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INTRODUCTION: WHY WRIT RELIEF SHOULD BE GRANTED

On August 27, 2008, the court below granted petitioners' writ of mandate, ordering that respondents comply with the California Administrative Procedures Act prior to rescinding respondents' long-standing regulation commonly known as the Cahill Policy allowing a clothing optional beach at San Onofre State Park. Respondents have filed an appeal with this court. Despite the lower court's order to maintain the *status quo*, respondents have failed to cease and reverse the implementation of their rescission plan and have, in direct contravention of this Court's jurisdiction and the lower court's prohibitive writ, proceeded with the plan. Respondents' actions include the posting of signs, which are integral to their rescission plans; as well as verbally misinforming the public regarding rescission. This petition seeks a writ of supersedeas (alternatively, a writ of prohibition or other relief that the Court may deem appropriate) to require respondents to restore the *status quo* at the clothing-optional area of San Onofre State Beach during the pendency of appeal.

Briefing has not yet begun on respondents' appeal. Should respondents be allowed to maintain their march toward implementation of their rescission during the pendency of appeal, the *status quo* which the stay is intended to preserve will be destroyed; the public will be misinformed as to the status and letter of the law; and petitioners will be denied their rights under the Administrative Procedures Act ¹if respondents fail on appeal.

¹ Cal. Gov. Code §§11346 et. seq. (West, 2008)

PETITION

The Naturist Action Committee, Friends of San Onofre Beach, R. Allan Baylis and Gerda Hayes petition this Court for a writ of supersedeas, writ of prohibition, or other appropriate relief, directing respondents, California State Department of Parks & Recreation and Ruth Coleman in her capacity as Director of the California State Department of Parks & Recreation to cease implementation of rescission of the clothing-optional status at San Onofre State Beach (at the Area commonly known as Trail Six). Said cessation to include removal of “Nudity Prohibited” signs at or near the public entrance to the State Beach, in and around the Trail Six Area, the beach at the end of Trail Six, and the parking lot; and cessation of conveying to the public misleading information by the petitioner’s employees regarding the non-existence of a clothing-optional beach at San Onofre.

To these ends, petitioner alleges:

BENEFICIAL INTEREST OF PETITIONERS; CAPACITIES OF PETITIONERS AND RESPONDENTS.

1. Petitioners, Naturist Action Committee, Friends of San Onofre Beach, R. Allen Baylis and Gerda Hayes are parties to the petition for writ of mandate, the order granting same of which is now before this Court on appeal (Naturist Action Committee, *et.al.* v. Dept. of Parks & Recreation, *et.al.* (Orange County Superior Court Case No. 30-2008-00109007); see also Exh. 1, p.p. 18-20; Exh. 2, p. 21.

2. Respondents are the California State Department of Parks & Recreation and Ruth Coleman, in her official capacity as Director of the California State Department of Parks & Recreation. Said parties have been ordered by the Orange County Superior Court to cease actions to rescind the clothing-optional status of San Onofre State Beach—Trail Six Area and not to

proceed with a change in said Policy unless they comply with the provisions of the California Administrative Procedures Act.

AUTHENTICITY OF EXHIBITS.

4. The exhibits accompanying this petition are true and correct copies of original documents filed with the superior court, except for Exhibit 6 which is a true and correct copy of signs placed at San Onofre State Beach in and around the Trail 6 Area and at the park's public entrance by respondents; and Exhibit 9 which is a true and correct copy of a digital video recording of an exchange between park visitors, Nicky Hoffman, Carmen Hamm and one of respondents' employees. The exhibits are paginated consecutively from page 1 to page xxx. Page references in this petition are to the consecutive pagination.

TIMELINESS OF THE PETITION.

5. On September 9, 2008, the Honorable Sheila Fell, Judge of the Orange County Superior Court declined to grant petitioners' *ex parte* application for the removal of signs which implement rescission of the clothing-optional status at the Trail 6 Area of San Onofre State Beach and which also misstate California Code of Regulations § 4322; all in violation of the prohibitive portion of the lower court's order, the whole of which is currently on appeal. (Exh. Xxx [minute order] p. xxx.) This petition is filed within 60 days of said action by the lower court.

SUMMARY OF RELEVANT FACTS AND PROCEDURE

6. The Cahill/Harrison Policy. On May 31, 1979, Russell W. Cahill, then Director of the California State Department of Parks & Recreation (hereinafter, "the Department"), after conducting an extensive feasibility study (Exh. xxx [feas. Study] pp. xxx.) and holding three public hearings (San Francisco, Sacramento and Los Angeles), issued what is commonly known as

the Cahill Policy. (Exh. xxx [Cahill Policy] pp. xxx.) Under the terms of the Cahill Policy, clothing-optional beaches were not to be specifically designated within the California State Park System at that time. However, finding that nude sunbathing is “certainly an innocuous action” (Exh. [Cahill Policy, at p. xxx.); a policy was implemented wherein citation of nude sunbathers would be limited to instances of specific public complaint and then only after voluntary dressing was refused by the nude sunbather. The nude sunbather, having voluntarily ceased his/her activity would be allowed to remain at the beach. The Cahill Policy was restated nine years later in June, 1988, by then Deputy Director of Operations for the Department, Jack V. Harrison. The Harrison letter stated that “[s]o long as [nude sunbathing] takes place in a traditionally recognized area, it is legal unless and until a complaint from a member of the public is received” (Exh. xxx [Harrison Letter] p. xxx (emphasis added).) The sunbather would be allowed to return and resume his/her activities on the following day. The Harrison letter was broadly disseminated to the public. Exhibit xxx Declaration of R. Allen Baylis. Pages

7. The Department’s Unilateral Rescission of the Cahill/Harrison Policy. On May 28, 2008, the Department began its efforts to rescind the long-standing Cahill/Harrison Policy at San Onofre State Beach where naturists and other members of the public had been using the Trail 6 Area. On or about June 2, 2008, signs were erected by the Department, at and around the Trail 6 Area and at the entrance to San Onofre State Beach. (Exh. xxx [sign] p. xxx , Exh. xxx [dec of Baylis pg.) Coincident with the placement of the signs, the Department began a plan for enforcement (Exh. xxx [plan] pp xxx – xxx.)

8. Writ of Mandamus. On August 27, 2008, the Superior Court for the County of Orange, Department C-22, Judge Sheila Fell presiding, issued an Order granting the Petition of NATURIST ACTION COMMITTEE, FRIENDS

of SAN ONOFRE BEACH, R. ALLEN BAYLIS and GERDA HAYES (Petitioners) for Writ of Mandate. (Order, Exh. xxx, pp. xxx – xxx).

9. Appeal from Order. On September 2, 2008, the CALIFORNIA STATE DEPARTMENT OF PARKS & RECREATION and RUTH COLEMAN in her Official Capacity as DIRECTOR of the CALIFORNIA STATE DEPARTMENT OF PARKS & RECREATION (Respondents) filed a Notice of Appeal of said Order for Writ of Mandate.

10. Ex Parte Application for Removal of Signs. On September 9, 2008, attorneys for petitioners filed an *ex parte* Application with the lower court for Removal of Signs at San Onofre State Beach in order to preserve the *status quo* pending appeal. After reviewing each side's written submissions and hearing oral argument in chambers, without a court reporter, Judge Fell denied the Application citing stay of proceedings on appeal.

BASIS FOR RELIEF.

11. This Petition is based on California Code of Civil Procedure §916; and the case law cited herein. Without the requested relief in the form of writ of supersedeas or writ of prohibition, petitioners will be deprived of the fruits of success on appeal.

ABSENCE OF OTHER REMEDIES

12. Petitioners have no adequate legal remedy other than writ relief. The lower court has declined to order removal of its order-violating and misleading signage pending appeal. If these signs are allowed to remain during the pendency of the respondents' appeal, petitioning parties who are organizations and their constituent members, as well as individuals, Baylis and Hayes, will be subjected to unilateral and unlawful rescission of the Cahill/Harrison Policy. Respondents will have been allowed to advance their

rescission thereby destroying the *status quo* which is necessary to preserve the integrity of appeal.

GROUNDS FOR AN IMMEDIATE STAY

13. Respondents, since June 2, 2008, and continuing to this time, have posted signs prohibiting nudity at the Trail Six Area of San Onofre State Beach which mislead the general public as to the letter and status of the law. Respondents are advising members of the public that there is no nude beach at San Onofre State Beach—again purposely misleading the general public as to the letter and status of the law. These actions should not have occurred at all; but should they be allowed to continue, even for a few days, the general public will be misled; the naturists' community will be placed in fear of citation and arrest even though, under the current status of the law, they have every right to use the Trail Six Area at San Onofre as a clothing-optional beach; and, the petitioners will be deprived of their rights should they prevail on appeal. In short, respondents will have been allowed to engage in the bureaucratic tyranny which the lower court prohibited and which should continue to be prohibited pending the instant appeal.

PRAYER

Petitioners, Naturist Action Committee, Friends of San Onofre Beach, R. Allen Baylis and Gerda Hayes, pray that this Court:

1. Issue a writ of supersedeas or alternately a writ of prohibition in the first instance (Code Civ. Proc., §§1087-1088, 1104-1105; see *Palma v. U.S. Indus. Fasteners, Inc.* (1984) 36 C3d 171, 178) directing respondents State Department of Parks & Recreation and Ruth Coleman, in her official capacity as Director of said Department, to remove signs stating, *inter alia*, that “Nudity is Prohibited” at the Trail Six Area of San Onofre State Beach. Further directing respondents to cease informing members of the public that “nudity is

prohibited” at the Trail Six Area of San Onofre State Beach, in any manner at all; and

2. Award petitioners’ costs under California Rules of Court, Rule 8.490; and

3. Grant such other relief as may be just and proper.

Dated: September 23, 2008

Respectfully submitted,

Elva P. Kopacz

Attorney for Petitioners, Naturist
Action Committee, Friends of San
Onofre Beach, R. Allen Baylis,
and Gerda Hayes

VERIFICATION

I am a petitioner in this matter. I have read the foregoing Petition for Writ of Mandate or Other Appropriate Relief and know its contents. The facts alleged in this petition are within my own personal knowledge, and I know these facts to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on September 25, 2008, at Huntington Beach, California.

R. Allen Baylis

MEMORANDUM

1. INTRODUCTION

This matter is on appeal from the lower court's order granting petitioners, NATURIST ACTION COMMITTEE, FRIENDS OF SAN ONOFRE BEACH, R. ALLEN BAYLIS and GERDA HAYES (hereinafter, "petitioners") petition for writ of mandate. Respondents (and appellants) are the CALIFORNIA STATE DEPARTMENT OF PARKS & RECREATION and RUTH COLEMAN (in her official capacity as Director thereof) (hereinafter, "respondents"). The lower court found that the Cahill Policy was a "regulation" within the meaning of the California Administrative Procedures Act (hereinafter, the "APA")² and ordered respondents to maintain the Cahill Policy³ in full effect until the respondents complied with all of the requirements of the State of California Administrative Procedure Act.

The Cahill Policy has been in effect since 1979. In 1988, the broadly disseminated Harrison Letter reinforced and clarified the Cahill Policy. The Cahill Policy, combined with the Harrison Letter comprises the Cahill/Harrison Policy (found by the lower court to be a "regulation"⁴ within the meaning of the APA).

² Cal. Gov. Code §§11346 *et. seq.*

³ For the purpose of clarity, the Cahill Policy referred to by the lower court will be termed herein, the Cahill/Harrison Policy. The regulation, regardless of nomenclature, is the same.

⁴ The requirements of the APA apply to changes in "regulations". A "regulation" is defined as: "every rule, regulation, order, or standard of general application . . . adopted by any state agency to implement interpret, or make specific, the law enforced or administered by it or to govern its procedure". Cal. Gov. Code §11342.600 (West, 2008).

While the matter of the lower court's writ of mandamus is on appeal, the respondents are required to maintain the Cahill/Harrison policy in full force and effect as it was prior to the filing of the writ petition below. Instead of doing so, the respondents have continued to implement their rescission of the Cahill/Harrison Policy by posting signs which not only rescind Cahill/Harrison, but also misstate the law regarding nudity at the beach. Respondents have also begun to respond to inquiries by the public in a manner which negates Cahill/Harrison and misleads the public.

2. THE APPELLATE COURT HAS INHERENT POWER TO ISSUE A WRIT OF SUPERSEDEAS OR ANY OTHER WRIT TO COMPLETE THE EXERCISE OF ITS APPELLATE JURISDICTION.

It is well established that the Appellate Court has inherent power to issue a writ of supersedeas (or any other writ) if such action is necessary or proper to complete the exercise of its appellate jurisdiction. *Ohaver v. Ferech*, (1928) 206 Cal. 118; *Clayton v. Schultz*, (1939) 12 Cal 2d. 703; *People v. Associated Oil Co.* (1931) 211 Cal. 93.

In this case, the Court's issuance of a writ of supersedes (or alternately, a writ of prohibition) prohibiting the respondents from disrupting the *status quo* is necessary and proper to complete the exercise of its appellate jurisdiction. In May, 2008, the respondents developed a plan of action to unilaterally rescind the long-standing Cahill/Harrison Policy and, on or about June 2, 2008, began implementing that plan by placing signs at San Onofre which stated:

**NUDITY PROHIBITED Pursuant to Title 14, [CCR] 4322
California Department of Parks and Recreation.**

After the issuance of the writ of mandamus and during the current pendency of its appeal of the writ, the respondents continued to display

the signs and *further* implemented their rescission plan by informing visitors to the park that a nude beach did not exist at San Onofre. By these actions, the respondents are continuing their march forward with rescission of the Cahill/Harrison Policy, taking matters into its own hands as though they have already prevailed on appeal. As a direct result, petitioners are losing ground during the pendency of the appeal to their detriment. Should petitioners prevail on appeal, they will be faced with the recession of the Cahill/Harrison Policy as a *fait accompli*. During public hearings under the APA, petitioners position with respect to respondents will most certainly be compromised in that petitioners will be starting from a seemingly inferior position to respondents.

3. THE WIT OF MANDAMUS ISSUED BY THE COURT BELOW WAS PARTIALLY MANDATORY AND PARTIALLY PROHIBITORY IN NATURE.

If an injunction is mandatory in nature it is automatically stayed by appeal. On the other hand, if it is prohibitory in nature, it is self-executing and its operation is not stayed by the appeal. *Food and Grocery Bureau of Southern California v. Garfield*, (1941) 18 Cal. 2d 174. Furthermore, the injunction issued by the court below may be partially mandatory and partially prohibitory even though it is mandatory by its form. *Id.*, at 177.

In the instant case, the lower court ordered the respondents to maintain the *status quo* (prohibiting rescission of the Cahill/Harrison Policy) while complying with the procedures required by the APA. This is the mandatory portion of the order, which states:

Further, until the administrative process is completed, Parks is ordered to maintain the status quo, and enforce the Cahill Policy as it has done since its issuance and subsequent

interpretation by the Harrison letter, at trail 6 in San Onofre State Beach.

Exhibit xxx, p. xxx (emphasis added).

Clearly, the part of the order requiring maintenance of the *status quo* is self-executing during appeal and respondents have done violence to the *status quo* through their actions to rescind the Cahill/Harrison policy despite being prohibited from doing so.

4. CONSIDERATION OF THE RESPECTIVE RIGHTS OF THE LITIGANTS WHICH CONTEMPLATES AFFIRMATION OR REVERSAL ON APPEAL LEADS TO THE GRANTING OF THIS WRIT.

In *Garfield*, on application by a trade association, the lower court issued a preliminary injunction directing an operator of a chain of drug stores to refrain from giving away trading stamps to its customers. The trade association alleged violation of the Unfair Practices Act.

The *Garfield* court held that unless the operation of the lower court's preliminary injunction was stayed during pendency of Mr. Garfield's appeal, he would be irreparably injured through loss of business and that, in effect, he would be deprived of the fruits of his appeal should he be successful in securing a reversal of injunction. *Garfield, id* at 178.

The *Garfield* court found that the issuance of trading stamps was a long standing practice to which the trade association had long acquiesced. In the instant case, the Cahill/Harrison policy has been in effect for almost 30 years without change or challenge by petitioners.

The *Garfield* court found that, “the abrupt abolishment of the practice would cause disruption of the orderly conduct of Mr. Garfield’s business, a loss of patronage and customer good will possibly so irreparable as to deprive him of the fruits of a meritorious appeal.” *Id.*, at 178.

The instant case is analogous to *Garfield* although the roles of the parties appear on first glance to be reversed. In our case, petitioners appear to be standing in the shoes of the *Garfield* trade organization in that they sought to compel compliance with a mandatory state law (the APA) and prevailed in the lower court. Respondents appear to be in the position of Mr. Garfield in that they resisted same. However, in effect it is petitioners who will be damaged if the prohibitory portion of the lower courts order is not held in effect pending appeal. This places them in an analogous position to Mr. Garfield.

Orange County Water District v. City of Riverside, (1957) 154 Cal. App. 2d 345 is also instructive. In that case, certain municipalities were allegedly diverting water from a watershed in excess of their prescriptive rights. The lower court mandated that the cities surrender water rights long held or elect to meter water used and either replenish it within 3 years or pay the Water District for its use. The Court of Appeal held that compelling the cities to make an immediate election pending their appeal would “. . . amount to an acceptance of the judgment with . . . possible prejudice to their rights on appeal”. *Id.* at 349.

In our case, requiring petitioners to comply with the steps taken toward rescission of the Cahill/Harrison Policy pending appeal would amount to acceptance of reversal of the lower court’s writ of mandate during pendency of respondent’s appeal, thus damaging petitioner’s position should the Department

be required to comply with the APA while also impinging on this Court's appellate powers.

CONCLUSION

The lower court's order granting petitioner's writ of mandate requires that respondents maintain the *status quo* while complying with the requirements of the Administrative Procedures Act. Respondents have failed to maintain the *status quo* by continuing actions to rescind the Cahill/Harrison Policy and are in violation of the lower court's prohibitive writ. The respondent's actions not only impinge upon the Appellate Court's exercise of its jurisdiction; but also deprive the public of its privileges under the 29 year old Cahill/Harrison Policy during the pendency of appeal *and* place petitioners in a grossly inferior position should they prevail on appeal. Finally, signs posted and information given to the public by respondents misstates current law and misleads the public, has a chilling effect on those who have a right to rely on public regulations as they are validly and currently in place. Accordingly, this Court should grant petitioners writ petition.

Dated: September 23, 2008

Respectfully submitted,

Elva P. Kopacz

Attorney for Petitioners, Naurist
Action Committee, Friends of San
Onofre Beach, R. Allen Baylis
and Gerda Hayes

CERTIFICATE OF WORD COUNT

The foregoing Petition contains 3,972 words (excluding this Certificate and Tables). In preparing this certificate, I relied on the word count generated by MS Word 2007.

Executed on September 23, 2008, at Huntington Beach, California.

Elva P. Kopacz