האגודה לזכויות האזרח בישראל
جمعية حقوق المواطن في اسرائيل
The Association for Civil Rights in Israel

At the Supreme Court **HCJ 2135/20**

Sitting as a High Court of Justice

The Petitioner: **Association for Civil Rights in Israel R.A. 580011567**
Represented by Attys. Dan Yakir and/or Gil Gan-Mor and/or Avner Pinchuk and/or Oded Feller and/or Sharon Abraham-Weiss and/or Debbie Gild-Hayo and/or Abir Joubran Dakwar and/or Maskit Bandel and/or Tal Hassin and/or Ann Suciu and/or Roni Pelli and/or Sana Ibn Bari

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- Versus -

Respondents:
1. The Prime Minister
2. The Government
3. The Israel Security Agency
4. The Israel Police
5. The Ministry of Health

All represented by the Petitions Department, State Prosecutor's Office, Ministry of Justice

Petition for the Granting of a Degree Nisi and Request for an Urgent Hearing

The honorable Court is asked to grant a decree nisi addressed to the Respondents instructing them to appear and give cause:

A. Why it should not be established that the Emergency Regulations (Empowerment of the Israel Security Agency to Assist in the National Effort to Reduce the Spread of the New Corona Virus), 5780-2020 (hereinafter – **the ISA Regulations**) are void.

B. Why it should not be established that the Emergency Regulations (Location Data), 5780-2020 (hereinafter – **the Police Regulations**) are void.

The honorable Court will also be asked to schedule an urgent hearing in the petition.

The following are the grounds for the petition:

1. In Israel, as in the entire world, the Corona virus is spreading, and the government, like many government around the world, is adopting numerous means to slow its spread and to reduce the number of patients resulting from it. As the Ministry of Health explains, the purpose of these means is to protect human life, defend public health, and slow the spread of the virus in order to prevent undue pressure on the health system, leading to additional and unnecessary injury to human life and public health. The virus causes a new disease that manifests itself in some patients in mild symptoms, and in others in severe symptoms, including pneumonia and a severe respiratory syndrome that are liable to prove fatal. Not everything is known about the disease, but from the data known to date, approximately one in every six patients, particularly the elderly and those with background diseases, will require medical treatment at hospital or in intensive care if they are infected. The mortality rates are also unknown, but in all probability they are very low among children and young people, and rise in the case of populations at risk. Accordingly, it is important to slow the spread of the virus in the community.

2. According to the position of the Ministry of Health, without drastic steps, the spread of the virus will be more rapid than the ability of the health system to attend to the patients, and this is liable, heaven forbid, to lead to the death of patients who could otherwise have been saved.

3. As long as the number of patients was low and the source of infection known, it was of the greatest importance to locate patients and those they had come into contact with rapidly. However, at this early stage, no thought was given to the use of technological means, and the Ministry undertook an "epidemiological investigation" regarding any person who was sick or was suspected of being sick, in order to trace the places they visited over the fourteen days preceding the discovery of the disease. It then published this information for the public in order to inform those who visited the same places at the same times of the risk that they had been infected, and to instruct them to enter home isolation.

4. These steps naturally lose their efficacy once community transmission is high, and once there are patients for whom the source of infection remains unknown. In this situation, steps to slow the spread of the virus are focusing on the isolation of patients, numerous tests, and a reduction of social contacts in general in order to prevent or limit further infection; the "chase" after the track

of infection is less effective. The strategy behind this approach is to reduce the infection factor, thereby curbing the spread of the virus pending the retreat of the epidemic.

5. To this end, the Ministry of Health and the Government have adopted numerous and drastic steps, including a prohibition against gatherings of more than 10 people, the closure of non-vital places of work and businesses; and, on 17 March 2020, guidelines were published by the Ministry of Health instructing the public of a sweeping prohibition against leaving home, with the exception of a limited number of circumstances.

6. These steps are indeed helping to slow the spread, and as of the time of submission of this petition, only a few hundred patients have been located, and there is no extreme morbidity.

7. Accordingly, there can be no doubt that Corona constitutes an extremely serious crisis that poses a lethal threat to vulnerable groups in the population, and requires harsh steps that for a certain period disrupt life in a dramatic manner. However, it does not constitute an existential threat to the state, nor is it even close to this. The state institutions are functioning, vital services are working, many places of work are continuing to operate, albeit in a restricted format, public transportation is operating on a limited scale, and so forth.

8. Despite this, the Respondents, or some of them, are making a representation that Israel is engaged in a struggle for survival, that there is no means too extreme to be adopted in combating Corona, and the steps are being taken with dizzying rapidity.

9. The Petitioner has to date examined the Government's action, and has found that most of the steps taken, although they cause extremely grave violation of individual rights, are lawful and proportionate.

10. On the night between 16 and 17 March 2020, the Government enacted emergency regulations that are draconian and extreme, and unlike anything that has been adopted by any other democratic government struggling against the spread of the virus; it did so while deliberately evading parliamentary scrutiny. It has already been ruled that even in the height of combat, not everything is permissible in a democracy. Similarly, limits apply in the struggle against the spread of the epidemic.

11. Moreover, these steps appear to be ones that if justified at all would be so in the early stage of the outbreak, while the economy is functioning normally and the sources of infection must be located rapidly. Yet in this instance, they were adopted after sweeping restrictions of movement had already been imposed on the entire public.

12. Accordingly, the honorable Court should examine the marginal benefit of these draconian measures, which go beyond all the measures already adopted, relative to the grave violation of individual rights and the principles of the democratic regime and the presence of less injurious means.

The ISA Regulations

13. The ISA Regulations are emergency regulations empowering the ISA to collect and process technological information, and empowering the Director-General of the Ministry of Health to request the technological information for the purpose of assisting in undertaking an epidemiological investigation in order to reduce and prevent the spread of the Corona virus. The term "technological information" is not defined.

14. According to the Regulations, a representative of the Ministry of Health will be able to forward to a representative of the ISA the details of a diagnosed Corona patient, or a person suspected of being a patient but regarding whom the suspicion has not yet been confirmed, and to receive technological information about that person for the 14 days preceding the diagnosis, and information about the persons with whom the said person came into close contact. The consent of the person in question is not required.

15. According to the Regulations, the information will not be forwarded to any other body and will not be used in any manner that deviates from the epidemiological examination. The ISA has been forbidden to engage in direct contact with patients or persons required to be in isolation in light of the epidemiological investigations. The Ministry of Health will be able to use the data in order to update the list of persons subject to a requirement of isolation (the police has access to this list for the purpose of steps to enforce the isolation).

16. For the present, the Regulations have been established for a period of 14 days.

A copy of the Regulations is attached and labeled **P/1**.

17. The ISA does not engage in civilian issues such as the halting of an epidemic. Accordingly, the government initially decided on 15 March 2020 to charge the ISA with this function for a limited period by means of the proceeding established in section 7(B)(6) of the Israel Security Agency Law, 5762-2002 (hereinafter – **the Israel Security Agency Law**), i.e. – to extend the ISA's operations to "another area," provided that the operations "are intended to protect and promote state interests vital to the national security of the state."
A copy of the Government Decision is attached and labeled **P/2**.

18. However, the request to the Secret Services Subcommittee of the Knesset Foreign Affairs and Defense Committee, headed by MK Gabi Ashkenazi, was only submitted on 16 March 2020, and the committee was convened at extremely short notice in the afternoon, very close to the meeting for the swearing-in of the Twenty-Third Knesset, in a manner that did not leave the committee time to examine the request in depth. The legal advice function of the committee had numerous comments on the Government's decision, but there was no time to discuss these. Accordingly the discussion ended without a decision, and the Committee ceased to function following the swearing-in of the new Knesset the same day at 4:00 PM.

A copy of the comments of the legal advice function is attached and labeled **P/3**.

19. Section 2A of the Knesset Law, 5754-1994 (hereinafter – **the Knesset Law**) empowers the new Knesset to convene the Arrangement Committee immediately and to convene temporary committees for Foreign Affairs and Defense and Finance, pending the establishment of the permanent committees. For reasons of its own, the Government did not act to bring the decision for discussion in a temporary committee, though there was no impediment to the formation of such; instead, in the middle of the following night, it approved the Emergency Regulations.

20. The procedure established in accordance with regulation 3(A) of the Regulations, according to which the ISA is supposed to define the types of technological information and additional conditions for the use thereof, including the manner of collection of the information, its storage, its transfer to the Ministry of Health, and its deletion remains confidential. It is unclear what the legal foundation for this is, given that this is not an ISA procedure in accordance with the Israel Security Agency Law, and there is no substantive justification for refraining from publishing all or most of the procedure.

The Police Regulations

21. Alongside the approval of the ISA Regulations, the Government enacted emergency regulations concerning the powers of the police to receive location data. The regulations amend the Criminal Proceedings Law (Enforcement Powers – Communications Data), 5768-2007 (hereinafter – **the Communications Data Law**).

22. The regulations amend the Communications Data Law for three months (the maximum duration of emergency regulations). The regulations empower an appointed police officer, at the request of a policeperson, to request location data from the communications companies concerning a patient or a person suspected of being a patient for the purpose of warning the public or a specific

person. This authority will enable the policeperson to identify a person's location on a real-time basis; the goal, it seems, is to notify persons who are sick or required to be in isolation due to contact with a sick person, and to warn others. The location may also be provided without a judicial warrant.

23. Furthermore, the regulations permit the police to demand location data from the communications companies for a person subject to a home isolation order for the purpose of enforcing the isolation. The receipt of the data will be on a sample and non-contiguous or continuous basis; all this – without a judicial warrant.

24. The regulations establish that the location data will be used solely for the purpose of enforcing powers under the Public Health Law, 1940, or the enforcement of home isolation instructions, but they do not establish any sanction for the violation of this provision, as is established in the ISA Regulations.

25. The regulations define a Corona patient broadly, as someone suspected of being a patient. In other words, this involve a population of tens, if not hundreds, of thousands of people required to be in isolation due to close contact with a patient, or after having used public transportation on which a patient traveled. The access of a policeperson to the location data of these persons, without a judicial warrant, is on an unprecedented scale.

A copy of the Police Regulations is attached and labeled **P/4**.

The Legal Argument

Conditions for the Enactment of Emergency Regulations

26. In Israel, a state of emergency has been declared since the day on which the state was established, and the declaration of a state of emergency has continued without interruption through decisions of the Knesset, presently by virtue of section 38 of the Basic Law: The Government (see HCJ 3091/99 *Association for Civil Rights in Israel v The Knesset* (8 May 2012)). The declaration permits the Government to enact emergency regulations for a period of up to three months (section 39 of the Basic Law). Emergency regulations that violate constitutional rights formalized in the Basic Law: Human Dignity and Liberty, as in this instance, are subject to the restriction clause, as ordered in section 12 of the Basic Law: Human Dignity and Liberty: "when a state of emergency exists in the State, by virtue of a declaration under article 9 of the law and Administration Ordinance 5708-1948, emergency regulations may be enacted on the basis of the said article, that will involve denial or limitation of rights under this Basic Law, provided that the denial or limitation shall be for a worthy purpose, and for a period and an extent that do not exceed the required" (see

also Daphne Barak-Erez, "A Constitution for States of Emergency," *Shlomo Levin Book* 671).

27. In *Paritzky*, the honorable Court ruled that "the enactment of emergency regulations is a grave matter. The gravity is due to the fact that emergency regulations – which fall under secondary legislation – are able to "alter any law, temporarily suspend its effect or introduce conditions" (section 39(C) of the Basic Law: The Government). This force of the regulations violates two basic principles of any democratic regime: The principle of the separation of powers and the principle of the rule of law (HCJ 6971/98 *Paritzky v Government of Israel*, *Piskei Din* 53(1) 763 (1999)).

28. Accordingly, it has been ruled that "it is not sufficient that a state of emergency exist in the state… this is an essential, but not a sufficient, condition for the enactment of emergency regulations. It is required, in addition thereto – and to the other conditions established in sections 49 and 50 of the Basic Law: The Government – that the government's decision to enact emergency regulations must be taken for a worthy purpose. The means the emergency regulations adopt must be proportionate. This is required by virtue of the principles of our public law ibid., p. 778).

The ISA Regulation Are Not Proportionate and Were Adopted through a Defective Process

29. Section 7 of the Israel Security Agency Law empowers the ISA to assume responsibility for protecting state security and the arrangements and institutions of the democratic regime against threats of terror, sabotage, subversion, espionage, and the exposure of state secrets, as well as for protecting and promoting other national interests vital for the national security of the state, all as shall be determined by the state and subject to any law.

30. The following are the functions allocated to the ISA in the Law: (1) Thwarting and preventing illegal actions intended to damage state security or the arrangements and institutions of the democratic regime; (2) Securing persons, information, and places as determined by the government; (3) Establishing provisions concerning the security classification for functions and positions in the civil service and other bodies; (4) Establishing guarding procedures for bodies as determined by the government; (5) Undertaking intelligence research and providing consultation and evaluation of the situation for the government and for other bodies as determined by the government; (6)Activities in another field as determined by the government, with the approval of the Knesset Committee for ISA Affairs, intended to protect and promote national interests

vital for the national security of the state; (7) The collection and receipt of information in order to protect and promote the matters detailed in this section.

31. In contrast to these security functions, the ISA Regulations grant the ISA the authority to track civilians and to forward extensive private information about them, without obtaining their consent, without their knowledge, and without a judicial warrant or supervision – and this for the purpose of attending to a health crisis. Halting an epidemic is not one of the matters the legislator allocated to the Israel Security Agency.

32. It is true that the ISA Law grants the Government the possibility of expanding the ISA's authority to "another field as determined by the government," provided that two conditions are met: (A) Approval has been granted by the Knesset Committee for ISA Affairs; (B) The activity is intended to protect and promote national interests vital for the national security of the state.

33. These two conditions have not been met in our case.

34. Firstly, no approval has been granted by the relevant committee, which is the Subcommittee for Secret Services of the Knesset Foreign Affairs and Defense Committee. As fate would have it, the Corona crisis caught Israel in a particularly sensitive situation in which the outgoing Knesset was completing its course and a new Knesset had been elected. The latter was sworn in on 16 February 2020, and committees have not yet been elected. This matter could have been resolved in two ways: The request to expand the ISA's function could have been brought earlier before the outgoing Knesset committee, shortly before the swearing-in of the new Knesset, and the committee would then have approved or denied the request. Instead, the rules were only presented at the last moment, just before the swearing-in of the new Knesset, and accordingly it was impossible to discuss the request and take a decision. It would also be possible to wait for the establishment of a new subcommittee in the present Knesset. According to the Knesset Law, this is possible even before the permanent committees have been established, and even on an immediate basis. While the Government is not responsible for the Knesset, it is difficult not to draw the conclusion that political considerations are playing a part, and that the representatives of the factions that comprise the transitional government, who do not have a majority in the new Knesset, are not interested in parliamentary scrutiny and in the establishment of the committee (or other committees, for the purpose of the matter). The alternative that was selected – bypassing the law by means of emergency regulations – is an improper one in procedural terms, and one that unjustifiably circumvents the legislator, since the factions that are partners in the transitional government could have chosen not to thwart the

establishment of the subcommittee and to maintain parliamentary scrutiny, leading either to the approval or the rejection of the request.

35. Secondly, it is impossible to argue that the expansion of the ISA's mandate will contribute to interests vital to the national security of the state, and this without diminishing or belittling the gravity of the spread of Corona and its costs. The legislator granted the ISA far-reaching and draconian powers to address state security, and not for civilian affairs. The seepage of these powers into other fields is a slippery and dangerous slope. It is dangerous to involve the ISA in civilian fields, even at a time of serious crisis. The Government has adequate powers to attend to the matter without the ISA's involvement.

36. The comments of Atty. Arie Rotter (former legal advisor to the ISA) are pertinent: "Most democratic societies in the world activate preventative intelligence for preventative attention in the field of national security, but not in other fields. The reason for this is twofold: Firstly, security issues are generally perceived as an existential threat to society and to its democratic system of government, as distinct from criminal affairs, which are usually perceived (sometimes unjustly) as a nuisance that impairs quality of life, but not national or collective life itself. Secondly, and in our context this is the more important point, the availability of intelligence information carries a heavy price in terms of the damage to individual liberties and the rule of law, particularly in its substantive sense. Western democracy is ready, it would seem, to pay this price when it relates to the defense of its actual existential interests, but not for the sake of other matters" (Arie Rotter, *The Israel Security Agency Law – Anatomy of Legislation* (National Security College, 2009) 17-18).

37. Neither are the ISA Regulations proportionate. There is no doubt that they are for a worthy purpose, but it would seem that at this point in time there effectiveness has diminished. If there were any justification for using draconian tools to monitor and track patients by digital means, this would be in circumstances in which most of the population was functioning normally, while a small minority of patients could cause a significant outbreak. At that time, it might perhaps have been possible to take the position that when a balance must be struck between the total disruption of the way of life and the privacy of individuals, the scales tip in favor of the violation of privacy. Once there is an extensive outbreak in the community, and the steps taken to prevent the outbreak are primarily ones of preventing gatherings and imposing social isolation, the importance of these monitoring actions diminishes.

38. Even if monitoring actions are of importance, their marginal benefit in the present circumstances does not exceed the grave damage caused by the activation of monitoring means against citizens by the ISA. This damage is

manifested in the gross trampling of the right to privacy – a constitutional right (see section 7 of the Basic Law: Human Dignity and Liberty), both of the Corona patient and of all those with whom the patient came into contact. The information may provide an indication of all the places where the Corona patient was present, including sensitive places the patient does not wish to reveal, places best left shrouded in modesty, the exposure of the patient's social contacts, and so forth.

39. The information will also lead to a situation where information will be forwarded to the Ministry of Health concerning the location of healthy individuals, solely because they moved close to a Corona patient or to someone "suspected" of being such. This information will lead to their immediate entry into isolation, with all this implies. It is far from clear whether the technological means are capable of distinguishing between close and dangerous contact, as defined by the Ministry of Health, and non-dangerous contact – such as contact for less than 15 minutes, or in an open space without proximity of less than two meters, and so forth.

40. Naturally, the information produced may reach those close to the individual, exposing personal details to additional circles.

41. The act of monitoring per se has a regimenting effect on the entire population, since we all move around in places and maintain contacts with people in a private manner, and do not wish that this information should reach the ISA, the Ministry of Health or other bodies. The monitoring in itself may lead to a significant violation of liberty (HCJ 3809/08 *Association for Civil Rights in Israel v Israel Police* (ruling dated 28 May 2012)).

42. Moreover, the ISA Regulations are phrased in an extremely broad and vague manner; not for nothing did the legal advice function of the committee commit on this matter repeatedly. Thus, for example, it was noted that there are no details about the technological information. Does this relate solely to telephone location? Will it be possible to examine with whom the patient held conversations? Will it be possible to activate a face recognition technology? Will it be possible to undertake voice recognition in order to confirm who is the owner of the telephone? The only aspect that is prohibited is the collection of information about the content of the conversation.

43. The ISA has exceptional technological capabilities and access to enormous information – big data – concerning every one of us. Section 11 of the Israel Security Agency Law grants the ISA access to communications data, but this does not exhaust the information to which the ISA has access. Contrary to the impression created among the public that this matter relates mainly to the

location of the telephone carried by an individual, the technological information is also liable to include the history of our incoming and outgoing calls, including messages on instant messaging applications such as SMS and WhatsApp (though not the inspection of the content of the messages), the history of use of credit cards, video footage and stills from security cameras in the public domain and from cameras installed in various places – such as hospitals, banks, malls, offices, and entrances to homes – material that can be analyzed, among other means, through the use of artificial intelligence systems.

44. Former ISA head Avi Dichter commented on the legislative process for section 11 ("we tried to get it through under the radar, because it was potentially a very problematic clause, although in 2002 not everyone understood the full significance of communications data,") as well as on the ISA's access to SigInt, at a conference marking the tenth anniversary of the ISA Law held at the School of Law at the College of Administration on 20 March 2012. See his comments beginning from minute 18:35.

45. In our case, the information that will be gathered and analyzed will begin with the "suspect" and extend to widening circles of "identification of persons who came into close contact with him" (regulation 2). No definition is offered as to the width of the close circle, and neither is it clear whether this was determined in the confidential procedure in accordance with regulation 3(A). In addition, the ISA Regulations are applied without examining possible alternatives that would obviate their necessity, or at least reduce their application. The legal advice function of the subcommittee also committed on this aspect. Inter alia, the use of various technological means to reduce the violation of privacy could have been examined.

    Regarding privacy, technology, and the engineering of privacy, see Michael Birnhack, *Private Domain: The Right to Privacy between Law and Technology* (2010), 43-55;

    For alternative proposals for securing the purpose without the intervention of the ISA, see the opinion of Dr. Tehilla Schwartz Altshuler and Atty. Rachel Aridor-Hershkovitz (Israel Democracy Institute, 15 March 2020).

46. From all the above, it emerges that the Regulations were issued in a rapid, hasty manner, unjustifiably preventing parliamentary scrutiny, at a timing that is in any case too late and less relevant to the purpose of the Regulations, and without the examination of more proportionate alternatives. The Regulations are not proportionate and their damage exceeds their benefit.

The Police Regulations are Disproportionate

47. The Police Regulations circumvent the legislator's instructions concerning one of the most sensitive laws in terms of democracy and one of the most injurious laws for individual rights – the Communications Data Law. This law was discussed in depth in the Knesset and reached the honorable Court in an expanded panel. While the panel rejected the petition submitted by the Association for Civil Rights in Israel, it adopted a narrow interpretation, inter alia prohibiting the use of communications data for the purpose of monitoring and intelligence collection (HCJ 3809/08 *Association for Civil Rights in Israel v Israel Police* (ruling date 28 May 2012)).

48. The Police Regulations grant draconian powers to a police officer to ask a communication company for location data for a person at the request of a policeperson, without a judicial order, as well as the location data of persons in home isolation, on a random basis.

49. The Regulations are valid for a period of three months, although the situation is changing daily, and it would already seem that the means granted by the Regulations are less effective in securing their purpose, since the new instructions impose profound social isolation on all, rather than isolation of small numbers of people. Here, too, it might perhaps have been possible to understand the rationale in the period when most of the population was in a routine mode, and the number of patients requiring isolation was small. Here, too, the Regulations would appear to have missed the date when their purpose might have been secured. Now, the less efficient means and the marginal benefit it offers, relative to the other means adopted, are inconsistent with the substantial damage it causes to individual rights and to basic democratic principles.

50. The Regulations severely violate the right to privacy and have a significant regimenting effect. They are liable to lead to the seepage of the information for other needs. Contrary to the ISA Regulations, there is no sanction on a policeperson who uses the information for another purpose, and no certainty that such use will not take place in a covert manner – for example, in police investigations. The quantity of citizens for whom the Regulations are relevant is enormous, as is the number of policepersons who will be able to receive the information. The Regulations are liable to lead to unjustified enforcement actions, and even to false arrests, since the person requiring isolation is not always the person who is carrying the cell phone.

51. In light of all the above, it should be determined that the Police Regulations are also disproportionate in a manner that leads to their invalidity.

In Conclusion

52. We are in exceptional times. The Government is adopting a long series of steps, each of which in routine times would be regarded as a grave and acute violation of individual rights and the fabric of life. The Association for Civil Rights in Israel is following the steps with concern, but until now has not found a defect meriting an address to the honorable Court on account of these orders. We, too, are exposed to the virus and the dangers of the disease. We have elderly parents and some of the staff of the Association are included in the risk groups. But even in time of crisis, it is important to set boundaries. Democracy is measured precisely in those situations when the public is afraid, exposed day and night to nightmare scenarios, and waiting only for the threat to pass. Precisely in such moments, it is vital to act in a considered and level-headed manner, and not to take draconian and extreme decisions and to accustom the public to the use of undemocratic means when we have no way of knowing whether these will remain with us after the Corona crisis.

18 March 2020

Dan Yakir, Atty. Gil Gan-Mor, Atty.

Counsel for the Petitioner