people to peaceably assemble, and to petition the government
11 for a redress of grievances.” U.S. Const. amend. I.

12 25. Although the U.S. Constitution does not require states to provide the right of
13 initiative, “a state that adopts an initiative procedure violates the federal Constitution if it unduly
14 restricts the First amendment rights of its citizens who support the initiative.” *Taxpayers United for*
15 *Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993).

16 26. Several federal courts have recently held that various state requirements for
17 petitions in support of initiatives or candidates were unconstitutional as applied in light of state stay-at-
18 home orders similar to those in California. *See, e.g., Fair Maps Nevada v. Cegavske*, Case No. 3:20-
19 CV-00271-MMD-WGC (Dist. Nev. 5/29/20 Order); *Esshaki v. Whitmer*, Case No. 2:20-CV-10831-
20 TGB (E. Dist. Mich. 4/20/20 Order Granting Preliminary Injunction) (aff’d in part, rev’d in part as to
21 remedy in *Esshaki v. Whitmer*, Case No. 20-1336 (6th Cir.)); *Miller v. Thurston*, Case No. 5:20-CV-
22 05070 (W. Dist. Ark. 5/25/20 Order); *Thompson v. DeWine*, Case No. 2:20-CV-2129 (S. Dist. Ohio
23 5/19/20 Order) (stayed pending appeal in *Thomson v. DeWine*, Case No. 203526 (6th Cir.)).

24 **THE PROPOSED INITIATIVE AT ISSUE**

25 27. On November 13, 2019, Petitioners filed the Initiative with the State Attorney
26 General. Proponents included Petitioners MARK MACARRO, EDWIN ROMERO, ANTHONY
27 ROBERTS, and JEFF GRUBBE.

1 28. The Initiative would amend the California Constitution to authorize sports
2 wagering at tribal casinos and at existing horse racetracks. It would impose a tax on sports wagering
3 at racetracks and the revenue would be deposited into a new special fund, which is allocated for
4 problem gaming and mental health research programs, as well as enforcement costs, and the State’s
5 General fund. Tribes may choose to make payments into this fund, depending on the specific terms of
6 their tribal-state compacts. It would also (1) prohibit wagering on high school games, events in which
7 a California college team is a participant, and games that have already occurred, (2) limit wagering at
8 racetracks to those 21 years of age or older, and (3) prohibit advertising or marketing sports wagering
9 to individuals under the age of 21. Last, the measure would strengthen the enforcement of existing
10 gambling restrictions by creating a new civil enforcement tool.

11 29. Title and summary for the Initiative was received January 21, 2020, the “official
12 summary date.”

13 30. Pursuant to Elections Code section 9014, because the Initiative includes a
14 proposed constitutional amendment, petitions containing 997,139 valid signatures would be required to
15 be submitted on or before July 20, 2020. To qualify under the random sample requirements, 1,096,853
16 valid signatures would be required.

17 **COVID-19 AND THE STATE’S ACTIONS IN RESPONSE**

18 31. On January 30, 2020, the World Health Organization declared the outbreak of a
19 new coronavirus, COVID-19, a global public health emergency. On the same date, the U.S. Center for
20 Disease Control and Prevention (“CDC”) announced that COVID-19 had spread to the United States.

21 32. On February 26, 2020, the CDC announced the first potential person-to-person
22 transmission of COVID-19 in California.

23 33. On March 4, 2020, Governor Gavin Newsom proclaimed a state of emergency
24 in California.

25 34. On March 16, 2020, six Bay Area counties (Alameda, Contra Costa, Marin,
26 Santa Clara, San Francisco, and San Mateo) issued orders directing all individuals living in those
27
28

1 counties to shelter at their place of residence, with certain exceptions for providing or receiving
2 essential services and engaging in certain essential activities.

3 35. On March 19, 2020, Governor Newsom issued Executive Order N-33-20, which
4 ordered “all individuals living in the State of California to stay home or at their place of residence
5 except as needed to maintain continuity of operations of the federal critical infrastructure sectors, as
6 outlined at <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>.” Election-related
7 activities were not designated as “essential” and were therefore prohibited.

8 36. On May 4, 2020, Governor Newsom issued Executive Order N-60-20, which
9 announced that the State would be moving toward “stage 2” of a four-stage re-opening plan in
10 accordance with guidelines to be released by public health authorities. However, the order also
11 allowed counties to maintain more restrictions in place.

12 37. On May 7, 2020, the State Public Health Office announced that all counties
13 could move to “stage 2,” which allows for limited re-opening of some businesses provided the
14 businesses and patrons continue to practice safe-distancing and other hygiene measures. The order
15 also provides for the gradual re-opening of additional businesses in counties when it is determined that
16 they are eligible to move to “expanded stage 2.”

17 38. On May 7, 2020, Governor Newsom issued Executive Order N-63-20, which
18 suspended or extended numerous statutory and regulatory deadlines by 60 days, stating that “the
19 COVID-19 pandemic, as well as physical distancing and other public health measures undertaken in
20 response to it, have also had widespread impacts on state and local governments’ ability to perform
21 certain functions via in-person interactions” The May 7 order did not suspend or extend any of
22 the election-related deadlines applicable to the qualification of initiatives.

23 39. On May 8, 2020, the Governor issued Executive Order N-64-20, which directed
24 that mail ballots be mailed to all California voters in connection with the November 3, 2020 general
25 election to avoid the potential health risks that might be associated with in-person voting.

26 40. Over the course of May, 2020, most counties moved to the “expanded stage 2.”
27 One June 5, 2020, the state announced that it was releasing guidelines for counties to begin moving to
28 stage 3 starting June 12, 2020, allowing for such businesses as bars and gyms to reopen. However,

1 several counties (San Francisco, Alameda, Contra Costa, Marin, Santa Clara and Imperial) are still
2 operating under the early stage 2 restrictions and have not been cleared for expanded stage 2.

3 41. As a practical matter, both early and expanded stage 2, as well as early stage 3,
4 contain significant restrictions on commercial activity and in-person communications. Many retail
5 businesses continue to operate on a pick-up basis (rather than walk-in) and many other retail locations
6 remain closed. Large gatherings remain prohibited.

7 **THE IMPACT OF THE STATE’S ACTIONS ON PETITIONERS’**
8 **EXERCISE OF THEIR RIGHT TO ACT BY INITIATIVE**

9 42. Upon receiving the title and summary from the Attorney General on January 21,
10 2020, proponents of the Initiative immediately directed the Monaco Group, a printing and direct mail
11 production company, to format and print copies of the initiative petition for circulation throughout the
12 state.

13 43. On or about January 23, 2020, the signature gathering firm 2020 BallCamp, LLC
14 and its agents began collecting voters’ signatures, in person, to qualify the Initiative. At that point, the
15 goal was to qualify for the November 2020 ballot.

16 44. From January 23 until mid-March 2020, proponents collected approximately
17 971,373 signatures on the initiative petition. Although proponents needed to submit 1,096,853
18 signatures to reach the 110% threshold for qualification using the random sample technique,
19 proponents set an internal goal of approximately 1.6 million signatures to account for any found
20 invalid.

21 45. On March 16, 2020 the six Bay Area counties announced their shelter-in-place
22 or stay-at-home orders, and this was extended to the rest of the State on March 19, 2020. As a result of
23 these statewide and local stay-at-home orders, non-essential businesses around the state were required
24 shut down and public gatherings and events were canceled. Because the stay-at-home orders did not
25 identify any in-person election-related activities as critical infrastructure, such activities were
26 prohibited in the Bay Area commencing March 16, 2020 and statewide commencing March 19, 2020.

27 46. Most campaigns seeking to qualify an initiative for a November election
28 typically gather fewer signatures in January and February because of less favorable weather and fewer

1 hours of daylight. Once the time change occurs in March, the ability of circulators to gather signatures
2 increases. Because campaigns typically collect the most signatures in March and early April, the
3 shutdown orders came at the worst possible time for the Initiative proponents.

4 47. The State remains under stage 2 restrictions, which allow only for lower risk
5 activities and only with social distancing measures. Five of the Bay Area counties continue under the
6 most restrictive phase 2 guidelines. Activities such as movie theaters, gyms and open retail will not be
7 permitted until stage 3 (which has not been authorized as of this filing).

8 48. While stay-at-home restrictions have loosened in some counties in recent weeks
9 and more businesses have been permitted to open, collecting signatures remains a challenge because of
10 the physical distancing requirements. Gathering signatures for a petition requires the ability for
11 circulators to come into close contact with individual voters. Circulators generally need to be closer to
12 voters than six feet to hand them a copy of the measure to review, answer questions, instruct the voter
13 where to sign the actual petition, and properly witness the voter signing the petition.

14 49. Signature gathering also relies on taking the petitions to places where the public
15 congregates. Many businesses remain closed and all large, public gatherings are still canceled.
16 Because of public health concerns, even in places where circulators could collect signatures, voters
17 remain reluctant to speak with circulators and sometimes verbally abuse circulators for attempting to
18 collect signatures.

19 50. The COVID-19 restrictions have also made it difficult to maintain the same
20 level of circulators because a number of circulators are observing the stay-at-home orders and are
21 reluctant to continue circulating petitions because of concern for their own health. The number of
22 available circulators dropped to approximately 10% of the previous workforce once the stay-at-home
23 orders went into effect.

24 51. In addition to the restrictions that the stay-at-home orders have imposed on the
25 actual collection of signatures, the stay-at-home orders also impeded the ability of the signature
26 gathering companies to verify previously obtained signatures, an important part of the process. The
27 orders have prevented signature verification workers from continuing to work because this is typically
28 done in small, rented offices that do not meet the social distancing requirements.

1 52. In addition, the orders have also prevented those responsible for verification
2 from accessing county voter files that are necessary for the verification process as several county
3 election offices have been closed for in-person operations following the stay-at-home orders. The
4 elections offices in five of the ten most populous counties (Los Angeles, Orange, San Diego,
5 Riverside, and Fresno) remain closed to the public. If you cannot accurately verify signatures and
6 eliminate invalid ones, proponents must obtain even more signatures at additional time and cost.

7 53. Alternatives to in-person signature gathering such as mail or email are costly
8 and impractical, particularly for a proposed constitutional amendment such as the Initiative which
9 requires a much larger number of signatures.

10 54. But for the state and local stay-at-home orders in response to COVID-19, the
11 Initiative would undoubtedly have obtained the necessary number of signatures by July 20, 2020.
12 Before those orders went into effect, proponents were obtaining approximately 100,000-120,000
13 signatures per week and expected to reach their goal on or before the end of April, 2020.

14 55. Petitioners have acted diligently to comply with all the applicable requirements.
15 To date, they have spent more than \$7 million on signature gathering efforts and obtained almost a
16 million signatures. These costs and efforts will be rendered useless if proponents cannot complete
17 circulation and are forced to begin the process anew. The will of almost one million voters who have
18 already signed the Initiative petition would be frustrated.

19 56. With stay-at-home orders in place for at least one-half and perhaps two-thirds of
20 the statutory circulation period, it is virtually impossible to qualify any measure for the ballot as the
21 total number of necessary signatures would have to be obtained in approximately two months. In the
22 absence of a suspension or extension of the 180-day deadline, the combination of that deadline with
23 the stay-at-home orders constitutes an unreasonable burden that deprives the Initiative proponents and
24 supporters of a meaningful opportunity to meet the numerical goals set by the Constitution.

25 57. Strict enforcement of the 180-day deadline in the present circumstances would
26 be unconstitutional and would therefore constitute an error or omission or a neglect of duty as
27 described in Elections Code section 13314.

1 and constitutional amendments by initiative as provided in article II, section 8 and article I, sections 2
2 and 3 of the California Constitution.

3 64. Respondent Padilla and those public officers acting by and through his authority
4 have a clear, present and ministerial duty to refrain from taking action to implement or enforce
5 provisions of law in violation of the Constitution and to take such action as is necessary to allow
6 Petitioners to exercise the right of initiative provided in article II, section 8 and article I, sections 2
7 and 3 of the California Constitution.

8 65. Petitioners seek a preemptory writ of mandate pursuant to Code of Civil
9 Procedure section 1085 and Elections Code section 13314 to compel Respondent Padilla and those
10 public officers acting by and through his authority to refrain from taking action to implement or
11 enforce provisions of law in violation of the Constitution and to take such action as is necessary to
12 allow Petitioners to exercise the right of initiative provided in article II, section 8 and article I,
13 sections 2 and 3 of the California Constitution.

14 **SECOND CAUSE OF ACTION**
15 **(U.S. Constitution, First and Fourteenth Amendments)**

16 66. Petitioners incorporate Paragraphs 1 through 65 above.

17 67. The current provisions of Elections Code section 9014(b) are unconstitutional
18 and unenforceable as applied in light of the state and county stay-at-home orders issued in response to
19 the COVID-19 pandemic as those provisions deprive petitioners of their rights under the First
20 Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment.

21 68. Respondent Padilla and those public officers acting by and through his authority
22 have a clear, present and ministerial duty to refrain from taking action to implement or enforce
23 provisions of law in violation of the First Amendment to the U.S. Constitution, applicable to the states
24 through the Fourteenth Amendment, and to take such action as is necessary to allow Petitioners to
25 exercise their rights under the First and Fourteenth Amendments to the U.S. Constitution.

26 69. Petitioners seek a preemptory writ of mandate pursuant to Code of Civil
27 Procedure section 1085 and Election Code section 13314 to compel Respondent Padilla and those
28 public officers acting by and through his authority to refrain from taking action to implement or

1 enforce provisions of law in violation of the First and Fourteenth Amendments to the U.S. Constitution
2 and to take such action as is necessary to allow Petitioners to exercise their rights under the First and
3 Fourteenth Amendments to the U.S. Constitution.

4 **PRAYER**

5 WHEREFORE, Petitioners pray that this Court:

- 6 1. Set this matter for hearing on an expedited basis at the earliest time consistent
7 with its calendar;
- 8 2. Issue a peremptory writ of mandate commanding Respondent Padilla to suspend
9 the 180-day deadline set forth in Elections Code section 9014(b) for a period beginning March 19,
10 2020 and extending until all counties in the State have been authorized to move to stage 3 of the
11 COVID-19 re-opening guidelines or, alternatively, that the 180-day period set forth in Elections code
12 section 9014(b) be extended for a period of not less than 90 days;
- 13 3. Award Petitioners' attorneys' fees and costs incurred in connection with this
14 matter; and
- 15 4. Order such other and further relief as it deems just and proper.

16 Dated: June 9, 2020

17 Respectfully submitted,

18 OLSON REMCHO, LLP

19 By: 
20 Deborah B. Caplan

21 Attorneys for Petitioners Mark Macarro,
22 Edwin "Thorpe" Romero, Anthony Roberts,
23 Jeff L. Grubbe, and Coalition to Authorize Regulated
24 Sports Wager, Sponsored by California Indian Gaming
25 Tribes

1 VERIFICATION

2 I, Deborah B. Caplan, declare as follows:

3 I am counsel for the Petitioners in the above-captioned case. None of the individual
4 petitioners resides in the County of Sacramento so I make this verification on their behalf as provided
5 in Code of Civil Procedure section 446. I have read the foregoing Petition for Writ of Mandate and
6 know its contents. The facts stated therein are true and within my personal knowledge, except those
7 matters which are alleged upon information and belief, and as to those matters, I believe them to be
8 true.

9 I declare under penalty of perjury that the foregoing is true and correct.

10 Executed on June 9, 2020, at Sacramento, California.

11 
12 _____
13 Deborah B. Caplan