

IN THE
Supreme Court of the United States

CALIFORNIA RESTAURANT ASSOCIATION, INC.,

Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,
COUNTY OF LOS ANGELES DEPARTMENT OF
PUBLIC HEALTH, AND DR. BARBARA FERRER,
IN HER OFFICIAL CAPACITY AS DIRECTOR OF
PUBLIC HEALTH, COUNTY OF LOS ANGELES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

BROWNE GEORGE ROSS O'BRIEN	BROWNE GEORGE ROSS O'BRIEN
ANNAGUEY & ELLIS LLP	ANNAGUEY & ELLIS LLP
DENNIS S. ELLIS	CARL ALAN ROTH
<i>Counsel of Record</i>	NOAH S. HELPERN
ERIC M. GEORGE	RICHARD A. SCHWARTZ
KATHERINE F. MURRAY	801 S. Figueroa Street,
RYAN Q. KEECH	Suite 2000
LORI SAMBOL BRODY	Los Angeles, CA 90017
2121 Avenue of the Stars,	(213) 725-9800
Suite 2800	
Los Angeles, CA 90067	
(310) 274-7100	
dellis@bgrfirm.com	

*Counsel for Petitioner, California Restaurant
Association, Inc.*

QUESTION PRESENTED

Is due process satisfied, consistent with the decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), where a public health department acts based on “rational speculation” in issuing a public health order that effects a taking of a citizen’s right to the free use and enjoyment of his or her property?

PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT

California Restaurant Association, Inc. (“CRA”) is the petitioner in this Court. CRA was the plaintiff and petitioner in the Superior Court of the State of California, County of Los Angeles (“trial court” or “Los Angeles Superior Court”) proceedings, real-party-in-interest in the Court of Appeal of the State of California, Second Appellate District (“Court of Appeal”) writ proceeding, and petitioner in the Supreme Court of the State of California (“California Supreme Court”).

The County of Los Angeles Department of Public Health and Dr. Barbara Ferrer, in her official capacity as Director of Public Health, County of Los Angeles (collectively, the “County”) are respondents in this Court. The County was the defendant and respondent in the trial court proceedings, petitioner in the Court of Appeal writ proceeding, and respondent in the California Supreme Court.

The Los Angeles Superior Court is also a respondent in this Court, as well as respondent in the Court of Appeal writ proceeding and in the California Supreme Court.

Mark’s Engine Company No. 28 Restaurant, LLC (“Mark’s Engine Company No. 28”) was also real-party-in-interest in the Court of Appeal writ proceeding and petitioner in the California Supreme Court. As of the filing of this Petition, Mark’s Engine

Company No. 28 has not petitioned for certiorari before this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that CRA has no parent or publicly held company owning 10% or more of the corporation's stock.

.

RELATED CASES

- *California Restaurant Association, Inc. v. County of Los Angeles, Department of Public Health, et al.*, No. 20STCP03881, Superior Court of the State of California, County of Los Angeles. Granting, in part, preliminary injunction on December 15, 2020.¹
- *County of Los Angeles, Department of Public Health, et al. v. Superior Court of Los Angeles County (California Restaurant Association, Inc.)*, No. B309416, Court of Appeal of the State of California, Second Appellate District. Staying preliminary injunction on December 18, 2020. Issuing peremptory writ directing the Superior Court to vacate its December 15, 2020 preliminary injunction on March 1, 2021. Denying petition for rehearing on March 12, 2021.
- *County of Los Angeles, Department of Public Health, et al. v. Superior Court of Los Angeles County (California Restaurant Association, Inc.)*, No. S268101, Supreme Court of the State of California. Denying petition for review on June 9, 2021.

¹ This proceeding was consolidated with *Mark's Engine Co. No. 28 Restaurant, LLC v. County of Los Angeles, Department of Public Health, et al.* (Los Angeles Super. Ct.) (No. 20STCV45134), solely for purposes of the hearing on the motions for preliminary injunction.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE	
29.6 STATEMENT	ii
RELATED CASES	iv
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	viii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	2
CALIFORNIA AND MUNICIPAL STATUTES, REGULATIONS, AND ORDERS	2
INTRODUCTION	3
STATEMENT OF THE CASE	5
A. The Ban On Outdoor Dining	5
B. The Trial Court Grants CRA’s Motion For Preliminary Injunction	6
C. The Appellate Court Issues A Writ Of Mandate	10
D. The Court Of Appeal Denies CRA’s Petition For Rehearing	12

E.	The California Supreme Court Denies CRA’s Petition For Review	13
REASONS FOR GRANTING THE PETITION		13
A.	Review Is Necessary To Settle Important Questions That Will Recur During This Pandemic And Future Public Health Crises	13
B.	This Court Should Affirm That Traditional Rules For Reviewing Agency Action Are Not Dispensed With In A Pandemic	18
C.	Absent Review, Government Actors Will Resist Takings Clause Claims By Claiming That Shutdown Orders Were Justifiable Regulations.....	28
CONCLUSION		32
APPENDICES		
Appendix A, Order of the Supreme Court of the State of California, Filed June 9, 2021.....		1a
Appendix B, Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Four, Filed March 1, 2021		2a
Appendix C, Opinion of the Superior Court of the State of California, County of Los Angeles, Central District, Filed December 15, 2020		29a

Appendix D, Relevant Statutory Provisions	157a
Appendix E, Order of the Health Officer of the County of Los Angeles, Department of Public Health, dated November 25, 2020	159a

TABLE OF AUTHORITIES

<u>FEDERAL CASES</u>	Page(s)
<i>Am. Pelagic Fishing Co. v. United States</i> , 49 Fed. Cl. 36 (2001).....	31
<i>Brach v. Newsom</i> , No. 20-56291, 2021 WL 3124310 (9th Cir. July 23, 2021).....	17
<i>Calvary Chapel Dayton Valley v. Sisolak</i> , 140 S. Ct. 2603 (2020).....	11
<i>Cienega Gardens v. United States</i> , 331 F.3d 1319 (Fed. Cir. 2003).....	31
<i>County of Butler v. Wolf</i> , 486 F. Supp. 3d 883 (W.D. Pa. 2020)	25, 26
<i>Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.</i> , 140 S. Ct. 1891 (2020).....	22
<i>E. Enters. v. Apfel</i> , 524 U.S. 498 (1998).....	30
<i>First Eng. Evangelical Lutheran Church v. County of Los Angeles</i> , 482 U.S. 304 (1987).....	29
<i>Greene v. McElroy</i> , 360 U.S. 474 (1950).....	15

<i>Heller v. Doe ex rel. Doe</i> , 509 U.S. 312 (1993).....	4
<i>Hodel v. Irving</i> , 481 U.S. 704 (1987).....	31
<i>Hund v. Cuomo</i> , 501 F. Supp. 3d 185 (W.D.N.Y. 2020)	26
<i>Hurtado v. California</i> , 110 U.S. 516 (1884).....	4, 21
<i>Indus. Union Dep't v. Am. Petrol. Inst.</i> , 448 U.S. 607 (1980).....	22
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11 (1905).....	<i>passim</i>
<i>Jew Ho v. Williamson</i> , 103 F. 10 (C.C.N.D. Cal. 1900).....	24, 25
<i>League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer</i> , 468 F. Supp. 3d 940 (W.D. Mich. 2020)	25
<i>Lucas v. S.C. Coastal Council</i> , 505 U.S. 1003 (1992).....	29
<i>MHC Fin. Ltd. P'ship v. City of San Rafael</i> , 714 F.3d 1118 (9th Cir. 2013).....	31
<i>Michigan v. EPA</i> , 576 U.S. 743 (2015).....	22

<i>Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).....</i>	<i>passim</i>
<i>Nordlinger v. Hahn, 505 U.S. 1 (1992).....</i>	4
<i>Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).....</i>	29
<i>Palazzolo v. Rhode Island, 533 U.S. 606 (2001).....</i>	30
<i>Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).....</i>	<i>passim</i>
<i>Preterm-Cleveland v. Att’y Gen. of Ohio, 456 F. Supp. 3d 917 (S.D. Ohio 2020)</i>	26
<i>Ramsek v. Beshear, 468 F. Supp. 3d 904 (E.D. Ky. 2020).....</i>	26
<i>Robinson v. Att’y Gen., 957 F.3d 1171 (11th Cir. 2020).....</i>	26
<i>Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).....</i>	<i>passim</i>
<i>S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).....</i>	11, 25, 27

<i>S. Bay United Pentecostal Church v. Newsom</i> , 141 S. Ct. 714 (2021).....	3, 11, 24, 27
<i>S. Wind Women’s Ctr. v. Stitt</i> , 455 F. Supp. 3d 1219 (W.D. Okla. 2020).....	26
<i>Tabernacle Baptist Church, Inc. v. Beshear</i> , 459 F. Supp. 3d 847 (E.D. Ky. 2020).....	26
<i>Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency</i> , 535 U.S. 302 (2002).....	30
<i>Truax v. Raich</i> , 239 U.S. 33 (1915).....	15
<i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974).....	21
<i>Wong Wai v. Williamson</i> , 103 F. 1 (C.C.N.D. Cal. 1900).....	24, 25
<i>Zinerman v. Burch</i> , 494 U.S. 113 (1990).....	4, 21

CALIFORNIA CASES

<i>Cal. Hotel & Motel Ass’n v. Indus. Welfare Comm’n</i> , 25 Cal. 3d 200 (1979)	19
<i>W. States Petrol. Ass’n v. Super. Ct. (Cal. Air Res. Bd.)</i> , 9 Cal. 4th 559 (1995).....	19

OTHER STATE CASES

<i>Gym 24/7 Fitness, L.L.C. v. Michigan</i> , No. 20-000132-MM, 2020 WL 6050543 (Mich. Ct. Cl. Sep. 24, 2020).....	25
--	----

FEDERAL STATUTES

28 U.S.C. § 1257(a).....	1
--------------------------	---

STATE STATUTES

Cal. Health & Safety Code	
§ 101040	2, 7, 17
§ 120175	2, 7, 17

RULES

Sup. Ct. R. 10(c)	13
-------------------------	----

CONSTITUTIONAL PROVISIONS

U.S. Const.	
amend. I	5, 15, 16, 27
amend. V	2, 28, 29, 30
amend. XIV	2, 9, 21

OTHER AUTHORITIES

- Office of Behavioral Safety Research,
*Update to Special Reports on Traffic
 Safety During the COVID-19 Public
 Health Emergency: Third Quarter Data*,
[https://www.nhtsa.gov/sites/
 nhtsa.dot.gov/files/documents/traffic_
 safety_during_covid19_01062021_0.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/traffic_safety_during_covid19_01062021_0.pdf)
 (Jan. 2021).....23
- Sophie Kasakove, *Los Angeles County's
 sheriff declines to enforce the mask
 mandate about to resume*, N.Y. Times,
[https://www.nytimes.com/2021/07/17/wo
 rld/los-angeles-sheriff-mask.html](https://www.nytimes.com/2021/07/17/world/los-angeles-sheriff-mask.html) (July
 17, 2021)14, 15, 16
- County of Los Angeles Dep't of Pub. Health,
 Order of the Health Officer, *Reopening
 Safer at Work and in the Community for
 Control of COVID-19, Blueprint for a
 Safer Economy–Tier 1 Surge Response*
 (Nov. 25, 2020)3, 6, 7

PETITION FOR A WRIT OF CERTIORARI

CRA respectfully submits this petition for a writ of certiorari for review of the opinion of the Court of Appeal.

OPINIONS BELOW

The December 15, 2020 order of the Los Angeles Superior Court entering the preliminary injunction is unpublished.² Appendix (“App.”) 29a. The December 18, 2020 order of the Court of Appeal staying the preliminary injunction order is unpublished. The March 1, 2021 opinion of the Court of Appeal issuing the peremptory writ directing the Los Angeles Superior Court to vacate its December 15, 2020 order is available at 61 Cal. App. 5th 478. App. 2a. The March 12, 2021 order of the Court of Appeal denying rehearing is unpublished. The June 9, 2021 order of the California Supreme Court denying CRA’s petition for review is unpublished. App. 1a.

JURISDICTION

On June 9, 2021, the California Supreme Court denied CRA’s petition for review. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

² The December 15, 2020 order is available at 2020 WL 8410014 but omits the referenced Exhibit A, the trial court’s December 8, 2020 ruling granting the application for preliminary injunction in part.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution provides, in relevant part,

No person shall be . . .
deprived of life, liberty, or
property, without due
process of law; nor shall
private property be taken
for public use, without just
compensation.

Section 1 of the Fourteenth Amendment of the United States Constitution provides, in relevant part,

No State shall . . . deprive
any person of life, liberty,
or property, without due
process of law

**CALIFORNIA AND MUNICIPAL STATUTES,
REGULATIONS, AND ORDERS**

Pursuant to this Court's Rule 14.1(f), the following state statutes and municipal orders are set out verbatim in the Appendix to this Petition:

California Health & Safety Code section 101040. App. 157a.

California Health & Safety Code section 120175. App. 158a.

County of Los Angeles Dep't of Pub. Health, Order of the Health Officer, *Reopening Safer at Work and in the Community for Control of COVID-19, Blueprint for a Safer Economy–Tier 1 Surge Response* (Nov. 25, 2020). App. 159a.

INTRODUCTION

From *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (“*Jacobson*”) through *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam) (“*Roman Catholic Diocese*”) and *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 714 (2021) (“*South Bay II*”), this Court has made clear that generally applicable rules of judicial review apply to state health agencies’ exercise of emergency powers, notwithstanding the exigencies of a pandemic. Ignoring that clear instruction, however, the Court of Appeal held that the trial court in this case overstepped its bounds by requiring the County to perform the basic task of considering the various ramifications of a countywide shutdown of all outdoor dining at restaurants before extending the shutdown any further. By interdicting that modest order, the Court of Appeal discarded the principle embodied in federal and California administrative law that agencies act arbitrarily and capriciously when they fail “to consider an important aspect of the problem” they are trying to solve. See *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”). Instead, the Court of Appeal stated that agencies need not consider any evidence whatsoever when non-fundamental rights are implicated, provided that the agency can

articulate an after-the-fact justification that would satisfy “rational basis review,” even if it is based on rational speculation.

The Court of Appeal improperly applied the rational basis review test that might apply to an equal protection challenge, and thus excused the County from complying with the mandates of the “arbitrary and capricious” test that applies to administrative actions in substantive due process challenges. In doing so, the Court of Appeal provided too much deference to the County and insulated the County’s action—which was not based on any evidence competent to employ in comparing the risks and benefits of a countywide restaurant shutdown order—from judicial review.³ This Court should grant certiorari to clarify that, even in a pandemic,

³ For equal protection purposes, a decision maker need not actually articulate at any point the purpose or rationale supporting the regulation, and may act based on “rational speculation” and without evidentiary support or empirical data. *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992). This rational speculation standard, however, is completely irrelevant to the arbitrary and capricious standard that applies in substantive due process challenges. Unlike equal protection, the core concept of substantive due process is protection against *arbitrary* government action, *Hurtado v. California*, 110 U.S. 516, 527 (1884), “regardless of the fairness of the procedures used to implement them.” *Zinerman v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). As a result, the standard that should have applied to the instant substantive due process claim is whether the County’s action was “arbitrary and capricious,” which requires agencies to “examine the relevant data and articulate a satisfactory explanation for its action.” *State Farm*, 463 U.S. at 43.

government agencies violate substantive due process rights when they act arbitrarily or capriciously in exercising their broad emergency powers.

Review is especially appropriate in this case, given that the Court of Appeal's approval of the County's shutdown order would cast significant doubt on what should be straightforward Takings Clause challenges brought by plaintiffs who were arbitrarily precluded from enjoying the use of their property as a result of sweeping government edicts. If lower courts believe that the County's shutdown order was not arbitrary or capricious, they may be more inclined to find that such regulations do not amount to a taking under this Court's test enunciated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123 (1978) ("*Penn Central*"). While the rights to pursue one's chosen employment and to enjoy private property without government interference may not be not as "fundamental" as the religious liberties enshrined in the First Amendment, they are basic rights protected by the United States Constitution, and thus this Court should grant certiorari to affirm that these rights, too, deserve protection from arbitrary and capricious government regulation.

STATEMENT OF THE CASE

A. The Ban On Outdoor Dining

On November 25, 2020, the County's public health officials issued a sweeping ban on outdoor dining throughout Los Angeles County (the "Restaurant Closure Order"), without any scientific

evidence to suggest that outdoor dining posed any particular risk of spreading COVID-19. App. 159a (County of Los Angeles Dep’t of Pub. Health, Order of the Health Officer, *Reopening Safer at Work and in the Community for Control of COVID-19, Blueprint for a Safer Economy–Tier 1 Surge Response* (Nov. 25, 2020)). Indeed, prior to the enactment of the Restaurant Closure Order, at a meeting of the Los Angeles County Board of Supervisors to discuss the proposed order, participants highlighted the lack of scientific underpinning for banning outdoor dining. County health officials admitted that they had not been tracking COVID-19 transmission at Los Angeles County restaurants and did not have State or County data to support any outdoor dining closure. Los Angeles County Health Officer Dr. Muntu Davis referred to a single study by the Centers for Disease Control and Prevention—calling it “the best information that we have” in support of the Restaurant Closure Order; but that study provided no insight into the risks specific to outdoor dining because it failed to distinguish between indoor and outdoor dining as potential vectors for COVID-19 transmission, even while all available evidence on the transmission of any airborne illness suggests that ventilation is the key factor.

B. The Trial Court Grants CRA’s Motion For Preliminary Injunction

CRA sued, alleging, *inter alia*, substantive due process violations, and moved for a preliminary injunction against the County’s evidence-free Restaurant Closure Order. The trial court granted a

preliminary injunction. App. 29a. In a circumspect, 53-page decision, the trial court found the Restaurant Closure Order arbitrary and capricious because the County, as a matter of fact, had failed to consider the costs of its policies, and the County had no information about its relative benefits. *See* App. 34a.

The trial court noted that agencies violate a litigant's due process rights with agency action that is "arbitrary, capricious, or entirely lacking in evidentiary support." *See* App. 108a (quoting *Davies v. Contractors' State License Bd.*, 79 Cal. App. 3d 940, 946 (1978)). The trial court correctly recited that its duty was to "ensure that the agency has adequately considered all relevant factors and has demonstrated a rational connection between those factors and the choice made." App. 108a (quoting *Carrancho v. Cal. Air Res. Bd.*, 111 Cal. App. 4th 1255, 1265 (2003)). In particular, the trial court evaluated the enabling statutes for the County's Restaurant Closure Order—California Health and Safety Code sections 101040(a) and 120175, App. 157a and 158a—and determined that those provisions require health officials to consider the important aspects of the problem they are trying to solve, including the likely risks or benefits of agency action because they authorize health officials to take "measures as may be necessary to prevent the spread of disease" App. 43a and 149a. In the same vein, the trial court noted that under the State of California's Blueprint for a Safer Economy, local health agencies "may continue to implement or maintain more restrictive public health measures" than those imposed by the State's Blueprint for a Safer Economy, but only "if the local

health officer determines that health conditions in that jurisdiction warrant such measures.” App. 148a. After all, without any understanding of the likely risks or benefits of a given course of action, how could a government agency make a non-arbitrary or capricious determination about what “may be necessary”?⁴

The trial court also expressly acknowledged the considerable deference owed to executive agencies pursuant to this Court’s decision in *Jacobson*, and emphasized that although “a municipality’s health officer has broad authority” to enact reasonable regulations to protect the public health and public safety, that power is not “unbridled.” App. 43a-44a. The trial court recited its “duty to evaluate an exercise of that authority to ensure actions taken have a ‘real and substantial relationship’ to public health and safety. The health officer cannot act arbitrarily or oppress. In addition, the health officer cannot engage in a ‘plain, palpable invasion of rights’ secured by the Constitution.” *Id.* (quoting and citing *Jacobson*, 197 U.S. at 31, 38).

The trial court also acknowledged and addressed the County’s argument that it was entitled to rely on “rational speculation” to support its Restaurant Closure Order, noting that the rational basis test “does not allow a party to probe the

⁴ Rather than showing that it had actually considered the probable costs or risks associated with the Restaurant Closure Order, the County argued that the trial court could not require the County to consider such costs or risks at all. App. 139a-40a.

decision-making processes of the government” only “[f]or purposes of equal protection claims,” as opposed to the substantive due process claims advanced by CRA. App. 107a. As the trial court explained, the substantive component of the Due Process Clause of the Fourteenth Amendment “bars arbitrary, wrongful, government action,” and that “[w]hile courts do not weigh evidence when applying this test, they must ensure that the agency has adequately considered all relevant factors and has demonstrated a rational connection between those factors and the choice made.” App. 108a (citing *Zinermon*, 494 U.S. at 125; *Carrancho*, 111 Cal. App. 4th at 1265).

Applying that governing law to the public health context, as informed by independent experts and the County’s own evidence, the trial court found that “public health decisions require a risk/benefit analysis of health restrictions. In making public health decisions, it is important for health officials to weigh the overall risk of the given disease to the overall benefits of the imposed public health policy.” App. 136a. The trial court then found, as a matter of *fact*, that the County had not assessed the costs or risks of its Restaurant Closure Order before issuing it, notwithstanding the County’s conclusory declarations claiming to have done so. App. 138a and 155a.

The trial court also found that the County had not relied on any quantitative data establishing the magnitude of any risk posed by outdoor dining; it found that the only evidence in the record about transmission specific to outdoor dining concluded that

the risk was insubstantial. App. 144a-45a and 155a. The trial court concluded that understanding the likely prospective benefits of a policy would be an important consideration of a non-arbitrary and capricious health policy. App. 156a.

Notwithstanding its conclusion that the Restaurant Closure Order was arbitrary and capricious, the trial court did *not* put an end to the Restaurant Closure Order; it merely held that the County could not *extend* that ban any further unless and until the County conducted a risk-benefit analysis elucidating the County's calculus. App. 156a. Nor did the trial court dictate that the County needed to perform any particular form of analysis. Instead, the trial court merely stated that the County could not extend the Restaurant Closure Order beyond a temporary three-week period.

C. The Appellate Court Issues A Writ Of Mandate

The County filed a Petition for Writ of Mandate with the Court of Appeal two days after the trial court issued the preliminary injunction. The next day, the Court of Appeal stayed the preliminary injunction and issued an order to show cause.

On March 1, 2021, the Court of Appeal issued an opinion granting the County's writ petition and vacating the trial court's preliminary injunction. App. 2a (61 Cal. App. 5th 478). The Court of Appeal upheld the County's Restaurant Closure Order on the ground that the County purportedly had a rational

basis to believe that closing outdoor dining would mitigate the spread of COVID-19. App. 3a (61 Cal. App. 5th 478, 482) (“Although the [County] had no study specifically demonstrating that outdoor restaurant dining contributes to the spread of the disease, [it] had a rational basis to believe it does.”).

In order to uphold the Restaurant Closure Order, the Court of Appeal fashioned a novel test for how agency action should be analyzed during a pandemic. The Court of Appeal held “that courts should be extremely deferential to public health authorities, particularly during a pandemic, and particularly where, as here, the public health authorities have demonstrated a rational basis for their actions.” App. 4a (61 Cal. App. 5th 478, 483). Surveying *Jacobson*, *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (“*South Bay I*”), *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020), *Roman Catholic Diocese*, and *South Bay II*, the Court of Appeal opined that agency action must pass rational basis scrutiny, and would fail if the agency action could be deemed “arbitrary, capricious, or entirely lacking in evidentiary support.” App. 17a (61 Cal. App. 5th 478, 490) (citing *Davies*, 79 Cal. App. 3d at 946).

However, the Court of Appeal did not discuss the decades of case law holding that agency action is “arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem.” *E.g.*, *State Farm*, 463 U.S. at 43. Instead, the Court of Appeal construed the rational basis test and arbitrary and capricious test as “identical.” App. 17a

(61 Cal. App. 5th 478, 490) (citing *Ursack, Inc. v. Sierra Interagency Black Bear Group*, 639 F.3d 949, 958 (9th Cir. 2011)). Essentially, the Court of Appeal ignored the trial court's careful distinction between equal protection claims, for which courts do not look into governmental decision-making, and substantive due process claims, for which courts are obligated to ensure that agency action is not arbitrary, capricious, or entirely lacking in evidentiary support.

Consistent with its view that extreme deference to health agencies is required and heedless of the case law requiring agencies to consider the important aspects of the problem being addressed through agency action, the Court of Appeal concluded that “[m]andating a nebulous risk-benefit requirement is inconsistent with the court’s appropriate role,” and that CRA had consequently “failed to satisfy [its] burden of demonstrating the Order is arbitrary, capricious, or without rational basis.” App. 23a and 25a (61 Cal. App. 5th 478, 493, 495).

D. The Court Of Appeal Denies CRA’s Petition For Rehearing

On March 11, 2021, CRA filed a Petition for Rehearing in which CRA noted that the Court of Appeal had failed to consider or discuss evidence offered by two expert witnesses (who confirmed that some assessment of likely risks or costs was necessary in public health policy contexts). The Court of Appeal denied the petition for rehearing the following day.

E. The California Supreme Court Denies CRA's Petition For Review

On April 8, 2021, CRA filed a Petition for Review with the Supreme Court of California seeking review of the Court of Appeal's March 1, 2021 opinion. On June 9, 2021, the Supreme Court of California denied the petition for review. App. 1a.

REASONS FOR GRANTING THE PETITION

A. Review Is Necessary To Settle Important Questions That Will Recur During This Pandemic And Future Public Health Crises

Review should be granted here because the Court of Appeal “has decided an important question of federal law that has not been, but should be, settled by this Court.” Sup. Ct. R. 10(c). This Court should issue a writ of certiorari and reverse the decision below to clarify that generally applicable standards of administrative law, which prohibit government action that is “arbitrary and capricious,” apply to government health agencies during a pandemic, even where a non-fundamental right is abridged. As discussed below, the Court of Appeal ignored key aspects of that inquiry to excuse public health officials and uphold the County's Restaurant Closure Order, although the trial court had ruled that the County had “entirely failed to consider an important aspect of the problem,” *see State Farm*, 463 U.S. at 43, by ignoring the economic, social, and psychological costs of its restaurant shutdown. Absent these safeguards

against arbitrary government action, the judiciary will have abdicated its duty—recognized from *Jacobson* through the present—to ensure that agency powers are not exercised “in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public.” *Jacobson*, 197 U.S. at 28; *see also Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring) (“*Jacobson* didn’t seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so.”).

This case is neither *sui generis* nor moot.⁵ Judicial review of government agencies’ edicts for arbitrary and capricious action will remain a vital and

⁵ The County may attempt to argue that this matter is moot, notwithstanding its recent warnings about the Delta variant of COVID-19 and its recent mandate that Los Angeles residents must wear masks in indoor environments, an order that its own chief law enforcement officer has said his department will not enforce, in part because it is not supported by science. *See* Sophie Kasakove, *Los Angeles County’s sheriff declines to enforce the mask mandate about to resume*, N.Y. Times, <https://www.nytimes.com/2021/07/17/world/los-angeles-sheriff-mask.html> (July 17, 2021). The Court of Appeal acknowledged that this matter is not moot, at the very least, because “conditions may change and the County may re-impose its outdoor restaurant dining ban.” App. 4a (61 Cal. App. 5th 478, 483). As a result, this matter “fits squarely within an exception to mootness” for cases where the “(1) challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” App. 11a-12a (61 Cal. App. 5th 478, 487) (quoting *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007)).

needed check on executive authorities purportedly exercising emergency powers, especially as the COVID-19 pandemic hopefully begins to fade and the necessity of extreme intervention like the Restaurant Closure Order here at issue dissipates. However, if the Court of Appeal's decision is left to stand unchecked, health officials around the country might conclude that they have free rein to order any regulation they desire, heedless of cost or consequence, so long as they steer clear of the First Amendment or other clearly defined "fundamental rights."⁶

⁶ It can be argued (as Mark's Engine Company No. 28 did below) that fundamental rights are in fact implicated here with respect to the right to pursue a chosen profession and the right to assemble. See Opp'n to Pet. for Writ of Mandate, Prohibition or Other Appropriate Relief and Request for Stay at 14-18, *County of Los Angeles, Dep't of Pub. Health v. Super. Ct. (California Restaurant Ass'n, Inc.)* (Cal. Ct. App. 2021) (No. B309416) (filed by Mark's Engine Co. No. 28); *Greene v. McElroy*, 360 U.S. 474, 492 (1950); *Truax v. Raich*, 239 U.S. 33, 41 (1915). But, even setting aside the complicated analysis of where the line of fundamental rights begins and ends, the Court of Appeal's holding contradicts the precedent it claims to follow, including *Jacobson*, which expressly instructs courts to invalidate government regulation "purporting to have been enacted to protect the public health" but which "has no real or substantial relation to [that] object." *Jacobson*, 197 U.S. at 31. The trial court followed that precedent and concluded that the ban was arbitrary and had no real relation to the public health, without any indication that outdoor dining actually posed any risk of substantial transmission or consideration of whether the benefits outweighed the risks. App. 142-145a and 154a-156a. The County has now done this again with respect to its renewed mask order (for vaccinated individuals). Sophie Kasakove, *Los Angeles County's sheriff declines to enforce the mask mandate*

Because this Court has only revisited *Jacobson* in the context of fundamental rights cases—specifically, those involving First Amendment challenges—an absence of authority from this Court in non-fundamental rights cases has caused lower courts to provide extreme and unjustifiable deference to executive agencies. These courts have concluded that, where “non-fundamental” rights are implicated, government regulation of individuals’ liberty cannot be curtailed in the face of a pandemic, no matter how slapdash or ill-considered the government action.⁷

That conclusion is not an exaggeration. The logic of the Court of Appeal’s decision holds that if there is *any* articulable reason to believe that some disease transmission is possible in a given context, a public health agency may regulate that conduct out of existence in the name of public health.⁸ The Court of

about to resume, N.Y. Times, <https://www.nytimes.com/2021/07/17/world/los-angeles-sheriff-mask.html> (July 17, 2021).

⁷ Although CRA tends to agree with Mark’s Engine Company No. 28 that fundamental rights are implicated here, no discussion of that point is necessary because the trial court found that the County’s order was arbitrary, capricious, and entirely lacking in evidentiary support irrespective of whether or not fundamental rights were implicated for equal protection purposes. App. 154a-55a. Therefore, in this Petition, CRA advances the trial court’s conclusion that the Restaurant Closure Order is improper regardless of whether fundamental rights are involved. The undisputed fact is that the County did not consider the devastating consequences of its decision to close essentially an entire industry.

⁸ Recently, the United States Court of Appeals for the Ninth Circuit determined that because citizens have no

Appeal specifically *rejected* the notion that a government health agency might need to consider whether the likely benefits of a given policy outweigh its costs, or even to appreciate what costs or risks are implicated, even though the relevant enabling statutes required health officials to only promulgate “measures as may be necessary” to combat the spread of disease. App. 157a-58a (Cal. Health & Safety Code §§ 101040, 120175); App. 17a-18a n.5 (61 Cal. App. 5th 478, 483 n.5).

Illustrating the lack of any limiting principle to the Court of Appeal’s decision, the County’s only basis for prohibiting *outdoor* dining was the premise that prolonged *in-person* interaction increased the possibility of transmitting COVID-19. The County had no evidence quantifying the magnitude of that

fundamental right to any particular form of public education, the State of California could permissibly prohibit all in-person public education under rational basis review. *Brach v. Newsom*, No. 20-56291, 2021 WL 3124310, at *12 (9th Cir. July 23, 2021). However, the Ninth Circuit determined that the State could not prohibit in-person *private* education on the basis of the State’s thin evidence that “[i]t is possible that in the school setting, as in other settings, asymptomatic transmission may occur,” because the State “did not identify any evidence indicating that children in a school setting would present greater risks of transmission than some of the other activities that the State had authorized, such as operating grocery stores, factories, daycare centers, and shopping malls.” *Id.* at *18. In other words, the Ninth Circuit recognized that government actors have some obligation to consider the relative costs and benefits in promulgating emergency policies, but has refused to police that requirement outside the fundamental rights context. A decision from this Court is needed to provide guidance when the regulatory line is crossed in the non-fundamental rights context.

“risk,” nor did it consider any evidence about the costs that would be imposed on hundreds of thousands of Los Angeles residents who were put out of a job while the County completely shut down restaurants, and on restaurant workers who depended on in-person dining to make a living.

Thus, due to the absence of guidance from this Court in the context of actions impacting non-fundamental rights—and more specifically, where unelected officials promulgate sweeping policies without considering any evidence that would lead them to act *non*-arbitrarily—the Court of Appeal erred in failing to properly apply *Jacobson* to this case. This Court should grant review in order to provide this much-needed guidance, lest government agency officials interpret the Court of Appeal’s decision as a blank check for unlimited authority in a pandemic so long as those officials manufacture a remotely plausible public safety justification after the fact.

B. This Court Should Affirm That Traditional Rules For Reviewing Agency Action Are Not Dispensed With In A Pandemic

Both the Court of Appeal and the trial court agreed that *Jacobson* and more recent decisions by this Court require that a reviewing court evaluating substantive due process claims must review the challenged agency action under a standard of review akin to what is applicable to “arbitrary and capricious” action. App. 14a-17a (61 Cal. App. 5th

478, 488-490); App. 43a-44a; App. 105a-106a. The agreement of these Courts ends there. The Court of Appeal concluded that rational basis review in a pandemic *cannot* impose any requirement that a government agency consider the important aspects of the problem it is trying to solve. Nor, concluded the Court, does that standard of review require an agency to consider *any* evidence that might inform on the magnitude of the likely costs or benefits of the policies it promulgates. That modified test absolves government agencies from having to “examine the relevant data and articulate a satisfactory explanation for its action[,] including a ‘rational connection between the facts found and the choice made.’” *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).⁹ Moreover, the Court of Appeal’s test completely discards the rule that an agency fails to meet the arbitrary and capricious standard if it has “failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a

⁹ California law is coterminous with federal law in requiring that courts reviewing agency action “ensure that an agency has adequately *considered all relevant factors*, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.” *Cal. Hotel & Motel Ass’n v. Indus. Welfare Comm’n*, 25 Cal. 3d 200, 212 (1979) (emphasis added); *see also W. States Petrol. Ass’n v. Super. Ct. (Cal. Air Res. Bd.)*, 9 Cal. 4th 559, 577-78 (1995) (reversing Court of Appeal’s grant of a petition for writ of mandate where the agency had failed to show its consideration of factors relevant to its regulation).

difference in view or the product of agency expertise.”
Id.

The Court of Appeal’s approach engages in a misunderstanding of this Court’s opinion in *Jacobson* and its more recent decisions clarifying that *Jacobson* did not modify generally applicable standards for judicial review of administrative actions. Mistakenly believing that this Court held that *Jacobson* required *only* rational basis review in any context where non-fundamental rights were implicated, regardless of the governmental actor,¹⁰ the Court of Appeal set aside decades of administrative law requiring agencies to consider at least some evidence or at least the important aspects of the problems they are trying to solve in order to avoid acting arbitrarily and capriciously and infringing upon substantive due process rights.

Had the Court of Appeal applied the generally applicable administrative law analysis, as the trial court did, it would have concluded that the County did not consider important aspects of the public health

¹⁰ This Court has held that the standard in reviewing whether action is arbitrary and capricious—applicable to review of agencies’ quasi-legislative action—is not the same as rational basis review. See *State Farm*, 463 U.S. at 44 n.9 (rejecting the argument that “the arbitrary and capricious standard requires no more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause,” because “[w]e do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.”).

problem it was trying to solve—namely, the economic, psychological, and social costs of completely shutting down the livelihoods of hundreds of thousands of Los Angeles residents—and that the County therefore acted arbitrarily and capriciously, in violation of those residents’ substantive due process rights under the Due Process Clause of the Fourteenth Amendment. *See Zinermon*, 494 U.S. at 125 (“[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them.’” (quoting *Daniels*, 474 U.S. at 331)). The “core of the concept” of substantive due process is the protection against arbitrary government action. *Hurtado*, 110 U.S. at 527; *see also Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (“The touchstone of due process is protection of the individual against arbitrary action of government.” (citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889))).

Here, the trial court correctly observed that litigants may not probe government decision-making *only* in the context of equal protection; conversely, in this substantive due process challenge, government actors are not allowed to “rationally speculate,” and instead must demonstrate that they have considered all relevant factors and demonstrate a rational connection between those factors and the choice made. *See App. 139a-42a.*

Because the relevant enabling statutes vest discretion in the public health officer to determine what measures “may be necessary” to combat the spread of disease, the trial court concluded that the

County must at least consider the relative magnitude of risks or costs on the one hand and the magnitude of prospective benefits that would be gained from the outdoor dining ban on the other hand. App. 155a-56a. The trial court found, as a matter of fact, that the County had failed to consider those factors prior to issuing the outdoor dining ban. In other words, the County had “failed to consider . . . important aspect[s] of the problem” before implementing the outdoor dining ban. *See Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910, 1913 (2020) (omission and alteration in original) (quoting *State Farm*, 463 U.S. at 43); *see also Michigan v. EPA*, 576 U.S. 743, 752 (2015) (enabling statute authorizing agencies to take actions that are “appropriate and necessary” “requires at least some attention to cost”); *Indus. Union Dep’t v. Am. Petrol. Inst.*, 448 U.S. 607, 642-44 (1980) (authorizing statute’s use of “reasonably necessary or appropriate” qualifier required “some cost-benefit analysis before [the Occupational Safety and Health Administration] promulgates any standard”). However, by repudiating any consideration of relative cost and benefit, the Court of Appeal abdicated its responsibility to conduct even rational basis review, much less arbitrary and capricious review. *Michigan*, 576 U.S. at 752 (“One would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”).

Reversing the trial court, the Court of Appeal held that “[m]andating a nebulous risk-benefit requirement is inconsistent with the court’s

appropriate role.” App. 23a (61 Cal. App. 5th 478, 493). All that is required, opined the Court of Appeal, is that the County has “rationally speculated” that its regulation would have some impact—without any consideration of its size or cost—on public health. *See* App. 22a-25a (61 Cal. App. 5th 478, 493-95) (relying on claims that outdoor dining presents a “higher” risk of transmission as justifying the County’s determination that the Restaurant Closure Order was “necessary”). This logic knows no bounds.

Under the Court of Appeal’s standard of review, a government health agency could prohibit all in-person interaction whatsoever without even considering the costs because any in-person interaction creates a “higher” risk of transmission. *See* App. 24a-25a (61 Cal. App. 5th 478, 493-95). Health officials could order all citizens to not sleep in the same bed as a spouse or loved one who has recently left their residence using the same rationale. Health officials could claim authorization to ban all car travel on the grounds that such travel poses an unmitigatable risk of fatal accidents that would contribute to overwhelming the hospital system.¹¹ A government agency could prohibit igniting flames in

¹¹ Lest the Court view this suggestion as inapposite to the exigencies imposed by a pandemic, the National Highway Traffic Safety Administration has also concluded that highway fatalities have increased as a result of the COVID-19 pandemic. *See* Office of Behavioral Safety Research, *Update to Special Reports on Traffic Safety During the COVID-19 Public Health Emergency: Third Quarter Data*, https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/traffic_safety_during_covid19_01062021_0.pdf (Jan. 2021).

private residences when wildfires rage in California because of the risk that a domestic kitchen fire could tap scarce firefighting resources. Or, perhaps more relevant here, the Court of Appeal is holding that California public health agencies could issue an order to force COVID-19 vaccinations on *all citizens* without even considering the potential risks such a decision might pose for sensitive populations. *Cf. Jacobson*, 197 U.S. at 29-30. Is this Court ready to countenance such an order? Per the Court of Appeal, public health agencies need not even consider the disproportionate cost-benefit relationship of any of these measures, as long as fundamental constitutional rights are not implicated. App. 14a-15a (61 Cal. App. 5th 478, 488-489).

Cases invalidating health agency action during a pandemic demonstrate that the specific nature of the right at issue is not, in and of itself, dispositive. As Justice Gorsuch explained in both *Roman Catholic Diocese* and *South Bay II*, “*Jacobson* didn’t seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so.” *Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring); *see also South Bay II*, 141 S. Ct. at 718 (Gorsuch, J., concurring) (“It has never been enough for the State to insist on deference or demand that individual rights give way to collective interests.”). Even in cases like *Jew Ho v. Williamson*, 103 F. 10, 24 (C.C.N.D. Cal. 1900) and *Wong Wai v. Williamson*, 103 F. 1, 9 (C.C.N.D. Cal. 1900), where the courts invalidated Chinatown quarantines targeting Asian Americans, the courts took pains to observe that the government “may not, under the guise of protecting

the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.” *Jew Ho*, 103 F. at 20 (quoting *Lawton v. Steele*, 152 U.S. 133, 137 (1894)); *see also Wong Wai*, 103 F. at 7. Put simply, each of these cases affirmed that generally applicable administrative rules requiring government agencies to not act arbitrarily, capriciously, or entirely without evidentiary support apply, even in a pandemic.

In stark contrast to the Court of Appeal’s failure to restrain enforcement of the County’s Restaurant Closure Order, the court in *County of Butler v. Wolf* performed the necessary review of an overbroad and unjustified health regulation. *See County of Butler v. Wolf*, 486 F. Supp. 3d 883, 922 (W.D. Pa. 2020) (“*Wolf*”) (“Rational basis review is a forgiving standard for government acts, but it ‘is not a toothless one’” (omission in original) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)), *stay granted*, No. 20-2936, 2020 WL 5868393 (3rd Cir. Oct. 1, 2020).¹² In *Wolf*, the federal district court held that

¹² Recognizing that even emergency powers have limits, courts across the country have invalidated overbroad, overreaching or arbitrary directives purportedly justified as “necessary” to combat COVID-19. *See, e.g., League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 468 F. Supp. 3d 940, 948-99 (W.D. Mich. 2020), *appeal dismissed as moot*, 843 F. App’x 707 (6th Cir. 2021) (even under the highly deferential *Jacobson* and *South Bay I* standard, the state failed to introduce evidence that demonstrated a rational relationship between closing indoor gyms and public health when other similar activities were permitted); *Gym 24/7 Fitness, L.L.C. v. Michigan*, No. 20-000132-MM, 2020 WL 6050543, at *3 (Mich. Ct. Cl. Sep. 24, 2020) (state was not entitled to summary

an order closing all “non-life-sustaining” businesses with no end date was arbitrary and capricious precisely because the government offered no objective criteria for determining whether a business was “life-sustaining” or not, and thereby added “a government-induced cloud of uncertainty to the usual unpredictability of nature and life,” running afoul of the constitutional “protection against arbitrary government action.” *Wolf*, 486 F. Supp. 3d at 921-22 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). There, the court performed its role: it checked arbitrary government action to protect its constituents from the uncontested negative consequences that flowed from that arbitrariness.

Requiring government agencies to consider the costs of their policies and avoiding arbitrary government action is all the more necessary now and

disposition on allegedly arbitrary regulations in the absence of “documentary evidence suggesting whether the state relied on these materials, or any other evidence, in its decision-making”); *Hund v. Cuomo*, 501 F. Supp. 3d 185, 200-201 (W.D.N.Y. 2020) (substantive due process challenge survived motion to dismiss where regulation impeded pursuit of common professions); see also *Robinson v. Att’y Gen.*, 957 F.3d 1171, 1182 (11th Cir. 2020) (state failed to justify limitations on abortions as necessary to combat COVID-19); *Preterm-Cleveland v. Att’y Gen. of Ohio*, 456 F. Supp. 3d 917, 939 (S.D. Ohio 2020) (same); *S. Wind Women’s Ctr. v. Stitt*, 455 F. Supp. 3d 1219, 1222 (W.D. Okla.), *appeal dismissed as moot*, 823 F. App’x 677 (10th Cir. 2020) (same); *Ramsek v. Beshear*, 468 F. Supp. 3d 904, 921 (E.D. Ky. 2020) (blanket prohibition on gathering in large groups was unconstitutionally overbroad), *appeal dismissed as moot*, 989 F.3d 494, 501 (6th Cir. 2021); *Tabernacle Baptist Church, Inc. v. Beshear*, 459 F. Supp. 3d 847, 854-55 (E.D. Ky. 2020) (same).

going forward, in the remaining days of a dynamic pandemic, when emergency health policies will have questionable utility relative to the costs such policies impose. As this Court's decisions over the course of the past year show, we are too far along in the pandemic and our understanding of how COVID-19 is transmitted to rely on pure exigency and speculation, rational as it may be, as a reason to defer to public health officials. In *South Bay I* (decided on May 29, 2020), a plurality of this Court held that the exigencies of the then-new pandemic required extreme deference to public health officials, even in the face of a challenge to California's public health restrictions on First Amendment grounds. *See South Bay I*, 140 S. Ct. at 1613. But in *Roman Catholic Diocese* (November 25, 2020) and *South Bay II* (February 5, 2021), months later in the course of the pandemic, this Court held that such extreme deference was no longer required, especially where the litigants in those cases had established that the government contravened constitutional rights by favoring certain potentially COVID-19 spreading activities over others. *Roman Catholic Diocese*, 141 S. Ct. at 66; *South Bay II*, 141 S. Ct. at 718.

Consistent with that authority, the trial court correctly held that the County's complete lack of evidence quantifying the risk associated with outdoor dining—and its failure to consider the mounting evidence of the opposite, as reflected in CRA's submission and the record below—could not be excused nine months into the pandemic. App. 142a-45a. Established rules governing administrative action, including those requiring basic considerations

of cost and benefit, must apply at some point. CRA is not challenging a broad-based shutdown order designed to handle an unstudied exigency, but rather a narrowly tailored order that, nine months into the pandemic, banned only outdoor dining while contemporaneously permitting other businesses, such as indoor/outdoor dining in the entertainment industry, public parks with eating areas, and even indoor hair and nail salons, to continue to operate, even though the only scientific evidence available (and certainly the only evidence in the record specific to outdoor dining) showed that such measures were unlikely to have any serious impact in curbing COVID-19 transmission.

C. **Absent Review, Government Actors Will Resist Takings Clause Claims By Claiming That Shutdown Orders Were Justifiable Regulations**

This Court should also grant certiorari because the decision of the California Supreme Court leaving intact the flawed opinion of the Court of Appeal has implications across other areas of constitutional law. In particular, the Court of Appeal's decision has important ramifications for Takings Clause jurisprudence. If the Court of Appeal's order stands, affirming that the County was justified in completely shutting down outdoor dining in the name of public health, governmental defendants may rely on that decision to avoid paying just compensation for their various takings under the Fifth Amendment. This Court should grant certiorari to prevent these governmental defendants from avoiding the Fifth Amendment.

The United States Constitution states that “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V. The Fifth Amendment “is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation.” *First Eng. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (citation and internal quotation marks omitted). This Court has long recognized that the constitutional prohibition on takings without compensation extends past physical intrusions. “[I]f regulation goes too far it will be recognized as a taking.” *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

A property owner can show that a government action is a taking, without physical intrusion, in two circumstances: “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good,” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992), and when there is a regulatory taking under the rule established in *Penn Central*, 438 U.S. at 123.

Here, the County’s order shutting down all in-person dining in Los Angeles County gives rise to takings claims. *First*, plaintiffs will be able to easily establish clear diminution in value. In the trial court,

CRA introduced dozens of declarations highlighting the ruinous economic impact of the Restaurant Closure Order on restaurants within Los Angeles County. App. 53a. As here, when a regulation imposes a “considerable financial burden” on a party, it supports a finding that there has been a taking. *E. Enters. v. Apfel*, 524 U.S. 498, 529 (1998). These are the sorts of burdens that fall squarely within Fifth Amendment protection. *See Penn Central*, 438 U.S. at 123-24 (“[T]he ‘Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” (omission and second alteration in original) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))).

Next, there has been an obvious interference with reasonable investment-backed expectations. *See generally Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001). Restaurant owners have designed their businesses to *serve* food. Suddenly, and with no meaningful warning, they were prohibited from doing so. Those same restaurants had, in many cases, invested significant money and time into implementing outdoor dining options. App. 53a. The Restaurant Closure Order did not just interfere with those expectations, it made them entirely valueless; nor is the County’s order protected from being classified as a taking just because it was temporary. *See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 335-36 (2002) (temporary takings are still analyzed within the *Penn Central* framework).

However, lower courts analyzing the final factor, the “character of the government action,” may be inclined to conclude that only a total ban on dining activity, instead of all on-premises dining, has the character to constitute a taking, although the latter undisputedly imposes a devastating financial condition on restaurant owners, should this Court allow the Court of Appeal’s decision to stand. *Compare, e.g., MHC Fin. Ltd. P’ship v. City of San Rafael*, 714 F.3d 1118, 1128 (9th Cir. 2013) (a rent control ordinance was not a taking where “the Ordinance is much more an ‘adjust[ment of] the benefits and burdens of economic life to promote the common good’ than it is a physical invasion of property”) (quoting *Penn Central*, 438 U.S. at 124) *with Hodel v. Irving*, 481 U.S. 704, 716 (1987) (a taking exists when “the character of the Government regulation here [was] extraordinary” because “the regulation destroyed one of the most essential sticks in the bundle of rights that are commonly characterized as property”) (citations and internal quotation marks omitted). *See also Cienega Gardens v. United States*, 331 F.3d 1319, 1338 (Fed. Cir. 2003) (“The character of the government’s action is that of a taking of a property interest, albeit temporarily, and not an example of government regulation under common law nuisance or other similar doctrines, which we would treat differently.”); *Am. Pelagic Fishing Co. v. United States*, 49 Fed. Cl. 36, 47 (2001), *rev’d and remanded on other grounds*, 379 F.3d 1363 (Fed. Cir. 2004) (“The relevant stick in the bundle in this context is the right to use the *Atlantic Star* to fish, subject to regulation.”).

Thus, absent guidance ensuring that arbitrary exercises of government authority in the name of public health are not “adjusting the benefits and burdens of economic life to promote the common good,” *Penn Central*, 438 U.S. at 124, lower courts may ultimately hold that arbitrary and overreaching government regulations do not amount to a taking. That risk is heightened in the COVID-19 context because these regulations will be easily “justified” under *Jacobson* as interpreted by the Court of Appeal, because any restriction on an economic use of private property (at least, any use involving people interacting in-person) could be justified as a non-arbitrary exercise of public health authorities’ powers to prevent the spread of COVID-19, no matter how significant an infringement on property rights.

As a result, allowing the County’s Restaurant Closure Order to stand undisturbed would cast significant doubt on what should be straightforward Takings Clause claims, and raises important questions of federal law that have not been, but should be, settled by this Court.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the decision of the California Court of Appeal and, ultimately, to reverse that decision and render a decision in favor of CRA.

Dated: July 30, 2021

	Respectfully submitted,
BROWNE GEORGE ROSS	BROWNE GEORGE ROSS
O'BRIEN ANNAGUEY &	O'BRIEN ANNAGUEY & ELLIS
ELLIS LLP	LLP
Dennis S. Ellis	Carl Alan Roth
<i>Counsel of Record</i>	Noah S. Helpern
Eric M. George	Richard A. Schwartz
Katherine F. Murray	801 S. Figueroa Street
Ryan Q. Keech	Suite 2000
Lori Sambol Brody	Los Angeles, CA 90017
2121 Avenue of the	T: (213) 725-9800
Stars, Suite 2800	
Los Angeles, CA 90067	
T: (310) 274-7100	
dellis@bgrfirm.com	

*Attorneys for Petitioner, California Restaurant
Association, Inc.*

APPENDIX

1a

**APPENDIX A — ORDER OF THE SUPREME
COURT OF THE STATE OF CALIFORNIA,
FILED JUNE 9, 2021**

COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION FOUR
No. B309416

S268101

IN THE SUPREME COURT OF CALIFORNIA

En Banc

COUNTY OF LOS ANGELES, DEPARTMENT
OF PUBLIC HEALTH, *et al.*,

Petitioners,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

CALIFORNIA RESTAURANT ASSOCIATION, INC.,
et al.,

Real Parties in Interest.

The petitions for review are denied.

CANTIL-SAKAUYE
Chief Justice

Filed: June 9, 2021

**APPENDIX B — OPINION OF THE COURT OF
APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION
FOUR, FILED MARCH 1, 2021**

COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

B309416

COUNTY OF LOS ANGELES DEPARTMENT
OF PUBLIC HEALTH, *et al.*,

Petitioners,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent,

CALIFORNIA RESTAURANT
ASSOCIATION, INC., *et al.*,

Real Parties in Interest.

March 1, 2021, Opinion Filed

Opinion by Currey, J., with Manella, P. J., and Willhite,
J., concurring.

*Appendix B***INTRODUCTION**

At a time when infection rates were surging, and Southern California’s intensive care units were about to be overwhelmed by COVID-19 patients, Los Angeles County’s Department of Public Health issued an emergency order temporarily prohibiting outdoor restaurant dining. Indoor restaurant dining had already been banned. Although the Department and its leadership (collectively, the County) had no study specifically demonstrating that outdoor restaurant dining contributes to the spread of the disease, they had a rational basis to believe it does.

For example, it is undisputed that the disease spreads through airborne transmission from an infected person (who may be asymptomatic) to an uninfected member of the community, if the latter receives a sufficient dose to overcome his or her defenses. The risk of transmission thus increases when people from different households gather in close proximity for extended periods without masks or other face coverings. The risk also increases with unmasked talking and laughter. These conditions are often all present when people dine together in restaurants, whether indoors or out.

According to the County’s Chief Medical Officer and Director of Disease Control, the wide consensus in the public health field is that pandemic risk reduction does not require definitive proof that a particular activity or economic sector is “the” cause of an increase in cases. Rather, best practices dictate that public health departments take steps to mitigate identified risks, particularly as infection rates and hospitalizations surge.

Appendix B

In these consolidated cases, the trial court enjoined the County's order temporarily banning outdoor restaurant dining until the County performed a risk-benefit analysis acceptable to the court. We issued a stay and an order to show cause why the lower court's order should not be set aside. We now hold that courts should be extremely deferential to public health authorities, particularly during a pandemic, and particularly where, as here, the public health authorities have demonstrated a rational basis for their actions. Wisdom and precedent dictate that elected officials and their expert public health officers, rather than the judiciary, generally should decide how best to respond to health emergencies in cases not involving core constitutional freedoms. Courts should intervene only when the health officials' actions are arbitrary, capricious, or otherwise lack a rational basis, or violate core constitutional rights, which demonstrably is not the case here.

Thankfully, during the pendency of this petition, infection rates declined and ICU availability increased, causing the Governor to rescind a similar prohibition on outdoor dining at restaurants, and the County to lift its prohibition as well. While we hope we do not see another surge, we recognize that conditions may change and the County may re-impose its outdoor restaurant dining ban. Thus, the cases are not moot. Accordingly, we issue a peremptory writ of mandate directing the trial court to set aside its order granting a preliminary injunction, and to instead deny the motions seeking that relief.

This does not mean we are unsympathetic to the plight of restaurant owners and their employees, or to those in so

Appendix B

many other sectors who have had their livelihoods taken away and personal finances decimated by the pandemic. Far from it. Both the disease itself and its economic consequences have harmed people and communities unequally, sometimes devastatingly so. But whether, when, and how a risk-benefit calculus should be performed, and whether existing orders should be altered to mitigate their costs, is a matter for state and local officials to decide. The Los Angeles County Board of Supervisors considered the restaurant industry's objections to the order prohibiting outdoor dining at restaurants, but declined (by a majority vote) to rescind the order. On these facts, we will not disturb that decision.

FACTUAL AND PROCEDURAL BACKGROUND

On March 4, 2020, Governor Newsom declared a “State of Emergency,”¹ in response to the global outbreak of COVID-19, “a new disease, caused by a novel (or new) coronavirus that has not previously been seen in humans.” (Centers for Disease Control and Prevention, Coronavirus Disease, COVID-19, Frequently Asked Questions, What is COVID-19? (Feb. 2, 2021) <<https://>

1. The California Emergency Services Act empowers state and local governments to declare emergencies and coordinate efforts to provide services. (Gov. Code, §§ 8550–8669.7.) A “state of emergency” means “the existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by conditions” including an “epidemic” and “which, by reason of their magnitude, are or are likely to be beyond the control of” any single county or city and “require the combined forces of a mutual aid region or regions.” (Gov. Code, § 8558.)

Appendix B

www.cdc.gov/coronavirus/2019-ncov/faq.html> [as of Mar. 1, 2021].) To limit the spread of COVID-19, on March 19, 2020, Governor Newsom issued a Stay-at-Home Order, requiring California residents to remain in their homes except when engaging in essential activities.

Since March 2020, the County has also issued a series of health orders to combat the spread of COVID-19. These orders have been modified in response to hospitalization and death rates, and scientists' evolved understanding of how the virus is transmitted. The County's June 1, 2020 order prohibited restaurants from providing indoor dining, but permitted them to offer outdoor dining if they followed safety protocols set forth in the order. On November 19, 2020, the County imposed further restrictions on outdoor dining, including that dining must be reduced by 50 percent or tables must be repositioned so that they are at least eight feet apart.

On November 22, 2020, the County announced that, effective November 25, 2020, it would temporarily prohibit both indoor and outdoor dining at restaurants, breweries, wineries, and bars to combat the alarming surge in COVID-19 hospitalizations and deaths ("Order"). Under the Order, restaurants were permitted to continue take-out, delivery, and drive-through services.

In response to the Order, the California Restaurant Association, Inc. (CRA) and Mark's Engine Company No. 28 Restaurant LLC (Mark's) (collectively, the "Restaurateurs"), filed separate suits against the County in respondent Los Angeles County Superior Court.

Appendix B

CRA alleged the County “shut down outdoor dining without relying on or making available to the public any competent scientific, medical, or public health evidence stating that outdoor dining poses a substantial risk of unacceptably increasing the transmission of COVID-19.” It brought claims for (1) writ of traditional mandate; (2) writ of administrative mandate; (3) declaratory and injunctive relief; and (4) violation of due process and equal protection. Similarly, Mark’s alleged the Order “is an abuse of Defendants’ purported ‘emergency powers’ and is neither grounded in science, evidence nor logic, and thus should be deemed and adjudicated ... to be unenforceable as a matter of law.” It brought claims for (1) declaratory judgment; and (2) infringement of its right to liberty (Cal. Const., art. I, § 1).²

On November 24, 2020, the trial court denied CRA’s ex parte application to stay the Order for failure to present sufficient evidence to make a prima facie case. It permitted CRA to renew its application, however, as one for a temporary restraining order (TRO) and an order to show cause re: preliminary injunction (OSC) if it “presented evidence that the restrictions are unsupported

2. Neither CRA nor Mark’s, however, argues in this writ proceeding that the Order violates its right to liberty under the California Constitution or the equal protection clause of the Fourteenth Amendment, except for Mark’s cursory statement that the Order “had a disparate impact on [Mark’s] and has unfairly targeted the restaurant industry, despite the total lack of scientific evidence” We therefore deem these arguments abandoned. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1171, fn. 12 [201 Cal. Rptr. 3d 390].)

Appendix B

and of irreparable harm.” On December 1, 2020, the court also denied Mark’s separate ex parte application, but permitted it to file a new ex parte application for a TRO and OSC. The trial court later denied CRA’s and Mark’s ex parte applications for a TRO, but issued an OSC and set the consolidated actions for hearing.

While this action was pending in the trial court, Governor Newsom issued a “Regional Order,” which took effect on December 5, 2020. The Regional Order, among other things, prohibited indoor and outdoor dining at restaurants in the Southern California region in the event available ICU beds in the region fell below 15 percent of capacity. The Regional Order was to remain in effect for at least three weeks and, after that period, would be lifted if the region’s ICU availability projection for four weeks equaled or exceeded 15 percent of capacity.

On December 8, 2020, the trial court held a hearing on the OSC. On December 15, 2020, the trial court entered an order enjoining the County from enforcing or enacting any County ban on outdoor dining after December 16, 2020, unless and until its public health officers “conduct[] an appropriate risk-benefit analysis and articulate it for the public to see.”

The County petitioned this court for a writ of mandate directing respondent court to immediately stay the preliminary injunction, and issue a peremptory writ commanding respondent court to set aside the injunction. We stayed the preliminary injunction order and issued an order to show cause on December 18, 2020.

Appendix B

The Restaurateurs filed a return, and the County filed a reply.³ We also granted the applications of the City of Santa Clarita, Golden Gate Restaurant Association, Bicycle Casino, LP, et al., and Restaurant Law Center to file amicus briefs in support of the Restaurateurs.

While this writ petition was pending, on January 25, 2021, the Governor lifted the Regional Order based on the latest projections of improved regional ICU availability. The County also announced on January 25, 2021 that it

3. CRA requests we take judicial notice of nine documents. Exhibits 1 through 5 are printouts from the Centers for Disease Control and Prevention and the County of Los Angeles Public Health websites purporting to demonstrate that federal and Los Angeles County health authorities conduct risk-benefit analyses in connection with determinations about public health policy. These documents were not presented to the trial court, and we decline to judicially notice them. (See *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325–326 [48 Cal. Rptr. 2d 87, 906 P.2d 1242] [“An appellate court may properly decline to take judicial notice under Evidence Code sections 452 and 459 of a matter which should have been presented to the trial court for its consideration in the first instance. [Citations.]”].) We also deny CRA’s request to judicially notice exhibits 8 and 9, minute orders dated December 16, 2020, and December 17, 2020, in *Midway Ventures, LLC v. County of San Diego*, case No. 37-2020-00038194-CU-CR-CTL. We do not consider unpublished trial court orders in other cases as authority and, in any event, the Court of Appeal reversed the trial court on the ground it “erred by entering an overbroad injunction that was unsupported by the law.” (*Midway Venture LLC v. County of San Diego* (2021) 60 Cal.App.5th 58 [___ Cal. Rptr. 3d ___]). We grant CRA’s request to judicially notice exhibits 6 and 7, County orders dated December 11, 2020, and December 27, 2020. (Evid. Code, § 452, subd. (h).)

Appendix B

would permit outdoor dining at restaurants beginning January 29, 2021, but with significant restrictions (including minimum specified distances between tables, requiring servers to wear face coverings at all times and patrons to do so unless eating or drinking, and a new requirement that diners may only be seated at a table with members of their own household).

DISCUSSION**A. Standard of Review**

We generally review the grant of a preliminary injunction for abuse of discretion. (*Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1145 [5 Cal. Rptr. 3d 598].) In exercising its discretion, the court must consider “two interrelated factors: the likelihood the moving party ultimately will prevail on the merits, and the relative interim harm to the parties from the issuance or nonissuance of the injunction. [Citation.]” (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999 [90 Cal. Rptr. 2d 236, 987 P.2d 705].) “A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff will ultimately prevail on the merits of the claim. [Citation.] ‘Where there is ... no likelihood that the plaintiff will prevail, an injunction favoring the plaintiff serves no valid purpose and can only *cause* needless harm.’ [Citation.]” (*Aiuto v. City & County of San Francisco* (2011) 201 Cal.App.4th 1347, 1361 [135 Cal. Rptr. 3d 617].) Where “the determination on the likelihood of a party’s success rests on an issue of pure

Appendix B

law not presenting factual issues to be resolved at trial, we review the determination de novo. [Citation.]” (14859 *Moorpark Homeowner’s Assn. v. VRT Corp.* (1998) 63 Cal. App.4th 1396, 1403 [74 Cal. Rptr. 2d 712].) For the reasons discussed below, we conclude the trial court failed to apply the proper deferential standard for evaluating state and local agencies’ responses to public health emergencies. Under the correct standard, there is no likelihood the Restaurateurs will prevail on the merits of their claims. The trial court therefore abused its discretion by issuing a preliminary injunction.

B. This Action Is Not Moot

As stated above, while this writ was pending, the County lifted its prohibition on outdoor dining based on the latest data demonstrating a decline in daily case and hospitalization rates. This matter is not moot, however. (See *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) 592 U.S. ___ [208 L.Ed.2d 206, 210, 141 S.Ct. 63, 68] (*per curiam*) (*Roman Catholic Diocese*) [holding the applications to enjoin an order restricting attendance at religious services were not moot despite those restrictions being lifted during the pendency of the action because “the applicants remain under a constant threat” that those restrictions may be reinstated as the COVID-19 pandemic evolves].) The County has made it clear that it may reimpose its prohibition on outdoor dining if the region faces another surge. This matter therefore fits squarely within an exception to mootness: “(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation

Appendix B

that the same complaining party will be subject to the same action again.’ [Citation.]” (*Federal Election Comm’n v. Wisconsin Right to Life, Inc.* (2007) 551 U.S. 449, 462 [168 L.Ed.2d 329, 127 S.Ct. 2652]; see also *Amgen Inc. v. California Correctional Health Care Services* (2020) 47 Cal.App.5th 716, 728 [260 Cal. Rptr. 3d 873] [an appellate court retains “discretion to decide a moot issue if the case presents an issue of “substantial and continuing public interest” and is capable of repetition yet evades review.’ [Citation.]”].)

C. The Order Is Not a Plain, Palpable Invasion of Rights Secured by the Fundamental Law and Is Rationally Related to Limiting the Spread of COVID-19

a. *Jacobson* and Its Progeny

More than 100 years ago, the United States Supreme Court established the extremely deferential standard of review applicable to emergency exercises of governmental authority during a public health emergency. In 1905, the Supreme Court upheld a mandatory vaccination law against a substantive due process challenge. (*Jacobson v. Massachusetts* (1905) 197 U.S. 11, 39 [49 L.Ed. 643, 25 S.Ct. 358] (*Jacobson*).) It stated: “Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” (*Id.* at p. 27.) Thus, government action that “purport[s] to ... protect the public health” in such an emergency will be upheld, unless it “has no real or substantial relation” to the object

Appendix B

of public health or is “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” (*Id.* at p. 31.)

Jacobson predates the tiers of scrutiny used in modern constitutional law. Some (including the Restaurateurs) have questioned its continued vitality and applicability to state and local responses to the COVID-19 pandemic. (See *Delaney v. Baker* (D.Mass., Jan. 6, 2021, No. 20-11154-WGY) 2021 U.S. Dist. Lexis 1567 [collecting some criticism of *Jacobson*, particularly as applied to 1st Amend. challenges to pandemic restrictions].)

Jacobson was cited both positively and negatively in both concurrences and dissents in the recent series of United States Supreme Court cases adjudicating challenges to emergency exercises of state authority in the current pandemic based on the free exercise clause of the First Amendment. The Supreme Court had ample opportunity to overrule *Jacobson*, but did not. (See, e.g., *South Bay United Pentecostal Church v. Newsom* (2020) 592 U.S. ____ [207 L.Ed.2d 154, 140 S.Ct. 1613] (*per curiam*) (*South Bay I*); *Calvary Chapel Dayton Valley v. Sisolak* (2020) 591 U.S. ____ [207 L.Ed.2d 1129, 140 S.Ct. 2603] (mem.) (*Calvary Chapel Dayton Valley*); *Roman Catholic Diocese, supra*, 592 U.S. ____ [141 S.Ct. 63] (*per curiam*); *South Bay United Pentecostal Church v. Newsom* (2021) 592 U.S. ____ [141 S.Ct. 716] (mem.) (*South Bay II*).)

In the first two cases, *South Bay I* and *Calvary Chapel Dayton Valley*, the Supreme Court declined to

Appendix B

enjoin pandemic restrictions despite Free Exercise Clause challenges. In *Roman Catholic Diocese and South Bay II*, however, it enjoined health orders, concluding the orders unlawfully discriminated against religious groups. The different outcomes may be attributed to factual differences, and/or to the fact that Justice Amy Coney Barrett joined the court. In any event, the dissenters in *South Bay I* and *Calvary Chapel Dayton Valley* were in the majority in the later cases.

Under precepts of *stare decisis*, it is our role to harmonize *Jacobson* and these recent cases. We do so without difficulty. *Jacobson* admonished that “no rule prescribed by a State, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation” to protect public health may “contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument.” (*Jacobson*, *supra*, 197 U.S. at p. 25.) *Roman Catholic Diocese and South Bay II* enjoined application of public health orders that the majorities concluded violated the Free Exercise Clause because public officials failed to demonstrate that the distinctions drawn between houses of worship and secular businesses were based on scientific or medical expertise. This is fully consistent with *Jacobson*. As Chief Justice Roberts wrote in his concurrence in *South Bay II*, in a clear reference to his earlier reliance on *Jacobson* in *South Bay I*, “I adhere to the view that the ‘Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States.’ ... But the Constitution also entrusts the protection of the people’s rights to the Judiciary Deference, though broad, has

Appendix B

its limits.” (*South Bay II*, *supra*, 592 U.S. at p. ____ [141 S.Ct. at p. 717], citation omitted (conc. opn. of Roberts, C. J.); see also Thaler, *The Next Surges Are Here: What Can American Governments Lawfully Do In Response to the Ongoing COVID-19 Pandemic?* (2021) 42 Mitchell Hamline L.J. Pub. Pol’y & Prac. 165.)

In any event, the substantive due process claims advanced by the Restaurateurs are analyzed in essentially the same way under *Jacobson* or employing modern rational basis review.⁴ (See *Roman Catholic Diocese*, *supra*, 592 U.S. at p. ____ [141 S.Ct. at pp. 69–71] (conc. opn. of Gorsuch, J.) [equating *Jacobson* and rational basis review].)

We agree with the following summary of the current state of the law as laid out by Justice Kavanaugh in his dissenting opinion in *Calvary Chapel Dayton Valley*, *supra*, 591 U.S. at p. ____ [140 S.Ct. at pp. 2614–2615], and believe a majority of the United States Supreme Court would, too. It reconciles *Jacobson* with the Supreme Court’s most recent cases and indicates the Restaurateurs’ claims in this case should be resolved by extending great deference to the State and County, per *Jacobson*:

“[C]ourts should be very deferential to the States’ line-drawing in opening businesses

4. We note some courts appear to interpret the *Jacobson* test as more deferential than the rational basis standard. (See, e.g., *Calvary Chapel v. Mills* (D.Me. 2020) 459 F.Supp.3d 273, 284 [“while such an epidemic is ongoing, the ‘traditional tiers of constitutional scrutiny do not apply.’ [Citations.]”].)

Appendix B

and allowing certain activities during the pandemic. For example, courts should be extremely deferential to the States when considering a substantive due process claim by a secular business that is being treated worse than another business. Cf. *Jacobson v. Massachusetts*, 197 U.S. 11, 25–28 [49 L.Ed. 643, 25 S.Ct. 358] (1905). Under the Constitution, state and local governments, not the federal courts, have the primary responsibility for addressing COVID-19 matters such as quarantine requirements, testing plans, mask mandates, phased reopenings, school closures, sports rules, adjustment of voting and election procedures, state court and correctional institution practices, and the like.

“But COVID 19 is not a blank check for a State to discriminate against religious people, religious organizations and religious services. There are certain constitutional red lines that a State may not cross even in a crisis. Those red lines include racial discrimination, religious discrimination, and content-based suppression of speech.” (*Calvary Chapel Dayton Valley, supra*, 591 U.S. at p. ___ [140 S.Ct. at pp. 2614–2615] (dis. opn. of Kavanaugh, J.).)

For purposes of substantive due process claims, the rational basis test is “the law must not be unreasonable, arbitrary or capricious but must have a real and substantial relation to the object sought to be obtained. [Citations.]”

Appendix B

(*Gray v. Whitmore* (1971) 17 Cal.App.3d 1, 21 [94 Cal. Rptr. 904].) “[N]o valid objection to the constitutionality of a statute under the due process clause may be interposed ‘if it is reasonably related to promoting the public health, safety, comfort, and welfare, and if the means adopted to accomplish that promotion are reasonably appropriate to the purpose.’ [Citations.]” (*People v. Aguiar* (1968) 257 Cal.App.2d 597, 602 [65 Cal. Rptr. 171].)

Similarly, “[w]here judicial review of administrative action by an agency acting in its legislative capacity is sought, that review begins and ends with a determination as to whether the agency’s action has been “‘arbitrary, capricious, or entirely lacking in evidentiary support’” [Citations.]” (*Davies v. Contractors’ State License Bd.* (1978) 79 Cal.App.3d 940, 946 [145 Cal. Rptr. 284]; see also *Ursack, Inc. v. Sierra Interagency Black Bear Group* (9th Cir. 2011) 639 F.3d 949, 958 [noting “rational basis” and “arbitrary and capricious” standards of review are “identical”].) “A court reviewing a quasi-legislative act cannot reweigh the evidence or substitute its own judgment for that of the agency. [Citation.]” (*Plastic Pipe & Fittings Assn. v. California Building Standards Com.* (2004) 124 Cal.App.4th 1390, 1406 [22 Cal. Rptr. 3d 393].)

b. Analysis

Here, the Restaurateurs contend the County exceeded its “emergency powers” under the Health and Safety Code⁵ by implementing the Order without conducting a

5. Health and Safety Code section 101040, subdivision (a) states, in relevant part: “The local health officer may take any

Appendix B

risk-benefit analysis. They also contend the Order violates their substantive due process rights under the Fifth and Fourteenth Amendments. Although the Restaurateurs did not specifically label their claims as violations of their “substantive” due process rights, the trial court so characterized them because the claims target alleged arbitrary government action.

As discussed above, the Restaurateurs’ excess of power and constitutional arguments both call for the same analysis: the core issue is whether the County’s temporary suspension of outdoor restaurant dining is rationally related to a legitimate state interest, i.e., limiting the spread of COVID-19. (See *Roman Catholic Diocese, supra*, 592 U.S. at p. ___ [141 S.Ct. at p. 67] [“Stemming the spread of COVID-19 is unquestionably a compelling interest”].)⁶

preventive measure that may be necessary to protect and preserve the public health from any public health hazard during any ... ‘state of emergency,’ or ‘local emergency,’ ... within his or her jurisdiction.” (Health & Saf. Code, § 101040, subd. (a).) Health and Safety Code section 120175 states: “Each health officer knowing or having reason to believe that any case of the diseases made reportable by regulation of the department, or any other contagious, infectious or communicable disease exists, or has recently existed, within the territory under his or her jurisdiction, shall take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.”

6. The Restaurateurs also argue the Order infringes their fundamental right to pursue a profession. But “[t]he right to pursue one’s chosen profession is not a fundamental right for the purpose of invoking the strict scrutiny test. [Citations.]” (*Cunningham v. Superior Court* (1986) 177 Cal.App.3d 336, 348 [222 Cal. Rptr. 854].)

Appendix B

In support of their requests for a preliminary injunction, the Restaurateurs offered several expert declarations regarding the purported lack of evidence to support the Order and the economic harm the Order would cause restaurant owners and employees. For example, Jeff Barke, M.D., a primary care physician, opined the Order does not comport with epidemiological science and lacks a rational and legitimate medical basis. Similarly, Hubert A. Allen Jr., a biostatistician, declared no evidence or scientific studies support the conclusion that operating outdoor dining in Los Angeles County poses an unreasonable risk to public health.

The Restaurateurs also offered the declaration of Jayanta Bhattacharya, M.D., a Professor of Medicine and infectious disease specialist at Stanford University. In Dr. Bhattacharya's opinion, restaurants could safely permit outdoor dining by following the Centers for Disease Control and Prevention guidelines (i.e., social distancing and mask wearing by servers and by patrons when not eating). He explained the County provided "no indication that it has estimated or otherwise taken into account any of the economic, social, and public health costs of restricting outdoor dining." He also opined, without reference to any supporting evidence, that "[b]asic standards of public health policy design require a comparison of health costs and benefits of a policy to justify it from a scientific and ethical point of view." He further stated, "[a] scientifically justified policy must explicitly account for these costs—including an explicitly articulated economic analysis—in setting, imposing, and removing criteria for business restrictions such as the blanket prohibition on outdoor dining."

Appendix B

In response, the County submitted the declaration of Muntu Davis, M.D., the County's Health Officer and medical expert regarding public health matters. He declared: "The County recognizes that it has asked businesses in the County and its more than 10 million residents to make significant adjustments to fight this pandemic. Yet, in the considered opinions of myself and that of DPH [the County Department of Health] and its top communicable disease experts, these temporary adjustments and modifications are necessary to combat the ongoing surge in COVID-19 cases and hospitalizations, and the resulting strain on the County's health care system." He further stated: "Allowing COVID-19 to proliferate unchecked across the County, without taking affirmative measures to reduce transmission would be unacceptable, unethical, and bad public policy. The societal costs of allowing large numbers of preventable deaths in a quest for 'herd immunity' would far outweigh any economic or other benefits. That is why the overwhelming majority view has rejected and criticized Dr. Bhattacharya's suggested approach." Dr. Davis concluded: "Based on the data, I determined that the risks and harms of uncontrolled community spread, strain on the health care system, and excess preventable deaths outweighed the social and economic harm of a temporary suspension on in-person restaurant dining."

The County also offered the declaration of Jeffrey Gunzenhauser, M.D., the County's Chief Medical Officer and the Director of the Disease Control Bureau. He initially noted that "[b]ecause the virus that causes COVID-19 is novel, much remains uncertain." He explained, however, there is a consensus among epidemiologists that the most common mode of transmission of COVID-19 is from

Appendix B

person-to-person respiratory droplets that are expelled when a person coughs, sneezes, or projects his or her voice. “There is also evidence that COVID-19 may be spread through aerosols that are expelled when a person speaks.” There is no scientifically agreed-upon safe distance, but it is widely accepted that standing or sitting near an infectious person is riskier than being farther away.

Moreover, it is “widely accepted that an infected person is capable of transmitting COVID-19 before they develop symptoms and if they ever develop symptoms at all. Asymptomatic and pre-symptomatic transmission make COVID-19 particularly difficult to contain. Individuals without symptoms are generally unaware that they are infected and are thus less likely to isolate or take other steps to avoid transmitting the virus.”

Dr. Gunzenhauser further stated, “[t]he risk of transmission further increases when individuals are in close proximity for an extended period of time” and when “individuals are not wearing face coverings.” “Being in close proximity to an unmasked infected person for a prolonged period of time presents an especially high risk of receiving a viral dose sufficient to cause COVID-19 infection.”

Marianne Gaushe-Hill, medical director for the County’s Department of Emergency Medical Services Agency, detailed the recent surge in COVID-19 hospitalizations and the then imminent overwhelming of the County’s health care system. Specifically, the “County’s ICU bed availability in the month of November

Appendix B

... decreased to less than 5% of total capacity.” The County notes in its Reply brief, filed January 19, 2021, that available ICU capacity in the Southern California region “has been down to 0% since early December 2020.”

After reviewing the evidence, the trial court found the “County ha[d] shown that the greatly decreased capacity of hospitals and ICUs [were] burdening the healthcare system and action w[as] necessary.” It concluded, however, that what it called “the County’s syllogism”—“(a) COVID[-19] is spread by expelled droplets that transmit the virus to others in proximity, (b) people eating outdoors in restaurant are in proximity to others and they are not wearing masks, (c) therefore outdoor dining has a risk of spreading COVID[-19]—only weakly supports closure of outdoor restaurant dining because it ignores the outdoor nature of the activity which the CDC says carries only a moderate risk (and less with mitigations.)” After conceding it could not “weigh evidence in deciding whether the restriction ha[d] a rational basis, and [that] the Department [had] generalized evidence of a COVID[-19] risk in outdoor dining,” the trial court nevertheless held the County acted arbitrarily, because it failed “to perform the required risk-benefit analysis.”

Thus, despite acknowledging Supreme Court precedent requiring it to show great deference to the County in these circumstances, and the “syllogism” demonstrating a rational basis for the challenged order, the trial court took it upon itself to adopt Dr. Bhattacharya’s unsupported opinion and mandate a “risk-benefit analysis” before the County could enforce its order. The trial court

Appendix B

stated it could not “dictate what the [County] must do as part of the risk-benefit analysis.”

Mandating a nebulous risk-benefit requirement is inconsistent with the court’s appropriate role. As discussed above, our “review begins and ends with a determination ... whether the agency’s action has been ““arbitrary, capricious, or entirely lacking in evidentiary support”” [Citations.]” (*Davies v. Contractors’ State License Bd.*, *supra*, 79 Cal.App.3d at p. 946.) The County’s imposition of the Order is none of those things.

Of course, more particularized studies of the spread of COVID-19 while dining at outdoor restaurants would be valuable. But undertaking those studies takes time and resources that may not be available when swift government action must be taken in response to surging infection, hospitalization, and death rates during a once in a century pandemic.⁷ As of this writing, government sources indicate more than 500,000 Americans have died with COVID-19. As has been widely reported, that grim

7. Information about outdoor COVID-19 transmission is not completely absent, however. Relying on an incident in which a 27-year-old man contracted COVID-19 after having a conversation with another individual outdoors who had recently returned from Wuhan, Dr. Davis noted that “[w]hile the risk of transmission is lower outdoors, it is still present.” Dr. Davis also cited a study on the effectiveness of physical distancing in controlling the spread of COVID-19, and stated, “outdoor, well-ventilated spaces, such as an open patio restaurant, where unmasked persons have prolonged contact, present a moderate risk of transmission. Being outdoors reduces risk but does not eliminate it.”

Appendix B

figure exceeds the number of U.S. soldiers killed in combat in the Vietnam War and both World Wars combined. Approximately 50,000 of those deaths reportedly occurred in the State of California, with about 20,000 reported in Los Angeles County alone. (United States COVID-19 Cases and Deaths by State (<covid.cdc.gov/covid-data-tracker/#cases_totaldeaths> [as of Mar. 1, 2021]); LA County Daily COVID-19 Data (<publichealth.lacounty.gov/media/coronavirus/data/index.htm> [as of Mar. 1, 2021]).⁸

When the Order went into effect, Los Angeles was experiencing a surge of infections. Against this backdrop, the County was forced to take immediate action. As detailed in Dr. Davis’s declaration, the County recognized the preventative measures required to slow the spread of COVID-19, including temporarily restricting in-person dining, have an emotional and economic impact on businesses, families, and individuals, but ultimately determined the restriction on outdoor dining was necessary because “dining with others creates a circumstance where non-household members are gathering in close proximity to each other without any COVID-19 infection control protections and typically for more than 15 minutes.” This scenario presents “significant risks of transmission from persons who are asymptomatic or pre-symptomatic” and “from a disease control standpoint” restricting in-person dining “is necessary to mitigate the risks presented by persons gathering together without masks.” In making

8. On our own motion, we take judicial notice of the CDC and the County of Los Angeles Public Health websites tracking the numbers of COVID-19 deaths. (Evid. Code, § 452, subd. (h).)

Appendix B

this determination, Dr. Davis relied, in part, on “a number of studies showing the role of masks in limiting the spread of COVID-19, and that situations where unmasked individuals from different households spend extended periods of time in close proximity to one another present a higher risk of transmission than settings where one or more of these factors is absent.”

We decline the Restaurateurs’ invitation to second-guess public health officials’ actions in an “area[] fraught with medical and scientific uncertainties.” (*South Bay I, supra*, 590 U.S. at p. ___ [140 S.Ct. at p. 1613] (conc. opn. of Roberts, C. J.).) Because the Restaurateurs failed to satisfy their burden of demonstrating the Order is arbitrary, capricious, or without rational basis, we conclude they cannot ultimately succeed on the merits of their claims. Thus, they were not entitled to injunctive relief. (*Aiuto v. City & County of San Francisco, supra*, 201 Cal.App.4th at p. 1361 [“A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff will ultimately prevail on the merits of the claim. [Citation.]”].)

D. Mark’s Freedom of Assembly Argument

Mark’s joins in the arguments of CRA, but also separately contends the Order violates its (or its patrons’) First Amendment right to freedom of assembly. Mark’s seemingly forfeited this argument by failing to raise it in the trial court. (*In re Riva M.* (1991) 235 Cal.App.3d 403, 411–412 [286 Cal. Rptr. 592] [“As a general rule, a party

Appendix B

is precluded from urging on appeal any point not raised in the trial court. [Citation.]”.) In its complaint, Mark’s also failed to allege the Order violated its (or its patrons’) First Amendment right to freedom to assembly. The closest it came to raising the issue below is one sentence in its trial court brief where it contends it is entitled to preliminary injunctive relief because the Order “is irrational, arbitrary and capricious,” and “has caused irreparable harm, economic damages, loss of civil liberties, and massive unemployment” and “represents a plain and palpable invasion of clearly protected rights, i.e., Freedom of Association, Right to Labor, Right to Equal Protection of the Law.” But perhaps recognizing its complaint is devoid of any First Amendment claim, Mark’s did not argue the Order violated its First Amendment right to freedom of assembly (i.e., a fundamental right) and therefore should be subject to intermediate or strict scrutiny. Because Mark’s did not raise a freedom of association claim in its complaint, did not request leave to amend to add such a claim, and made no reasoned argument about such a claim, the trial court did not consider it or address it in its 52-page decision.

In any event, we reject Mark’s argument on the merits. Initially, we note Mark’s fails to address whether a restaurant—as opposed to its patrons—has a right to freedom of assembly. Even assuming, however, that Mark’s has such a right, or has standing to bring a First Amendment challenge on behalf of its patrons or employees, its contention fails. The First Amendment guarantees that “Congress shall make no law ... abridging ... the right of the people to peaceably assemble.” (U.S. Const., 1st

Appendix B

Amend.) Constitutional rights, however, “may at times, under the pressure of great dangers” be restricted “as the safety of the general public may demand.” (*Jacobson, supra*, 197 U.S. at p. 29.) Specifically, states may impose reasonable restrictions on the time, place, and manner of protected speech and assembly provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” [Citations.]” (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791 [105 L.Ed. 661, 109 S.Ct. 2746] (*Ward*).) The Order meets this standard.

First, the Order does not regulate assembly based on the expressive content of the assembly. Instead, it prohibits all outdoor dining at restaurants, breweries, wineries, and bars irrespective of the purpose of the gathering or type of speech the patrons may wish to express.

Second, as stated above, it is undisputed limiting the spread of COVID-19 is a legitimate and substantial government interest. Banning outdoor dining, where people from different households gather in close proximity for extended periods without masks, is narrowly tailored to limiting the spread of COVID-19. (See *Ward, supra*, 491 U.S. at p. 800 [“So long as the means chosen are not substantially broader than necessary to achieve the government’s interest ... the regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative.”].)

Appendix B

Third, the Order leaves open alternative channels for assembling, i.e., videoconference or in-person socially distant gatherings with face coverings. (See, e.g., *Amato v. Elicker* (D.Conn. 2020) 460 F.Supp.3d 202, 222 [“[T]he limitation on the size of in-person social and recreational gatherings leaves open alternative channels of expression: ... residents are free to communicate and express themselves in any means other than a large, in-person gathering. They may assemble in small groups and may communicate with any number of people over the phone or over videoconference.”].) We therefore conclude the Order does not violate Mark’s purported First Amendment right to freedom of assembly or that of its patrons.

DISPOSITION

Let a peremptory writ of mandate issue directing respondent court to vacate its December 15, 2020 order enjoining the County from enforcing its orders to the extent they prohibit outdoor dining until after conducting an appropriate risk-benefit analysis, and enter a new order denying the Restaurateurs’ request for a preliminary injunction. The County is awarded its costs in this original proceeding.

Manella, P. J., and Willhite, J., concurred.

**APPENDIX C — OPINION OF THE SUPERIOR
COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL
DISTRICT, FILED DECEMBER 15, 2020**

SUPERIOR COURT OF THE STATE OF
CALIFORNIA COUNTY OF LOS ANGELES,
CENTRAL DISTRICT

Case No. 20STCP03881

CALIFORNIA RESTAURANT ASSOCIATION, INC.,
A CALIFORNIA CORPORATION,

Petitioner and Plaintiff,

vs.

COUNTY OF LOS ANGELES DEPARTMENT
OF PUBLIC HEALTH, A GOVERNMENTAL
ENTITY; BARBARA FERRER, IN HER OFFICIAL
CAPACITY AS DIRECTOR OF PUBLIC HEALTH,
COUNTY OF LOS ANGELES; DOES 1 THROUGH
100, INCLUSIVE,

Respondents and Defendants.

[~~PROPOSED~~] PRELIMINARY INJUNCTION

Date: December 8, 2020

Time: 1:30 p.m.

Dept.: 85

30a

Appendix C

Case No. 20STCV45134

MARK'S ENGINE CO. NO. 28, *et al.*,

Plaintiffs,

vs.

COUNTY OF LOS ANGELES, *et al.*

Defendants.

[~~PROPOSED~~] PRELIMINARY INJUNCTION

Counsel appeared in the above-captioned matter on December 8, 2020, before Department 85, the Honorable James C. Chalfant presiding, for a hearing on this Court's Order to Show Cause (the "Order to Show Cause") in the above-captioned matter.

As detailed in this Court's December 8, 2020 ruling (a copy of which is attached hereto as Exhibit A), IT IS HEREBY ORDERED THAT Respondents-Defendants ("Respondents") the Los Angeles County Department of Public Health and Barbara Ferrer, directly or indirectly, and whether alone or in concert with others, including any officer, agent, employee, and/or representative of Los Angeles County, are hereby enjoined from enforcing the November 25, 2020 Reopening Safer at Work and in the Community for Control of COVID-19, Blueprint for a Safer Economy – Tier 1 Surge Response, or the December 6, 2020 Revised Temporary Targeted Safer at Home

Appendix C

Health Officer Order for Control of COVID-19; Tier 1 Substantial Surge Updated Response to the extent either order seeks to prohibit outdoor dining, and/or any other order prohibiting outdoor dining beyond the period which ends on December 16, 2020, and Respondents are further enjoined from promulgating any further order to prohibit outdoor dining at restaurants and other food facilities that prepare and serve food until after conducting an appropriate risk-benefit analysis and articulating it for the public to see. Nothing herein enjoins Respondents from enforcing the State of California's December 3, 2020 Regional Stay At Home Order, as supplemented on December 6, 2020, which took effect in Los Angeles County on December 6, 2020, at 11:59 p.m., including, but not limited to, the prohibition of outdoor dining at restaurants and other food facilities that prepare and serve food, to the extent that order remains in effect.

IT IS FURTHER ORDERED THAT Plaintiff-Petitioner California Restaurant Association, Inc. and Plaintiff Mark's Engine Co. No. 28, Inc. shall, jointly and severally, deposit a bond with the Court in the amount of \$10,000 within five court days of this order.

The Court reserves jurisdiction to modify this injunction as the ends of justice may require.

IT IS SO ORDERED.

DATED: 12/15/2020

/s/
Hon. James C. Chalfant
JUDGE OF THE SUPERIOR COURT

32a

Appendix C

APPROVED AS TO FORM:

DATED: December 10, 2020

MILLER BARONDESS, LLP

/s/
AMNON Z. SIEGEL
Attorneys for Respondents

33a

Appendix C

EXHIBIT A

Appendix C

California Restaurant Association, Inc. v. County of Los Angeles Department of Public Health, et al., 20STCP03881

Mark's Engine Company No. 28 Restaurant LLC, vs County of Los Angeles-Department of Public Health, et al., 20STCV45134

Tentative decision on application for preliminary injunction: granted in part

Petitioners California Restaurant Association, Inc. (“CRA”) and Mark’s Engine Company No. 28 Restaurant, LLC (“MEC”), each apply in a consolidated hearing (with Case No. 20STCP03881 as the lead case) for a preliminary injunction enjoining Respondents/Defendants County of Los Angeles Department of Public Health and Dr. Barbara Ferrer (“Ferrer”), in her official capacity as Director of Public Health, and Muntu Davis, M.D., M.P.H, (“Davis”) in his official capacity as Health Officer for County (collectively, “Department”), from enforcing the November 25, 2020 Order of the Health Officer entitled “Reopening Safer at Work and in the Community for Control of COVID 19, Blueprint for a Safer Economy–Tier 1 Surge Response” (“Restaurant Closure Order”).

The court has read and considered the moving papers, the County’s oppositions to the *ex parte* applications and consolidated opposition to the order to show cause (“OSC”), and the replies, and renders the following tentative decision.

*Appendix C***A. Statement of the Case****1. 20STCP03881**

Petitioner CRA commenced this action on November 24, 2020, alleging causes of action for administrative and traditional mandamus and declaratory relief. The Petition alleges in pertinent part as follows.

The Department has issued a series of health orders in an effort to halt the spread of COVID.¹ The Department's Health Order dated November 19, 2020 ("November 19 Order") issued restrictions that outdoor dining and wine service seating must be reduced by 50%, or tables must be repositioned so that they are at least eight feet apart.

On November 22, 2020, the Department announced that it was modifying the November 19 Order to eliminate outdoor dining and drinking entirely at restaurants, bars, breweries, and wineries by issuing the Restaurant Closure Order. The Restaurant Closure Order took effect on November 25, 2020.

The Department's own data provide no support for the planned shutdown of outdoor restaurant operations. The data tracks all non-residential settings at which three or more laboratory confirmed COVID cases have been identified. Of the 204 locations on the list, fewer than 10% are restaurants. Of the 2,257 cases identified on the list, fewer than 5% originate from restaurants.

1. For convenience, the court will refer to COVID-19 and SARS-CoV-2 as "COVID".

Appendix C

On November 17, 2020, the Department held a hearing at which COVID and restaurant closures were discussed. The Department scheduled another hearing for November 24, 2020. On November 23, 2020, CRA sent a notice and objection letter to the Department asking it to cancel the proposed modification to the November 19 Order on the grounds that the spread of COVID is due primarily to people in close proximity at private gatherings and other sources, not from restaurants.

CRA contends that the Department prejudicially abused its discretion by having hearings at which it failed to take and consider relevant advice. The Department made a decision to close restaurant dining that is not realistically designed to halt the spread of COVID. The Department proceeded without, and in excess of, its discretion, failed to give CRA a fair hearing, and prejudicially abused its discretion. The Restaurant Closure Order is not supported by any findings or the evidence.

2. 20STCV45134

Plaintiff MEC commenced this action on November 24, 2020 against the Department and Davis, in his official capacity as Health Officer for County, alleging causes of action for declaratory relief and violations of the California Constitution and seeking the remedy of injunctive relief. The Complaint alleges in pertinent part as follows.

The Department's initial June 2020 Health Order ("June Order") allowed many businesses, including MEC, to operate so long as they followed guidelines established

Appendix C

by the state and County to help curb the spread of COVID. As of June 1, 2020, restaurants in the County such as MEC were not permitted to provide dine-in service indoors. They were able to provide outdoor dining and take-out dining upon implementing County safety protocols as set forth in the June 2020 Order.

Since the promulgation of the June Order, MEC has complied with all local and statewide protocols relating to the safe operation of its restaurant, including a large investment of time and resources, to pivot from its previous indoor-dining concept to a takeout and outdoor-dining model.

On November 20, 2020, the Department announced that its June Order, as it relates to the operation of restaurants across the County, was being revised by the November 19 Order to limit the number of customers at outdoor restaurants to 50% of the outdoor establishment's outdoor capacity (which is already limited by virtue of compliance with the June 2020 Order, which requires physically distanced tables). In addition, the November 19 Order curtailed the hours of operation for restaurants by banning operations between 10:00 p.m. and 6:00 a.m.

On November 22, 2020, without any evidence to support it, the Department further modified the November 19 Order by issuing the Restaurant Closure Order, which prohibits any outdoor dining irrespective of capacity or curfew. The Restaurant Closure Order took effect on November 25, 2020 at 10 p.m. and will last for a minimum of three weeks. Take-out, delivery, and drive-thru services remain unaffected.

Appendix C

In attempting to justify the Restaurant Closure Order, Respondent Ferrer said at a November 22, 2020 press conference that there had been a 61% increase in hospitalization cases involving COVID in the County between November 7 and 20, 2020, which could potentially lead to overwhelming the healthcare system. Further, Ferrer pointed out that while most restaurants have complied with safety mandates, almost 20% of restaurants have had issues, mainly regarding social distancing.

Ferrer conceded that she did not have concrete data on how many people had been infected by outside dining at a restaurant. In actuality, the Department's data indicates that COVID cases traced back to the County's restaurants and bars accounted for a mere 3.1 % (70 of the total 2,257) confirmed cases countywide from over 204 outbreak locations -- the vast majority of which were chain/fast-food type restaurants and not MEC's model. Of those 2,257 confirmed cases, 2,249 of were traced to staff members at workplaces and just eight cases came from non-staff members.

The Restaurant Closure Order is an abuse of the Department's emergency powers, is not grounded in science, evidence, or logic, and should be adjudicated to be unenforceable as a matter of law.

3. Course of Proceedings

On November 24, 2020, the court denied CRA's *ex parte* application to stay the Restaurant Closure Order for failure to present sufficient evidence to make a *prima facie*

Appendix C

case. The court permitted CRA to renew its application as one for a temporary restraining order (“TRO”) and OSC re: preliminary injunction (“OSC”) if it presented evidence that the restrictions are unsupported and of irreparable harm.

On December 1, 2020, the court denied MEC’s *ex parte* application for declaratory and injunctive relief and informed the parties that declaratory relief cannot be granted on an *ex parte* basis. The court permitted MEC to file and serve new *ex parte* application for a TRO and OSC.

On December 2, 2020, the court denied CRA’s and MEC’s *ex parte* applications for a TRO, but it set an OSC for the instant date.

The independent calendar court assigned to Case No. 20STCV45134 found that it and Case No. 20STCP03881 are not related under CRC 3.300(a) and declined to relate them. This court consolidated both cases only for hearing on the OSCs and designated 20STCP03881 as the lead case for the hearing.

B. Governing Law**1. Emergency Services Act**

The Emergency Services Act (“ESA”) empowers state and local governments to declare emergencies and coordinate efforts to provide services. Govt. Code §§ 8550-668. The purpose of the ESA and the policy of the state is that all emergency services functions shall be coordinated

Appendix C

as far as possible with the comparable functions of its political subdivisions, the federal government, and private agencies, to the end that the most effective use may be made of all resources for dealing with an emergency. Govt. Code §8550.

A “state of emergency” means the existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by conditions including an epidemic and which by reason of their magnitude, are or likely to be beyond the control of any single county or city and require the combined forces of a mutual aid region or regions. Govt. Code §8558.

During a state of emergency, the Governor shall, to the extent he deems necessary, have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the California Constitution and laws of the State of California in order to effectuate the purposes of this chapter. Govt. Code §8627.

The Governor may make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter. The orders and regulations shall have the force and effect of law. Due consideration shall be given to the plans of the federal government in preparing the orders and regulations. The Governor shall cause widespread publicity and notice to be given to all such orders and regulations, or amendments or rescissions thereof. Govt. Code §8567(a).

Appendix C

“State Emergency Plan” means the State of California Emergency Plan approved by the Governor. Govt. Code §8560. The Office of Emergency Services shall update the State Emergency Plan on or before January 1, 2019 and every five years thereafter. Govt. Code §8570.4.

“The Governor may, in accordance with the State Emergency Plan and programs for the mitigation of the effects of an emergency in this state: ... (c) Use and employ any of the property, services, and resources of the state as necessary to carry out the purposes of this chapter;... (i) Plan for the use of any private facilities, services, and property and, when necessary, and when in fact used, provide for payment for that use under the terms and conditions as may be agreed upon. Govt. Code §8570.

In the exercise of the emergency powers vested in him during a state of emergency, the Governor is authorized to commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the state and the state shall pay the reasonable value thereof. Govt. Code §8572.

A political subdivision of the state is obligated to take all actions necessary to carry out a State Emergency Plan once the Governor has declared an emergency. Govt. Code §8568. A political subdivision includes any city, city and county, county, district, or other local governmental agency or public agency authorized by law. Govt. Code §8557(b).

Appendix C

The governing body of a county or city may proclaim a local emergency. Govt. Code §8630. A local emergency must be reviewed by the governing body every 30 days and it shall be terminated at the earliest possible date that conditions warrant. Govt. Code §8630(c), (d). During a local emergency, the governing body of a county or city may promulgate orders and regulations necessary to protect life and property. Govt. Code §8634.

2. Health and Safety Code

The Restaurant Closure Order specifies the authority upon which it is based—Health and Safety Code (“H&S Code”) sections 101040, 101085 and 120175. H&S Code section 101040 permits a local health officer to take preventative measures that may be necessary to protect and preserve the public health during an “state of emergency” or “local emergency” under the ESA.²

H&S Code section 120175 provides:

“Each health officer knowing or having reason to believe that any case of the diseases made reportable by regulation of the department, or any other contagious, infectious or communicable disease exists, or has recently existed, within

2. H&S Code section 101085 confers powers on a local health officer to take action after a declaration of a health emergency or local health emergency under H&S Code section 101080. In turn, H&S Code section 101080 concerns hazardous waste spills and releases. As such, H&S Code section 101085 has no application in this case.

Appendix C

the territory under his or her jurisdiction, *shall take measures as may be necessary* to prevent the spread of the disease or occurrence of additional cases.” H&S Code §120175 (emphasis added).

While H&S Code section 101040 is dependent on the ESA, H&S Code section 120175 is not. The statute imposes a mandatory duty on a health officer to take measures to prevent the spread of contagious and communicable diseases. *AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health*, (2011) 197 Cal.App.4th 693, 701. The health officer must take “measures as may be necessary,” or “reasonably necessary,” to achieve the Department’s goals and policies, leaving the course of action to the health officer’s discretion. *Ibid.* The health officer is vested with discretion to act in a particular manner depending upon the circumstances. *Ibid.*

The notion that a municipality’s health officer has broad authority is well-established and long-standing. *Jacobson v. Commonwealth of Massachusetts*, (“*Jacobson*”) (1905) 197 U.S. 11, 25. “[A] community has a right to protect itself against an epidemic of disease which threatens the safety of its members.” *Id.* at 27. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety. *Ibid.*

The health officer’s authority is not unbridled. Courts have the duty to evaluate an exercise of that authority

Appendix C

to ensure actions taken have a “real and substantial relationship” to public health and safety. *Id.* at 31. The health officer cannot act arbitrarily or oppress. *Id.* at 38. In addition, the health officer cannot engage in a “plain, palpable invasion of rights” secured by the Constitution. *Id.* at 31. *See also Jew Ho v. Williamson*, (C.D. Cal. 1900) 103 F. 10. (Whether the regulation in question is a reasonable one, directed to accomplish the purpose that appears to have been in view, is a question for the court to determine).

3. Injunctive Relief

An injunction is a writ or order requiring a person to refrain from a particular act; it may be granted by the court in which the action is brought, or by a judge thereof; and when granted by a judge, it may be enforced as an order of the court. CCP §525. An injunction may be more completely defined as a writ or order commanding a person either to perform or to refrain from performing a particular act. *See Comfort v. Comfort*, (1941) 17 Cal.2d 736, 741. *McDowell v. Watson*, (1997) 59 Cal.App.4th 1155, 1160.³ It is an equitable remedy available generally in the protection or to prevent the invasion of a legal right.

3. The courts look to the substance of an injunction to determine whether it is prohibitory or mandatory. *Agricultural Labor Relations Bd. v. Superior Court*, (1983) 149 Cal.App.3d 709, 713. A mandatory injunction — one that mandates a party to affirmatively act, carries a heavy burden: “[t]he granting of a mandatory injunction pending trial is not permitted except in extreme cases where the right thereto is clearly established.” *Teachers Ins. & Annuity Assoc. v. Furlotti*, (1999) 70 Cal.App.4th 187, 1493.

Appendix C

Meridian, Ltd. v. City and County of San Francisco, et al., (1939) 13 Cal.2d 424.

The purpose of a preliminary injunction is to preserve the *status quo* pending final resolution upon a trial. See *Scaringe v. J.C.C. Enterprises, Inc.*, (1988) 205 Cal.App.3d 1536. *Grothe v. Cortlandt Corp.*, (1992) 11 Cal.App.4th 1313, 1316; *Major v. Miraverde Homeowners Assn.*, (1992) 7 Cal.App.4th 618, 623. The *status quo* has been defined to mean the last actual peaceable, uncontested status which preceded the pending controversy. *Voorhies v. Greene* (1983) 139 Cal.App.3d 989, 995, quoting *United Railroads v. Superior Court*, (1916) 172 Cal. 80, 87. *14859 Moorpark Homeowner's Assn. v. VRT Corp.*, (1998) 63 Cal.App.4th 1396. 1402.

A preliminary injunction is issued after hearing on a noticed motion. The complaint normally must plead injunctive relief. CCP §526(a)(1)-(2).⁴ Preliminary injunctive relief requires the use of competent evidence to create a sufficient factual showing on the grounds for relief. See e.g. *Ancora-Citronelle Corp. v. Green*, (1974) 41 Cal.App.3d 146, 150. Injunctive relief may be granted based on a verified complaint only if it contains sufficient evidentiary, not ultimate, facts. See CCP §527(a). For this reason, a pleading alone rarely suffices. Weil & Brown, *California Procedure Before Trial*, 9:579, 9(11)-21 (The Rutter Group 2007). The burden of proof is on the plaintiff as moving party. *O'Connell v. Superior Court*, (2006) 141 Cal.App.4th 1452, 1481.

4. However, a court may issue an injunction to maintain the *status quo* without a cause of action in the complaint. CCP §526(a)(3).

Appendix C

A plaintiff seeking injunctive relief must show the absence of an adequate damages remedy at law. CCP §526(4); *Thayer Plymouth Center, Inc. v. Chrysler Motors*, (1967) 255 Cal.App.2d 300, 307; *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*, (1992) 8 Cal.App.4th 1554, 1565. The concept of “inadequacy of the legal remedy” or “inadequacy of damages” dates from the time of the early courts of chancery, the idea being that an injunction is an unusual or extraordinary equitable remedy which will not be granted if the remedy at law (usually damages) will adequately compensate the injured plaintiff. *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*, (1992) 8 Cal. App.4th 1554, 1565.

In determining whether to issue a preliminary injunction, the trial court considers two factors: (1) the reasonable probability that the plaintiff will prevail on the merits at trial (CCP §526(a)(1)), and (2) a balancing of the “irreparable harm” that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction. CCP §526(a)(2); *14859 Moorpark Homeowner’s Assn. v. VRT Corp.*, (1998) 63 Cal.App.4th 1396, 1402; *Pillsbury, Madison & Sutro v. Schectman*, (1997) 55 Cal.App.4th 1279, 1283; *Davenport v. Blue Cross of California*, (1997) 52 Cal.App.4th 435, 446; *Abrams v. St. Johns Hospital*, (1994) 25 Cal.App.4th 628, 636. Thus, a preliminary injunction may not issue without some showing of potential entitlement to such relief. *Doe v. Wilson*, (1997) 57 Cal.App.4th 296, 304. The decision to grant a preliminary injunction generally lies within the

Appendix C

sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Thornton v. Carlson*, (1992) 4 Cal.App.4th 1249, 1255.

A preliminary injunction ordinarily cannot take effect unless and until the plaintiff provides an undertaking for damages which the enjoined defendant may sustain by reason of the injunction if the court finally decides that the plaintiff was not entitled to the injunction. *See* CCP §529(a); *City of South San Francisco v. Cypress Lawn Cemetery Assn.*, (1992) 11 Cal.App.4th 916, 920.

D. Statement of Facts

1. CRA and MEC’s Evidence⁵

a. Background

On March 4, 2020, Governor Newsom declared a “State of Emergency” followed by a March 19, 2020 Stay-

5. CRA requests judicial notice of the following exhibits attached to the Ellis declaration: (1) a November 22, 2020 Department press release entitled “Public Health to Modify Health Officer Order to Restrict Dining at Restaurants, Breweries, Wineries and Bars Amid Surge in Cases - 5-Day Average of New Cases is 4,097” (Ex. 1); (2) a transcript of a November 24, 2020 County Board of Supervisors (sometimes “Board”) meeting (Ex. 11); (3) the Restaurant Closure Order, a November 25, 2020 Order of the Health Officer for Los Angeles County entitled “Reopening Safer at Work and in the Community for Control of COVID-19, Blueprint for a Safer Economy – Tier 1 Surge Response” (Ex. 17); (4) a September 2020 California Department of Public Health chart entitled “Blueprint for a Safer

Appendix C

at-Home Order which included an indefinite prohibition on operating “nonessential businesses,” including restaurants. Ellis Decl., Ex. 18. Governor Newsom specified that California’s response to the coronavirus pandemic “must be done using *a gradual, science-based and data-driven framework*.” *Id.* (emphasis added). He also stated that the state’s actions should be aligned to achieve the objectives of (1) ensuring the ability to care for the sick within the state’s hospitals, (2) preventing infection in people who are at high risk for severe disease, (3) building the capacity to protect the health and well-being of the public, and (4) *reducing social, emotional, and economic disruptions*. *Id.*

Economy” (“Blueprint”) (Ex. 7); (5) a press release issued by the Governor entitled “Governor Newsom Outlines Six Critical Indicators the State will Consider Before Modifying the Stay-at-Home Order and Other COVID-19 Interventions” (Ex. 18); (6) the United States Supreme Court’s opinion in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, (“*Roman Catholic Diocese*”) (Nov. 25, 2020) 2020 WL 6948354, 592 U.S. ____ (Ex. 21); and (7) the TRO/OSC and accompanying minute order dated November 6, 2020 in *Midway Ventures, LLC v. County of San Diego, et al.*, Case No. 37-2020-00038194-CU-CR-CTL (San Diego County Superior Court) (Ex. 22).

The existence of the Exhibits 21 and 22, but not the truth of their contents, is judicially noticed. Evid. Code §452(d); *Sosinsky v. Grant*, (1992) 6 Cal.App.4th 1548, 1551 (judicial notice of findings in court documents may not be judicially noticed). The existence of the press release (Ex. 1), the Restaurant Closure Order (Ex. 17), the Blueprint (Ex. 7), and the Governor’s press release (Ex. 18) are judicially noticed. Evid. Code §452(c). The court cannot judicially notice a reporter’s transcript (Ex. 11), and the request is denied.

Appendix C

On August 28, 2020, Governor Newsom and the California Department of Public Health announced a revised regulatory regime entitled the “Blueprint for a Safer Economy” (the Blueprint), outlining a four-tiered system of community disease transmission risk with activity and business tiers for each risk level. Ellis Decl. Ex. 7. Restaurants are listed as a separate sector in the Blueprint. *Id.* A county in Tier 2 may allow indoor dining at a maximum capacity of 25% or 100 people, whichever is less, while a county in Tier 1 may permit only outdoor dining. *Id.* Even in the most restrictive tier, outdoor dining is expressly permitted. *Id.*

b. The Restaurant Closure Order

On November 22, 2020, the Department issued a press release announcing the issuance of the Restaurant Closure Order, effective November 25, 2020, which would ban outdoor dining for at least three weeks. Ellis Decl., Ex. 1.

On November 23, 2020, CRA sent an objection letter to the Department, asking it to cancel the proposed Restaurant Closure Order on grounds that the spread of COVID is due primarily to persons in close proximity at private gatherings and other sources, and not from restaurants. Ellis Decl. ¶9, Ex. 8. The letter contended that the County had no study that would support the Restaurant Closure Order, it was not supported by the existing scientific evidence, and it would cause significant harm to restaurants, their employees, and customers. Ex. 8, p. 1-2.

Appendix C

On November 24, 2020, the Board of Supervisors held a public meeting at which the potential Restaurant Closure Order was discussed, and the Department was questioned about the basis for its contemplated action. Ellis Decl., ¶13, Ex. 11. At this meeting, the Department admitted that it has not been tracking COVID transmission at County restaurants and did not have state or County data to support the Restaurant Closure Order. *Id.* Instead, County Health Officer Davis referred to a study by the Centers for Disease Control (“CDC”), calling it “the best information that we have” to support the Restaurant Closure Order. *Id.*

Department public health officials Davis, Health Officer, Ferrer, Director of the Department of Public Health, and Dr. Christina Ghaly (“Ghaly”), Director of the Department of Health Services, explained the reasons for the Restaurant Closure Order during the November 24 Board meeting:

Ghaly: “[H]ospital capacity is available right now, but we do risk using it up if the case counts continue to rise at the level they have to date.” Siegel Decl. Ex. B, p. 131 (emphasis added).

Davis: “We are solving the problem of people mixing together, often times from different households, being in close contact with a face covering while they are eating and drinking.” *Id.*, p. 136.

Appendix C

Ferrer: “[B]ecause all of the people and customers are not wearing their face coverings while eating drinking, there’s lot of increased risk in those settings. As you know, we have seen picture after picture of activity at restaurants, people close together and intermingling and many people going to . . . restaurants are not with members . . . of their household, when we proposed in the beginning of reopening restaurants, *we said perhaps it makes sense to limit people coming into restaurants and sitting together in households, and the restaurants notified us that would be impossible to enforce. They have no way of knowing whether people are from one household.* We are looking at increased risk, and a significant increase in increased risk because people are not wearing their face covering.” *Id*, pp. 137-38 (emphasis added).

Ferrer: “[I] agree that it seems a little bit counterintuitive to talk about cases when really all we are worried about is overwhelming the healthcare system. The issue is that cases are the earlier predictor of what is going to happen in our hospital care system. And I think Dr. Ghaly spoke to this as well, *you don’t want to wait until the case numbers in the hospitals are really high*, because those numbers that you are seeing in the hospital reflect people who are infected a couple of weeks earlier. As I said, we have seen this rapid acceleration this past

Appendix C

week and a half with hospitals and the number of patients that are there with COVID-19 and it is not attributed to the 4,500 cases we are seeking today, it is attributed to the 2,300 cases we saw two weeks ago.” *Id.*, pp. 139-40 (emphasis added).

Ferrer: “We are, in fact, trying to make sure that whenever you’re out and you’re not with people in your household, you’re always at an activity where you can wear your face covering and keep it on the entire time. And then we’re also trying to reduce crowded situations and having people not—and having people stay with just people from their household.” *Id.*, p. 149.

Ghaly: “And now about this most recent surge, we’ve seen that test positivity rate creep up again at 6, 7 percent. And that’s what’s concerning. And that’s one of the things that may lead in the future to more hospitalization over the next week or two.” *Id.*, pp. 161-62. Opp. to CRA Ex Parte at 14-15.

Two Board supervisors expressed their opinion at the November 24 meeting that scientific evidence was lacking to support the Restaurant Closure Order. Supervisor Barger stated: “There is no data to support closing restaurants. This action was arbitrary and only further encourages private gatherings, which is where the virus is actually spreading.” Ellis Decl. Ex. 14. Supervisor Janice Hahn stated: “I don’t think we have the data to prove that

Appendix C

outdoor dining is driving the recent surge in cases, nor do we have the data to assure us that this action will turn our case numbers around. I am also very worried that it will drive more people to indoor gathering.” Ellis Decl. Ex. 13.

On November 25, 2020, the Department issued the Restaurant Closure Order, shutting down all outdoor dining by 10:00 p.m. that night. Ellis Decl., Ex. 17. The Restaurant Closure Order states that restaurants, breweries, and wineries can only offer food and beverage via takeout, drive-thru, or delivery -- *i.e.*, no indoor or outdoor dining at restaurants. *Id.* Pursuant to the Restaurant Closure Order, County restaurants are prohibited from offering outdoor dining of any kind, regardless of the safety protocols in place. *Id.* The Department ordered the closure of all restaurants for in-person onsite dining for an indefinite period. *Id.*

CRA presents evidence that the Restaurant Closure Order imposes great financial hardship on the restaurant industry. Many restaurants previously had implemented safety measures to comply with the previous Health Order at significant financial cost. *See* Leon, Rosenthal, Terzian, Shams, Gay, and Thornberg declarations. CRA’s declarations refer to the abrupt nature of the County’s Restaurant Closure Order, the harm that restaurant outdoor dining closure will cause, and the risk of layoffs and permanent restaurant closure from an outdoor dining ban. *See* Shams Decl., ¶¶ 9, 11. Many restaurant owners feel the Restaurant Closure Order is unreasonable because the risk of COVID transmission from outdoor dining is greatly outweighed by the devastating economic consequences. *Id.*

*Appendix C***c. Expert Declarations⁶****(i) Barke**

Jeff Barke, M.D. (“Barke”), is a primary care physician based in Orange County, California who has treated numerous COVID patients on a near-daily basis since the start of the outbreak. Barke Decl., ¶4.

Barke opines that there is no rational and legitimate basis to support the breadth and scope of the Department’s shutdown of outdoor dining. Barke Decl., ¶7. Since the beginning of the pandemic, one of the consistent findings of studies of COVID transmission has been that the risk of transmission in outdoor settings is low, and the risk becomes negligible when combined with the use of commonly-accepted COVID precautionary measures such as symptom checks, spacing, and the appropriate use of personal protective equipment by servers according to CDC guidelines. Barke Decl., ¶7.

An academic study published on April 7, 2020 by professors and scientists from Southeast University, the University of Hong Kong, and Tsinghua University (“China Study”) extracted case reports from the local municipal health commissions of 320 prefectural (a district governed by a prefect) cities in China, identified all outbreaks of COVID (defined as three or more individual

6. CRA and MEC filed similar declarations from two experts, Jayanta Bhattachara and Sean Kaufman. The court’s citations are to CRA’s declarations.

Appendix C

cases), reviewed the major characteristics of the enclosed spaces in which the outbreaks were reported and their associated indoor environmental issues, and found that only one of the 318 identified outbreaks – amounting to only two infected persons – implicated an outdoor environment. Barke Decl., ¶8, Ex. A.

Another academic study published on April 16, 2020 by professors and scientists from the Japanese Ministry of Health, Labour and Welfare, Hokkaido University, the Tohoku University Graduate School of Medicine, and the Japanese National Institute of Public Health and National Institute of Infectious Diseases (“Japan Study”), examined clusters of COVID in Tokyo, Aichi, Fukuoka, Hokkaido, Shiakawa, Kanagawa and Wakayama prefectures in Japan, finding that closed – not open – environments contribute to the secondary transmission of COVID. Barke Decl., ¶9, Ex. B. The Japan Study also found that an infected person transmitted COVID in a closed environment at a rate 18.7 times greater than an open-air environment. *Id.* On the basis of these findings, the Japan Study concluded that a reduction of unnecessary close contact in closed environments may help prevent large case clusters and so-called “superspreading” events relating to COVID. Barke Decl., ¶9, Ex. B.

An article from the Mayo Clinic describes a general medical consensus regarding safe outdoor activities during the COVID pandemic. Barke Decl., ¶10, Ex. C. According to the Mayo Clinic article, COVID is primarily spread from person-to-person by those within six feet of each other. Ex. C. In some situations, especially in

Appendix C

enclosed spaces with poor ventilation, COVID can spread when a person is exposed to small droplets or aerosols that stay in the air for minutes to hours. *Id.* When the weather is appropriate, outside patio dining can be a good outdoor option. *Id.* Outdoor patio dining at uncrowded restaurants where patio tables are spaced appropriately is safer than indoor dining. *Id.* The article advises persons to wear a mask when not eating or drinking, in other areas of the restaurant, keep a distance of at least six feet (two meters), avoid self-service food and drink options, and remember to wash their hands when they enter and leave. *Id.*

These studies comport with Barke's observations in practice. Barke has not treated a single COVID who contracted it in an outdoor dining setting. Barke Decl., ¶11. The risk of COVID infection and transmission is much lower when eating in an outdoor setting, just as it is safe and permitted to travel for hours across the country in a crowded and enclosed aircraft. *Id.*

(ii) Bhattacharya

Jayanta Bhattacharya, M.D. ("Bhattacharya") is a Professor of Medicine and infectious disease specialist at Stanford University with a primary research area in health economics, including a focus on epidemiology and infectious disease epidemiology. Bhattacharya Decl., ¶¶ 2, 4. Bhattacharya opines that the blanket countywide prohibition on outdoor dining in the County does not comport with, and is inconsistent with, good public health practice applicable to COVID. Bhattacharya Decl., ¶2.

Appendix C

Bhattacharya conducted a study that found that 4.3% of County adults showed specific antibody evidence of prior or current COVID infection by April 10-11, 2020. Bhattacharya Decl., ¶6. This prevalence rate represents a multiple 43.5 times the number of cases confirmed by the County's public health authority by that same date. Bhattacharya Decl., ¶6. One important implication of this paper is that, on the date of the survey, the COVID infection fatality rate (the probability of dying from a COVID infection) in the County was at least an order of magnitude lower than the "case fatality rate", which consists only of patients who have been infected with COVID and identified as a "case". *Id.* A case most typically is a patient with severe symptoms who has come to the attention of medical authorities. *Id.*

In May 2020, Bhattacharya testified at a virtual roundtable organized by United States Senator Pat Toomey on the subject of the potential reopening of youth baseball leagues while protecting the safety of participants. Bhattacharya Decl., ¶12. At this roundtable, he reviewed the evidence regarding the relatively low mortality and morbidity risk that COVID infection poses to children and adolescents and discussed social distancing and other protocols to make youth baseball safer for coaches, umpires, and other adult participants. *Id.*

In October 2020, Bhattacharya, Harvard Professor Dr. Martin Kulldorff, and Oxford Professor Dr. Sunetra Gupta, wrote a declaration (the "Great Barrington Declaration") which discussed an alternative to the

Appendix C

current COVID strategies in jurisdictions across the United States. Bhattacharya Decl., ¶15. The Great Barrington Declaration offers an alternative approach called focused protection. Bhattacharya Decl., ¶16. According to focused protection, the most compassionate approach to the COVID pandemic balances the risks and benefits of reaching herd immunity by allowing those who are at minimal risk of death to live their lives normally to build up immunity to the virus through natural infection, while better protecting those who are at highest risk. *Id.* The Great Barrington Declaration was published with approximately 30 co-signers in early October 2020. Bhattacharya Decl., ¶17. Since then, it has been co-signed by more than 10,000 medical and public health scientists and 30,000 medical practitioners. *Id.*

Pursuant to the CDC's "Considerations for Restaurant and Bar Operators," updated November 18th, 2020, outdoor dining may occur with relative safety at restaurants if precautionary measures are observed, including but not limited to, social distancing and mask wearing by servers and by patrons (when not eating). Bhattacharya Decl., ¶20. The CDC includes outdoor dining in the second lowest tier of risk, and notes that even this risk can be mitigated by reasonable accommodations such as spacing tables appropriately, encouraging mask wearing by servers, frequent sanitizing of surfaces, and other actions that are well within the capability of County restaurants. *Id.* The Restaurant Closure Order is inconsistent with this guidance. *Id.*

Appendix C

Bhattacharya's medical opinion is that restaurants in the County can safely permit outdoor dining by following the CDC guidelines. Bhattacharya Decl., ¶20. Bhattacharya has read many of the contact tracing studies in the scientific literature that document the most common sources of spread of COVID infection and he is aware of no evidence suggesting that outdoor dining is more likely to spread the COVID virus than the activities – including private gatherings – that remain permissible. In fact, spread through permitted activities will be more likely if the Restaurant Closure Order remains in effect. Bhattacharya Decl., ¶22.

The County guidelines prohibiting outdoor dining are substantively stricter than is required by the state. Bhattacharya Decl., ¶23. The state's Blueprint builds considerable lags into the measurement of the epidemiological metrics (a seven-day lag and a seven-day smoothing requirement) and requires that a county must stay in the same tier for at least 21 days before it is permitted to move to a less restrictive tier even if it meets the criteria of the less restrictive tier. Bhattacharya Decl., ¶26. By prohibiting outdoor on-premises dining and doing so throughout the county, the Department is imposing stricter requirements than those required by the state. Bhattacharya Decl., ¶28.

The County has done so without a scientific justification for imposing such stricter requirements on these activities. *Id.* The Department's available data does not contain any epidemiological or other model that shows prohibiting outdoor dining on a countywide basis in a

Appendix C

county the size of the County has any relationship to avoiding circumstances that challenge the healthcare delivery system's ability to deal with a surge with space, supplies, and staff as required by the Blueprint, does not compare hospitalization forecasts against hospital capacity in light of prohibitions on outdoor dining, does not account for the possibility of transfers of patients across counties, and does not account for the possibility of building and staffing field hospitals in overstretched areas. Bhattacharya Decl., ¶28.

The Department also has provided no indication that it has estimated or otherwise taken into account any of the economic, social, and public health costs of restricting outdoor dining. Bhattacharya Decl., ¶29. Basic standards of public health policy design require a comparison of both costs and benefits of a policy to justify it from a scientific and ethical point of view. *Id.* A scientifically justified policy must explicitly account for these costs – including an explicitly articulated economic analysis – in setting, imposing, and removing criteria for business restrictions such as the blanket prohibition on outdoor dining. *Id.*

The County's positivity rate data is scientifically unjustified. Bhattacharya Decl., ¶30. Both the number of new daily cases and the percent positivity criteria require analysis of results from the reverse transcriptase - polymerase chain reaction ("RT-PCR") test for the COVID virus utilized by the County. *Id.* The available scientific information regarding the accuracy of COVID PCR tests, as conducted by clinical laboratories in California, suggests that they are not sufficiently accurate regarding

Appendix C

infectivity risk to warrant the central role they play in the criteria the County has adopted for restricting activity. *Id.*

There are two major problems that render these criteria scientifically unjustified. *Id.* Both criteria used by the County -- the new daily cases number and the positivity number -- are premised on a measurement that includes many people who are identified as COVID positive but who pose little or no community transmission risk. Bhattacharya Decl., ¶35.

First, neither new daily cases number nor the positivity number represent random samples of the California population, but rather results from selected populations who have chosen to obtain testing. Bhattacharya Decl., ¶31. Without population representative sampling for testing, the number does not reflect the risk of transmission and thus is scientifically unjustified as a criterion for imposing restrictions on normal activities. *Id.*

Second, the criteria do not account for the fact that the RT-PCR tests, as used in most laboratories around the U.S., likely register positive test results even for non-infectious viral fragments. Bhattacharya Decl., ¶32. Although a positive test result indicates that a person has come into contact with the COVID genomic sequence or some other viral antigen at some point, the mere presence of the viral genome is not sufficient by itself to indicate infectivity. *Id.* A binary “yes or no” approach to the RT-PCR test will result in false positives, segregating large numbers of people who are no longer infectious and not a threat. Bhattacharya Decl., ¶35.

Appendix C

The mortality rates used by the County as a justification for the ban on outdoor dining similarly lack a rational medical and scientific basis. The best evidence on the COVID infection fatality rate (the fraction of infected people who die from the infection) comes from seroprevalence studies. Bhattacharya Decl., ¶36. Seroprevalence studies provide better evidence of the total number of people who have been infected than do case reports or a positive RT-PCR test, which both miss infected people who either are not identified by the public health authorities or do not volunteer for RT-PCR testing. *Id.* Because the County's mortality rates ignore unreported cases in the denominator, its fatality rate estimates based on case reports and positive test counts are substantially biased upwards. *Id.*

According to a meta-analysis by Dr. John Ioannidis of every seroprevalence study conducted with a supporting scientific paper (74 estimates from 61 studies and 51 different localities around the world), the median infection survival rate from a COVID infection is 99.77%. Bhattacharya Decl., ¶37. For COVID patients under 70, the meta-analysis finds an infection survival rate of 99.95%. *Id.* A newly released meta-analysis by analysts independent of Dr. Ioannidis' group, reaches qualitatively similar conclusions. *Id.*

In September 2020, the CDC updated its current best estimate of the infection fatality ratio—the ratio of deaths to the total number of people infected—for various age groups. Bhattacharya Decl., ¶39. The CDC estimates that the infection fatality rate for people ages

Appendix C

0-19 years is .00003, meaning infected children have a 99.997% infection survivability rate. *Id.* The CDC's best estimate of the infection fatality rate for people ages 20-49 years is .0002, meaning that young adults have a 99.98% survivability rate. *Id.* The CDC's best estimate of the infection fatality rate for people age 50-69 years is .005, meaning middle-aged persons have a 99.5% survivability rate. *Id.* The CDC's best estimate of the infection fatality rate for elderly people aged 70+ years is .054, meaning seniors have a 94.6% survivability rate. *Id.*

The CDC's current best fatality rate estimates for COVID patients who are symptomatic among patients less than 50 years old is 0.05% (5 in 10,000), 0.2% for patients between ages 50 and 64, and 1.3% for patients 65 and above. Bhattacharya Decl., ¶40. The infection fatality rates are lower than these numbers since only a fraction of patients is symptomatic. *Id.*

A study of the seroprevalence of COVID in Geneva, Switzerland provides a detailed age break down of the infection survival rate in a preprint companion paper: 99.9984% for patients 5 to 9 years old; 99.99968% for patients 10 to 19 years old; 99.991% for patients 20 to 49 years old; 99.86% for patients 50 to 64 years old; and 94.6% for patients above 65. Bhattacharya Decl., ¶41.

In all of California through August 2020, there have been only two deaths among COVID patients below age 18. *Id.* 74.2% of all COVID-related deaths occurred in patients 65 and older. *Id.*

Appendix C

The scientific evidence shows that, for non-elderly outdoor diners, the mortality risk from contracting the disease is very low. Bhattacharya Decl., ¶43. The infection survival rate is more than 99.8% for this population. *Id.* Even this number overestimates the risk of outdoor dining, since the probability of contracting the disease during an outdoor meal is much less than one, though difficult to estimate with available public health information. *Id.* For elderly congregants (age 70+), the mortality risk conditional on contracting the disease is higher, but still small, with 98.7% of infected elderly people surviving the infection, according to the infection fatality rate from the Santa Clara study. *Id.* These risks are commensurate with other risks that many people are prepared to take in their lives. *Id.* The risks are lower, in fact negligible, if precautions of wearing masks, social distancing, spacing and hand washing are followed. Bhattacharya Decl., ¶44.

The risks of COVID transmission should be considered against the substantial evidence that social eating provides significant and tangible psychological and physiological benefits for diners that are lost through the imposition of such scientifically and epidemiologically unjustified blanket and untargeted bans. Bhattacharya Decl., ¶45. A comprehensive survey of 17,612 men and 19,581 women over the age of 65 found that eating alone has been linked to a higher incidence of depression among adults, particularly those who live alone. *Id.* Eliminating the possibility of all outdoor dining, no matter the precautions taken, reduces or eliminates these important benefits. *Id.*

Appendix C

Public health recommendations regarding behavior by private actors (such as the decision to protest) should weigh the benefits of that behavior against the public health costs. Bhattacharya Decl., ¶50. If the benefits of the undertaking are important enough relative to the public health risks and care is taken to minimize those risks by adhering to the extent possible to safe practice guidelines promulgated by public health authorities, then the activity should receive approval by public health experts. *Id.*

(iii) Lyons-Weiler

Dr. James Lyons-Weiler (“Lyons-Weiler”) is a scientific researcher with a background in public health policy and statistical research. Weiler Decl., ¶1. He opines that the risk of COVID transmission in outdoor dining is minimal because of the outdoor setting, with breeze, humidity, and sunlight. Weiler Decl., ¶2.

As of November 27, 2020, 364,261 cases, including presumed cases as well as laboratory-confirmed cases, have been detected in the County, with 7,174 deaths attributed to COVID infection. Weiler Decl., ¶8. Transmission is understood to occur in enclosed spaces with poor ventilation. *Id.*

In the County, the overall infection case fatality rate is 0.0196 (7,174/364,261). Weiler Decl., ¶9. In the week of November 29, 2020, 37 new deaths and 5087 new cases have been reported, implying a much lower current infection case fatality rate (0.007). *Id.*

Appendix C

A person who tests positive for the presence of the virus may not be contagious. Weiler Decl., ¶18. That depends on viremia (viral load), which is supposed to be reflected in the PCR curve. *Id.* All of the available empirical estimates support a minimum false positive rate of 0.48, meaning that 45-48% of cases of COVID have nearly a zero risk of transmission. Weiler Decl., ¶19. Concern over person-to-person transmission from people who test positive (and are thus given a presumptive diagnosis of COVID) must be adjusted downward by at least 50%. *Id.* It is possible that most of the asymptomatic cases being reported are false positives. *Id.*

Dr. Bonnie Henry, B.C. Provincial Health Officer, reported to CBC Vancouver that the risk of becoming infected by walking through a cloud of droplets from someone who has sneezed outside while walking by is “negligible.” Weiler Decl., ¶20. These principles have been applied to the study of the outdoor transmission as of COVID. *Id.*

The China Study found for 318 outbreaks that only 1 of 7,324 cases was assumed to be due to outdoor transmission. *Id.* The Japan Study tested 110 COVID individuals and used contact-tracing to follow-up on secondary cases. Weiler Decl., ¶23. The data indicated that people are much more likely to catch COVID indoors; the authors estimated that a primary case was 18.7 times more likely to transmit the disease in a closed environment than in the open air. *Id.* The environments considered included exercise gyms, a restaurant boat, and eating spaces in tents with minimum ventilation. *Id.*

Appendix C

The CDC reports that there are 24,292 restaurants in the County. Weiler Decl., ¶124. When the seating capacity is limited to 60 patrons for all 24,000 County restaurants, about two to 450 new COVID cases every 30 days would be expected. Weiler Decl., ¶130. COVID has a >99.9% survival rate, and it would be reasonable to conclude that about 4.5 deaths might occur (worst case scenario). *Id.*

Scientists recognize that all forms of human death should be avoided if possible. Weiler Decl., ¶131. Nevertheless, all forms of human activity, including eating at restaurants, carry some risk. Weiler Decl., ¶133. The risks associated with COVID from outdoor dining are far smaller than the risks of choking or food poisoning. *Id.* While on average, there is about one death from COVID for every 124 days of outdoor restaurant operation -- assuming that every restaurant in the County is operating at full capacity with 40 outdoor seats -- about 250 people die each year in the County from either choking or food poisoning. *Id.* Given the information available on outdoor transmission, the risk is “lower than a convenience store”. Weiler Decl., ¶133.

(iv) Allen

Hubert A. Allen, Jr. (“Allen”) has a Masters of Science Degree in Biostatistics from Johns Hopkins University, Bloomberg School of Public Health and 35 years as a statistician and in public health. Allen Decl., ¶12. He acknowledges that COVID rages in November 2020 with daily records of cases, hospitalizations, and deaths. Allen Decl., ¶13. The question is what are the effective methods of controlling community spread of COVID? *Id.*

Appendix C

Allen opines that the County has no basis to close outdoor dining because the Department has provided no supporting evidence and/or scientific studies, data, or evidence that the operating of outdoor dining establishments poses an unreasonable risk to public health. Allen Decl., ¶5. The Department's own data provide no support for the planned shutdown of outdoor restaurant operations. Allen Decl., ¶6. The data tracks all non-residential settings at which three or more laboratory-confirmed COVID cases have been identified. *Id.* Of the 204 locations identified on this list, fewer than 7% are restaurants. *Id.* Based on the case data for October-November, it is clear that the County's increased cases are not due to the restaurant sector as restaurants only making up 3.10% of new infections during that period. Allen Decl., ¶7. Allen's independent analyses show little risk of COVID spread in restaurants, and no evidence that outdoor dining is the problem. Allen Decl., ¶8.

Allen opines that the state's California Risk Tier System and trigger definitions are too simple and too blunt as deliberating instruments. Allen Decl., ¶11. There was no effort to conduct a comprehensive risk-benefit analysis, which means looking not only at two metrics but also the economic consequences of a move to greater constriction of the economy and whether the constricting actions are targeting the greatest risk businesses and activities based on business sector data and statistics in the specific country. *Id.*

*Appendix C***(v) Kaufman**

Sean G. Kaufman (“Kaufman”) is a certified public health professional, behaviorist, health education and infectious disease specialist with over 25 years of expertise in both behavioral-based training and infectious disease risk mitigation in clinical, laboratory and other public health settings. Kaufman Decl., ¶1. He worked for the CDC from 1999 through 2006. Kaufman Decl., ¶5. He opines that the risk of COVID transmission in an outside environment is extremely low due to the wind, dryness, sunlight, and the mere dilution of quantities needed for an exposure to cause illness and no scientific evidence exists which would warrant wide-spread closures of outside dining. Kaufman Decl., ¶2.

Contrary to Davis’s statement that a CDC study is the “best data” in support of the Restaurant Closure Order, the CDC study is not specific to restaurants and does not support the conclusion that outdoor dining should be banned. Kaufman Decl., ¶¶ 16-17. The study showed that a subset of COVID patients reported that they had recently dined at restaurants more than the general population. *Id.* The CDC study does not make any distinction between indoor and outdoor dining, even though all available evidence on the transmission of any airborne illness suggests that this is a key factor. Kaufman Decl., ¶17.

There is no scientific evidence that County public officials have cited that demonstrates that there is a measurable risk of transmission of COVID in an outdoor dining situation when the appropriate safety measures are

Appendix C

implemented. Kaufman Decl., ¶19. With the precautions already implemented by most restaurants in the County prior to the Restaurant Closure Order -- socially distanced outdoor dining, masks, and temperature checks -- the transmission of the virus from one person to another is highly unlikely. *Id.* The Department's data only attributed 3.1% of County COVID cases to restaurants. *Id.*

The CDC has determined that masks can help prevent people infected with COVID from spreading the virus. Kaufman Decl., ¶25. Restaurants that subscribe to adequate precautions, such as outdoor air ventilation, temperature checks, requiring restaurant employees to wear masks and gloves, and social distancing, can safely and effectively prevent the spread of the virus. *Id.* A restaurant that offers outdoor dining is reducing disease transmission drastically. *Id.*

There is no rational and legitimate scientific or public health basis supporting the ban on outdoor dining in restaurants. Kaufman Decl., ¶21. In making public health decisions, it is important for health officials to weigh the overall risk of the given disease to the overall benefits of the imposed public health policy. Kaufman Decl., ¶22. The likelihood of symptomatic and pre- symptomatic transmission, reproduction rates, signs, symptoms, mortality, risks and other infectious disease characteristics of COVID in both child and adult populations both domestically and internationally does not rationally support the County's order. *Id.*

Appendix C

There is now a widespread scientific consensus that COVID does not affect all people equally. Kaufman Decl., ¶26. Over 41% of the COVID deaths in the United States have occurred in nursing homes. *Id.* And 94% of all deaths associated with the COVID condition involved victims with pre-existing underlying medical conditions—such as diabetes or heart disease. *Id.* It is now understood that most of the severe cases of the disease occur in individuals over the age of 65. *Id.*

The recent countywide ban on all indoor and outdoor dining in restaurants is counter to the purpose and mission of public health. Kaufman Decl., ¶27. Realistically, asymptomatic transmission of COVID is fairly low. *Id.* Logically, it is unlikely that a symptomatic person would choose to dine out at a restaurant, just as someone with flu symptoms is unlikely to opt for a restaurant dining experience versus staying home. *Id.*

The sweeping nature of the Department's order shows that it is not rationally targeted as an infectious disease control mechanism. Kaufman Decl., ¶29. There is no public health reason that a restaurant in an unaffected portion of a California county must be prohibited from operating outdoor dining because of an outbreak in an affected portion of a California county. *Id.*

*Appendix C***2. The Department's *Ex Parte* Evidence⁷****a. Jeffrey D. Gunzenhauser**

Jeffrey D. Gunzenhauser, M.D. (“Gunzenhauser”) is the County’s Chief Medical Officer/Medical Director. Gunzenhauser Decl., ¶1. While older adults and those with underlying medical conditions are at higher risk of severe illness and death from COVID, the virus can cause severe illness and death in individuals of any age. Gunzenhauser Decl., ¶9. Unusual blood clotting has also been observed in COVID patients, which can lead to pulmonary embolism, deep vein thrombosis, or stroke. COVID-related clotting often does not respond to standard treatment, such as blood-thinners. *Id.*

Emerging evidence suggests that some who recover from COVID experience serious effects that linger long after clearing the viral infection. Gunzenhauser Decl., ¶10. Some of these long-term effects may be attributable to organ damage caused by the COVID infection. *Id.* Scans and tests of some patients who recovered from COVID have shown damage to heart muscle and scarring in the lungs. *Id.* Some of this damage is believed to be the result of COVID-related blood clotting, including clots

7. CRA has filed written objections to the County’s evidence supporting its *ex parte* opposition and its OSC opposition. Most of these objections are made on relevance grounds. The court has considered only relevant evidence and need not rule on those objections. The court has ruled on the other objections, the vast majority of which were overruled. The clerk is ordered to scan and file the rulings.

Appendix C

that weaken blood vessels and very small clots that block capillaries. *Id.*

The effectiveness of treatment remains limited, and a widely available vaccine is still months away. Gunzenhauser Decl., ¶11. Additionally, despite improved treatment, the proportion of COVID patients requiring hospitalization has remained elevated above 10% throughout the pandemic and averaging about 10% in the most recent four months, with approximately one quarter to one third of hospitalized patients in the ICU, and approximately one half of those ICU patients requiring ventilators. *Id.*

There is consensus among epidemiologists that the most common mode of transmission of COVID is from person-to-person through respiratory droplets that are expelled when a person coughs, sneezes, or projects their voice. Gunzenhauser Decl., ¶13. There is no scientifically agreed-upon safe distance, but it is widely accepted that standing or sitting near an infectious person is riskier than being farther away. *Id.*

Not every exposure to the COVID virus will lead to infection. Gunzenhauser Decl., ¶15. Infection occurs when a person receives a dose of the virus large enough to overcome the body's defenses, which may vary from person to person. *Id.* Measures to control the spread of COVID should therefore include efforts to limit interactions in conditions that support exposure to higher viral doses. *Id.* Conditions that pose a particularly high risk are present in gatherings. *Id.* It is widely accepted that a gathering of any size increases the risk of community transmission.

Appendix C

Id. Risk increases with the size of the gathering because the more people who gather, the likelier it is that one or more infected persons will be present. *Id.* In turn, the number of people who are potentially exposed to the virus increases with the size of the gathering. *Id.*

The risk of transmission further increases when individuals are in close proximity for an extended period of time. Gunzenhauser Decl., ¶16. Risk is also increased when individuals are not wearing face coverings. *Id.* Close proximity to an unmasked infected person for a prolonged period of time presents an especially high risk of receiving a viral dose sufficient to cause COVID infection. *Id.*

Many cases of COVID are the result of secondary spread wherein an individual who did not attend a particular event contracts the virus as a result of an outbreak triggered by that event. Gunzenhauser Decl., ¶27.

Evidence indicates that gatherings of individuals from different households facilitate the spread of COVID. Gunzenhauser Decl., ¶26. While large gatherings present the greatest risk, any gathering of individuals poses a risk of transmission. *Id.* There is widespread consensus among public health experts that restrictions on gatherings are a necessary and effective tool for preventing the spread of COVID. *Id.* Principles of infection control have shown that systematic administrative control measures such as the prohibition of gatherings are more effective than measures dependent on widespread individual compliance as the latter are difficult to enforce and sustain and

Appendix C

will fail in protecting the public's health even if a small proportion is non-compliant. *Id.* Excluding symptomatic individuals from gatherings is an inadequate strategy because a substantial proportion of transmission, and perhaps even the majority, involves spread of the virus from persons who are pre-symptomatic or asymptomatic carriers of the virus. *Id.*

The County's experience bears out the effectiveness of systematic responses such as prohibitions on gatherings. Gunzenhauser Decl., ¶29. While the initial March 2020 state and County stay-at-home orders were in effect, the rate of COVID transmission dropped significantly. *Id.* When COVID spreads, it is believed that the average infected person goes on to infect two to four other people. *Id.* This is sometimes referred to as the "R number." When the stay-at-home orders were in effect, the County's R number dropped to less than one, indicating that on average each infected person would infect less than one other individual, leading to a reduction in the number of new daily cases. *Id.* Once the orders were lifted, the R number began increasing again. *Id.* As of November 23, 2020, the R number for the County was 1.27, meaning the daily number of new COVID cases is expected to increase over time. *Id.*

The County's experience demonstrates the risk in relying on widespread individualized compliance alone to control the spread of COVID. Gunzenhauser Decl., ¶30. During one weekend in June, Department inspectors found that 49% of bars and 33% of restaurants were not adhering to physical distancing protocols and that 54%

Appendix C

of bars and 44% of restaurants were not enforcing mask requirements. *Id.* In September, the County reported that 20% of restaurants inspected were violating COVID protocols. *Id.*

A key part of any public health department's response to outbreaks involves field investigations. The level of evidence required in a field investigation is not the same as that required in a clinical trial. Gunzenhauser Decl., ¶32. In a field investigation, the purpose is to determine what steps can be taken to stop or slow the spread of an infectious disease. *Id.* The purpose of public health decisions based on field investigations is to take actions in a timely manner that will prevent or curtail the spread of the virus or other disease-causing agent. *Id.* Often, officials will have to make decisions quickly and when information is limited, especially in comparison to other medical studies such as full-blown, clinical trials when the urgency of the situation is not so severe. *Id.*

The accepted approach to outbreak response is systemic and multi-pronged. The purpose of "reopening" sectors is to create spaces where people can resume normal activities without triggering uncontrolled spread of the virus. Gunzenhauser Decl., ¶34.

From November 1, 2020 to November 22, 2020, the County's seven-day average of new daily cases more than doubled from 1,216 per day to 3,099 per day. Gunzenhauser Decl., ¶36. On November 23, 2020, the County reported 6,124 new cases for that day alone, which is the most since the onset of the pandemic. *Id.* Between November 13

Appendix C

and November 27, hospitalizations of confirmed COVID patients increased by 101%. *Id.* This indicates widespread and uncontrolled community transmission of the virus. *Id.* Currently, approximately one in 145 County residents is infectious to others. During the week of November 16, that number was one in 250. *Id.*

The number of new cases and hospitalizations is expected to rapidly increase over the next 21 days which, without rapid public health interventions, will lead to a major increase in the number of persons with severe illness and the number of deaths and will stress the healthcare system and healthcare workers. Gunzenhauser Decl., ¶37. This stress will limit the availability of ICU beds for patients who may need them, including patients hospitalized for conditions other than COVID. Gunzenhauser Decl., ¶37.

On November 21, 2020, the County reported 4,522 new confirmed cases and 1,391 people hospitalized, 26% of whom were in the ICU. On November 22, 2020, the County reported that the five-day average of new cases surpassed 4,000 daily cases—the threshold for suspending in-person dining. Gunzenhauser Decl., ¶40.

On November 23, the County reported the highest number of COVID cases in a single day, at 6,124. Gunzenhauser Decl., ¶41. This brought the total number of known COVID cases in the County to 370,636, with 7,446 deaths. *Id.* As of November 29, 2,049 COVID patients were hospitalized in the County, with 24% in the ICU. *Id.* The day before, 1,951 patients were hospitalized, with 25% in the ICU. *Id.*

Appendix C

When community spread of the virus increases, the number of known and suspected COVID patients occupying both ICU and non-ICU beds increases as well. Gunzenhauser Decl., ¶43. On most days in June, there were fewer than 1,500 confirmed COVID cases in the County's hospital beds. *Id.* For ICU beds, that number rarely exceeded 500. *Id.* Because hospitalizations tend to lag behind by two to three weeks, those numbers did not yet fully reflect the increase in community spread that followed the County's reopening measures that began in May. *Id.* During the July surge, the number of confirmed COVID patients exceeded 1,500 every day, and often approached 2,000. *Id.* For the ICU, those numbers never dropped below 500 and at times approached 700. *Id.* On November 1, 2020, known and suspected COVID cases accounted for 721 non-ICU beds and 239 ICU beds. *Id.* By the day before Thanksgiving, those numbers had risen to 1,431 and 475, respectively. *Id.* From October 27 to November 27, 2020, COVID hospitalizations jumped from 747 to 1,893. *Id.* The current surge is accelerating much more rapidly than the July surge. New cases and hospitalizations in the current surge are increasing at double the rate seen in July. *Id.*

Data shows that infections among younger people are a significant contributing factor to the surge. The CDC found that the median age of confirmed COVID cases decreased from 46 years in May to 38 years in August. Gunzenhauser Decl., ¶44. That same study found that people in their twenties accounted for the largest proportion of cases (more than 20%) out of any age group. *Id.* Younger adults make up a significant proportion of workers in front-line occupations such as retail stores

Appendix C

and highly exposed industries such as restaurants and bars, where they have more contact with members of the public. *Id.*

Increased hospitalizations due to COVID, including ICU admissions, risk overwhelming the County's hospital capacity. Gunzenhauser Decl., ¶45. A secondary effect of the COVID pandemic is that some individuals delay seeking treatment for other conditions for fear of being exposed to COVID at healthcare facilities. Gunzenhauser Decl., ¶46. More people in the United States have died in 2020 than in an ordinary year, but not all of these excess deaths are attributable to COVID. *Id.*

Based on public health observations of the effects of the virus during this pandemic, hospitalizations typically increase two to three weeks after a spike in cases, and deaths increase thereafter. Gunzenhauser Decl., ¶49. Therefore, while the County is currently experiencing a surge in hospitalizations, it expects the current high case counts to lead to an even higher hospitalization rate in the coming weeks, which is why the Department took proactive steps to combat the virus: ordering the temporary closure of in-person dining and issuing a new Safer-at-Home Order. *Id.*

There is general consensus that in-person eating and drinking at restaurants, breweries, and wineries are among the riskiest activities in terms of COVID transmission. Gunzenhauser Decl., ¶48. Studies have demonstrated that COVID is less likely to be transmitted in outdoor spaces than in indoor spaces, where respiratory droplets and aerosols can accumulate. *Id.* The risk of

Appendix C

transmission is further reduced when outdoor diners are spaced away from each other, when restaurant staff wear face coverings and face shields, and when patrons only remove their face coverings to eat and drink. *Id.*

Studies show the role of masks in limiting the spread of COVID, and that situations where unmasked individuals from different households spend prolonged periods of time in proximity to one another present a higher risk of transmission than settings where one or more of these factors is absent. Gunzenhauser Decl., ¶51.

In-person dining and drinking are particularly high risk, and an effective response to the COVID pandemic must account for these risks. Gunzenhauser Decl., ¶52. By contrast, activities such as shopping in stores and working in offices present lower risk because they lack one or more of the risk factors associated with restaurant dining. *Id.* The County has identified 90 restaurant outbreaks, including 20 in the last four weeks. *Id.*

CRA cites figures from the Department's COVID webpage in claiming that the Department's data does not support the Restaurant Closure Order. Gunzenhauser Decl., ¶54. This data is dynamic, changes daily, and may not reflect real-time investigation counts for the settings listed. Gunzenhauser Decl., ¶55. Restaurants and other employers are required to notify the Department if three or more employees test positive for COVID in a 14-day period. *Id.* It can be difficult or impossible for these businesses to know if they have been visited by customers who tested positive in that same time span. *Id.*

Appendix C

While every business on the list identified three or more confirmed staff cases, the “Total Confirmed Non-Staff” column for the vast majority of businesses lists zero. This does not mean that there were no cases of COVID among non-staff (such as customers). *Id.* It simply means that the Department has not identified any laboratory-confirmed cases that can be linked to the outbreak. *Id.* Non-restaurant businesses will necessarily be over-represented in the data set on which CRA relies because other sectors have been reopened for longer, and some were never closed for in-person operations to begin with. Gunzenhauser Decl., ¶56. These businesses, such as grocery stores and other essential businesses, will necessarily be over-represented in any location-based listing of outbreaks. *Id.*

There is wide consensus that risk reduction in a pandemic does not require definitive proof that a particular sector or activity is the cause of an increase in cases. Gunzenhauser Decl., ¶58. Best practices dictate that public health departments identify those sectors and activities that present a higher risk of transmission and take steps to mitigate those risks, especially during a surge in cases and hospitalizations. *Id.*

b. Peter B. Imrey⁸

Peter B. Imrey (“Imrey”) is a biostatistician-epidemiologist. Imrey Decl., ¶1. The disciplines most central to understanding and combatting infectious

8. The Imrey declaration is attached to the Siegel declaration as Exhibit A.

Appendix C

diseases in populations outside a clinic or hospital are infectious disease epidemiology and public health disciplines such as health education and biostatistics. Imrey Decl., ¶13. Medical students and residents typically receive only a rudimentary orientation to epidemiology, biostatistics, and other public health disciplines. Imrey Decl., ¶13. Relatively long-term projections from infectious disease outbreak models are highly fallible. Imrey Decl., ¶21.

Bhattacharya’s studies seroprevalence survey-based claims of very low overall and age-specific COVID infection fatality rates, generally and specifically in California, remain matters on which there is no scientific consensus. Imrey Decl., ¶¶ 42, 43, 49, 50.

3. The Department’s OSC Evidence⁹

a. Davis

Respondent Davis is the County Health Officer and serves as the County’s medical expert regarding public

9. In support of its OSC opposition, the County requests judicial notice of: (1) a May 1, 2020 Department of Finance public release of a “California Tops 39.8 Million Residents at New Year per New State Demographic Report” (Ex. 1); (2) the Blueprint (Ex. 2); (3) a County press release titled “Public Health to Modify Health Officer Order to Restrict Dining at Restaurants, Breweries, Wineries and Bars Amid Surge in Cases – 5-Day Average of New Cases is 4,097” dated November 22, 2020 (Ex. 3); (4) the County’s Public Health Temporary Targeted Safer at Home Health Officer Order to Control of COVID-19 (Ex. 4); (5) a Blueprint update

Appendix C

on December 1, 2020 (Ex. 5); (6) a California State Workbook: COVID-19 Cases report, updated on December 2, 2020 (Ex. 6); (7) “About COVID_19 restrictions”, an update accessed on December 3, 2020 (Ex. 7); (8) a County press release titled “COVID-19 New Cases and Hospitalizations Continue to Break Records – L.A. County Public Health advises everyone to stay home as much as possible” dated December 3, 2020 (Ex. 8); (9) a December 3, 2020 California Department of Public Health Regional Stay At Home Order (Ex. 9); (10) a December 1, 2020 CDC article title “People with Certain Medical Conditions” (Ex. 10); (11) a Declaration of Peter B. Imrey dated August 31, 2020 and filed in the matter titled *South Bay United, et al. v. Newsom, et al.*, United States District Court case No. 3:20-cv-00865 BAS-AHG (Ex. 11); (12) a Declaration of Michael A. Stoto dated December 2, 2020 and filed in the matter titled *Burfitt v. Newsom, et al.*, Kern County case No. BCV-20-102267 (Ex. 12); (13) a Declaration of Dr. George Rutherford dated December 2, 2020 and filed in the matter titled *Burfitt v. Newsom, et al.*, Kern County case No. BCV-20-102267 (Ex. 13); (14) a Declaration of Marc Lipsitch dated on November 17, 2020 and filed in the matter titled *Tandon, et al. v. Newsom, et al.*, United States District Court (San Jose Division) case No. 20CV07108LHK (Ex. 14); (15) a Declaration of Yvonne Maldonado dated November 18, 2020 and filed in the matter titled *Tandon, et al. v. Newsom, et al.*, United States District Court (San Jose Division) case No. 20CV07108LHK (Ex. 15); (16) a Declaration of Arthur R. Reingold dated November 17, 2020 and filed in the matter titled *Tandon, et al. v. Newsom, et al.*, United States District Court (San Jose Division) case No. 20CV07108LHK (Ex. 16); (17) a September 11, 2020 CDC article titled “Morbidity and Mortality Weekly Report” (Ex. 17); and (18) a December 3, 2020 press release “California Health Officials Announce a Regional Stay at Home Order Triggered by ICU Capacity” (Ex. 18).

The requests are granted as to Exhibits 1-5, 8-10, and 16-18. Evid. Code §452(c). The requests are denied as to Exhibits 6-7, which are not official acts. With the exception of the Reingold

Appendix C

health matters. He provides guidance and direction across the Department. Davis Decl., ¶¶ 2-3.

From November 1 to November 22, 2020, the County's seven-day average of new daily cases more than doubled from 1,216 per day to 3,099 per day. Davis Decl., ¶7. Between November 13 and November 27, 2020, the number of hospitalized COVID patients increased by 101%. *Id.* As of December 3, 2020, there are 2,572 COVID patients hospitalized, 23% of whom are in the ICU. *Id.*

On November 23, 2020, the County reported its then-highest number of cases for a single day at 6,124. Davis Decl., ¶8. That record was broken on December 1, 2020 and again on December 3, 2020, when the County reported 7,854 new cases. *Id.* The average daily cases have

declaration (Exhibit 16), none of the other declarations (Exhibits 11-15) were made under penalty of perjury of the laws of California. While otherwise subject to judicial notice under Evid. Code section 452(d), they are inadmissible and therefore not relevant. The requests for Exhibits 11-15 are denied.

In an unauthorized sur-reply, the County asks the court to judicially notice a California Department of Public Health press release dated December 5, 2020 announcing the latest ICU capacity by region (Ex. 19), a Department press release dated December 5, 2020 stating that Southern California Region ICU capacity has fallen below 15% (Ex. 20), the Department's revised Restaurant Closure Order intended to conform with the Governor's Regional Order, effective December 6, 2020 and continuing for at least 21 days (Ex. 21), and a Department press release dated December 6, 2020 and stating that the County has surpassed 10,000 new cases for the first time (Ex. 22). Although unauthorized, the exhibits present the latest information available and are judicially noticed. Evid. Code §452(c).

Appendix C

increased by 225% since early November. *Id.* The County has also seen a jump in the daily death rate, which has increased by 92% since November 9, 2020. *Id.*

The majority of COVID hospitalized patients have been adults between the ages of 18 and 64. Davis Decl., ¶9. This is consistent with the high numbers of infections the County has seen in younger and middle-aged adults. *Id.* These numbers are consistent with the theory advanced by many experts that increased infections among young adults are driving the ongoing surge. Davis Decl., ¶10. This is believed to be due to young adults engaging in risky behaviors, including socializing with people outside of their household. *Id.* Although members of this younger and healthier cohort are less likely to die, they may still transmit and have transmitted the virus to older or other individuals at high risk for severe COVID illness. Davis Decl., ¶12.

The Department regrets that the preventative measures required to slow the spread of the ongoing pandemic have had an emotional and economic impact on businesses, families, and individuals and, at the same time, must implement measures to fulfill its day-to-day statutory responsibility for communicable disease control, based on appropriate preventive measures for the communicable disease hazards in the community. Davis Decl., ¶14.

Because COVID spreads between persons in close contact via droplets and, under special circumstances, via airborne transmission produced through speaking, shouting/singing, breathing, coughing or sneezing, Davis

Appendix C

issues orders that require persons and businesses to modify their behaviors so that human interactions can occur with less risk of transmission. Davis Decl., ¶15.

The County's restriction on outdoor dining is necessary because dining with others creates a circumstance where non-household members are gathering in close proximity without COVID infection control protections and typically for more than 15 minutes. Davis Decl., ¶18. Close proximity for more than 15 minutes are two of the three criteria for the definition of a close contact; the third is this occurring with a person who is knowingly or unknowingly infected with the COVID virus. *Id.*

The County recognizes that it has asked its businesses and more than ten million residents to make significant adjustments to fight this pandemic. Davis Decl., ¶19. Yet, in the considered opinions of the Department and its top communicable disease experts, these temporary adjustments and modifications are necessary to combat the ongoing surge in COVID cases and hospitalizations, and the resulting strain on the County's healthcare system. *Id.*

The rate at which a pathogen spreads in a community is determined by its reproductive number, sometimes referred to as the "R number" or simply "R." Davis Decl., ¶20. R describes the number of new cases directly generated by one case in a population— the number of other people a single infected person is expected to infect. *Id.* When R is below 1.0, the number of cases diminishes over time, and community spread eventually ends. *Id.*

Appendix C

When R is greater than 1.0, community spread increases over time. *Id.* That increase is exponential, not linear. *Id.*

Most public health experts believe that employing health measures such as distancing, gathering restrictions, and masking is scientifically, morally, and ethically justified and necessary. Davis Decl., ¶25. A minority of the scientific community has advocated for a more hands-off approach to the pandemic, in which the government does not employ measures such as physical distancing or limits on gatherings, and instead would let the virus spread unimpeded among the general population while (purportedly) protecting the most vulnerable. *Id.* This approach—allowing the virus to proliferate among healthy individuals so that herd immunity is achieved through “natural infection”—has been advanced by Plaintiffs’ expert Bhattacharya. *Id.* Bhattacharya’s opinion is a minority opinion in the scientific community. The Department strongly disagrees with the hands-off approach advocated by Bhattacharya in the Great Barrington Declaration and believes it to be contrary to accepted public health practice, public health ethical standards, and the public interest. *Id.*

A herd immunity approach similar to the one Bhattacharya advances was initially employed in Sweden with disastrous results. Sweden experienced a much higher rate of severe illness and death than neighboring countries, as well as a worse economic downturn and higher level of unemployment. Davis Decl., ¶27.

Appendix C

Most public health experts believe the hands-off approach would result in many more deaths and much more severe illness than would the approach followed by the County, the state, and most other jurisdictions. Davis Decl., ¶29. Most public health professionals would view any approach that would result in many preventable deaths to be unethical and would conclude that the overall societal costs of such an approach far outweigh any economic or other benefits. *Id.* The County's orders reflect these principles and are consistent with public health best practices. They provide for various sectors to reopen based upon their risk factors, while other sectors and activities are required to stay closed or reopen at reduced capacities. Davis Decl., ¶30.

Increased community spread leads to increasing numbers of infections, hospitalizations, and deaths. Davis Decl., ¶35. Community spread can be reduced by limiting activities that present a higher risk of exposure. *Id.* It is now well-established that gatherings of individuals from different households of any size presents a greater risk of COVID transmission, which increases with the size of the gathering. *Id.*

The purpose of the suspension of restaurant dining is to address the County's current emergency. Davis Decl., ¶31. Based on the data, the Department determined that the risks and harms of uncontrolled community spread, strain on the health care system, and excess preventable deaths outweighed the social and economic harm of a temporary suspension on in-person restaurant dining. *Id.*

Appendix C

Gunzenhauser, the Department's Communicable Disease Bureau director, identified a number of studies showing the role of masks in limiting the spread of COVID, and that situations where unmasked individuals from different households spend extended periods in close proximity to one another present a higher risk of transmission than settings where one or more of these factors is absent. Davis Decl., ¶33. *See* Gunzenhauser Decl. ¶¶ 51-52. Residents are instructed to wear masks even when outdoors because it is undisputed that COVID transmission can occur and has occurred in outdoor settings. Davis Decl., ¶34. While the risk of transmission is lower outdoors, it is still present. *Id.* This is why face coverings are recommended whenever individuals from different households are in proximity to one another, regardless of whether it is indoors or outdoors. *Id.*

A study on the effectiveness of physical distancing in controlling the spread of COVID shows that, in outdoor, well-ventilated spaces, such as an open patio at a restaurant, where unmasked persons have prolonged contact, present a moderate risk of transmission. Davis Decl., ¶37. Being outdoors reduces risk but does not eliminate it. *Id.* The risk of transmission outdoors is even more elevated at a restaurant where people are sitting close to each other for a prolonged period, not wearing, not distancing, eating and drinking and projecting their voices (and respiratory and aerosol droplets) toward each other. *Id.*

The benefits of being outdoors are reduced when a space is partially enclosed, such as is often the case on a

Appendix C

restaurant patio. Davis Decl., ¶38. Even partial enclosures affect airflow and the extent to which virus-containing respiratory droplets and aerosols can accumulate. *Id.* The benefits of being outdoors are further diminished when people from different households gather for prolonged periods without wearing masks. Davis Decl., ¶39. The Department consulted with members of the County's restaurant industry in an attempt to avoid an outdoor dining closure. *Id.* The Department proposed that restaurants take steps to ensure that all persons seated at a table were from the same household. *Id.* The Department was informed that restaurants had no way of verifying that information for their diners. *Id.*

A September 2020 CDC report found that adults testing positive for COVID were twice as likely to have reported dining at a restaurant within the past two weeks than those who tested negative. Davis Decl., ¶42. *See* Gunzenhauser Decl., ¶50. The fact that the study did not distinguish between indoor and outdoor dining does not undermine its usefulness and validity in determining the County's responses to the recent surge in COVID cases. Davis Decl., ¶42. The study looked at dining in any area designated by the restaurant, including indoor, patio, and outdoor seating. *Id.*

Studies show that asymptomatic cases can have higher viral loads and be more infectious than asymptomatic cases. Davis Decl., ¶43. Asymptomatic and pre-symptomatic spread of COVID are believed to be significant drivers of community spread, which was not understood earlier in the pandemic. Davis Decl., ¶44. "Viral load" refers to the

Appendix C

quantity of virus in a given volume of fluid, such as saliva. A person with a high viral load expels more virus, exposing others to a higher dose of virus. *Id.* While intuitively one would expect an asymptomatic person to carry a lower viral load, and thus be less infectious, there is data suggesting that is not the case with COVID. *Id.* A study published on November 24, 2020 found that asymptomatic patients had a higher viral load than symptomatic ones, and that those who were severely ill had lower viral loads. Davis Decl., ¶45. Other studies have found little to no difference in the viral loads of asymptomatic and symptomatic patients. *Id.* This suggests that asymptomatic individuals as a category are at least as infectious as those with symptoms. *Id.*

The County has not conducted a clinical study on how outdoor dining affects the transmission rates of COVID. Davis Decl., ¶48. The County has limited time and resources to conduct clinical studies during a pandemic when it must act swiftly and proactively to halt the spread of the disease. *Id.* Clinical studies provide minimal value in deciding how to respond to an emergency like the COVID pandemic. Davis Decl., ¶49. Clinical studies have a higher evidentiary standard and take longer to complete whereas field investigations are intended to identify those factors and behaviors that impose a higher risk of transmission, so that those factors can be quickly addressed. *Id.*

Davis made the decision to issue the Restaurant Closure Order based on the evidence that COVID spreads most easily when individuals from different households are in close proximity to one another for prolonged periods of time, without wearing masks. Davis Decl., ¶51. Restaurant dining was the only remaining setting where this was

Appendix C

largely still permitted, and while dining outdoors is less risky than dining indoors, the nature of dining together at a restaurant still presents a substantial risk of viral transmission. *Id.*

Based on the current projections and reported data, COVID is projected to be one of the leading causes of death in the County in 2020. Davis Decl., ¶53. For the period between March 15 and November 14, 2020, there were 339,000 excess COVID deaths in the United States—18% above normal. Davis Decl., ¶54. COVID is currently the third leading cause of death in the United States, behind heart disease and cancer. Davis Decl., ¶55. As of December 3, 2020, the County had recorded 7,782 COVID deaths. Davis Decl., ¶56.

Beyond hospitalizations and mortality rates, emerging evidence suggests that some number of patients who recover from active COVID infection experience long-term effects. Davis Decl., ¶57. The full extent of the long-term health consequences after recovering from COVID is not yet known, but the evidence available is concerning. *Id.* Scans and tests of some people who recovered from COVID have shown damage to heart muscle and scarring in the lungs, which is believed to be the result of COVID-related blood clotting. Davis Decl., ¶58.

The Department hoped the County would not reach a 4,000 case per day average after the initial outbreak of the pandemic in March 2020. Davis Decl., ¶64. Hospitalizations trail new cases by two to three weeks, meaning that when cases go up, hospitalizations will

Appendix C

increase a few weeks after that. Davis Decl., ¶65. While most people who contract the virus will not need to be hospitalized, the larger the number of infected people, the larger the number of people who will need hospital treatment. *Id.*

If the state's Regional Stay Home Order takes effect in the Southern California Region, this would mean that all restaurants in the County must be closed for in-person dining pursuant to state law, but could continue to service their customers through take-out, pick-up, or delivery. Davis Decl., ¶71. Based upon the current data being reported by the hospitals, counties, and California Department of Public Health, it is projected that the Southern California Region, of which the County is part, will cross this threshold within the next few days because ICU availability in the Southern California Region will be less than 15%. Davis Decl., ¶69.

b. Gausche-Hill

Marianne Gausche-Hill ("Hill") is the Medical Director for the County Department of Emergency Medical Services ("EMS") Agency and has served in that capacity since July 1, 2015. Hill Decl., ¶¶ 1, 5. The EMS Agency serves as the lead agency for emergency medical services system in the County and is responsible for coordinating all hospitals with emergency rooms in the County, both public and private. Hill Decl., ¶6.

There has been a recent surge in COVID cases and hospitalizations in the County. Hill Decl., ¶9. From

Appendix C

November 1 to November 22, 2020, the County's seven-day average of new daily cases more than doubled from 1,216 per day to 3,099 per day. Hill Decl., ¶10. On November 23, 2020, the County reported 6,124 new cases for that day alone, which was the most since the onset of the pandemic at that time. Hill Decl., ¶11. About a week later, on December 1, 2020, the County reported a record-breaking 7,593 new cases. *Id.* That same day, 46 deaths were reported, up from the average of 30 deaths per day the prior week. *Id.* Hospitalizations have also seen a marked increase in the last month. Hill Decl., ¶12. Between November 13 and November 27, 2020, hospitalizations of confirmed COVID patients increased by 101%. *Id.*

On average, there are approximately 14,000 licensed non-intensive care unit ("non-ICU") beds and 2,500 licensed intensive care unit ("ICU") beds available in the County at 70 designated 911-receiving hospitals. Hill Decl., ¶13. The number of beds can fluctuate from day-to-day depending on staff availability and other factors, including a mix of COVID and non-COVID patients and the need for cohorting (collecting in one place) COVID patients. *Id.*

Non-COVID patients occupy between 9,500 and 11,000 non-ICU beds on average, and between 1,000 and 1,500 ICU beds on average. Hill Decl., ¶14. The County tracks daily the number of COVID patients who are hospitalized. Hill Decl., ¶15. When the County started to reopen in the summer, there was a surge of COVID cases and hospitalizations. Hill Decl., ¶16. During the months of June and July, COVID positive patients and patients under investigation ("PUIs") occupied as much as 15% of

Appendix C

the County's non-ICU capacity and as much as 30% of the County's ICU capacity. *Id.*

The hospitalization rate began to decrease in August 2020 after the County re-implemented certain public health restrictions and the number of COVID hospitalizations decreased significantly. Hill Decl., ¶17. Between August and October 2020, COVID patients and PUIs occupied as low as 6% of the County's non-ICU capacity and as low as 14% of the County's ICU capacity. *Id.*

Beginning in November 2020, the number of COVID cases and hospitalizations began to surge again. Hill Decl., ¶18. The percentage of non-ICU and ICU beds occupied by COVID patients has increased every week:

Percentage of Non-ICU Beds Occupied by COVID Patients

November 1-7: 6%

November 8-14: 7%

November 15-21: 9%

November 22-28: 12%

Percentage of ICU Beds Occupied by COVID Patients

November 1-7: 15%

November 8-14: 16%

November 15-21: 19%

November 22-28: 24%

(Hill Decl., ¶18).

Appendix C

On November 1, 2020, approximately 960 COVID patients were hospitalized in ICU and non-ICU beds. Hill Decl., ¶19. On November 28, 2020, approximately 2,000 COVID patients were hospitalized in ICU and non-ICU beds. Hill Decl., ¶20.

These numbers have continued to rise in the beginning of December. Hill Decl., ¶21. On December 1, 2020, 2,690 COVID patients were hospitalized as follows: 573 COVID positive patients and 42 PUIs occupied ICU beds, a total of 615. *Id.* That means approximately 25% of the County's ICU beds were occupied by COVID patients. *Id.* Additionally, 1,858 COVID positive patients and 217 PUIs occupied non-ICU beds, a total of 2,075. *Id.* That means approximately 15% of the County's non-ICU beds were occupied by COVID patients. *Id.*

The number of COVID patients hospitalized in the County has nearly tripled. Hill Decl., ¶22. The strain on the healthcare system caused by COVID hospitalization is particularly concerning for ICU beds. ICU beds are generally reserved for the sickest of patients (acutely ill patients) and are staffed by specially trained medical professionals. Hill Decl., ¶23. As a result of the recent surge, the number of available ICU beds in the County has significantly decreased. In mid-October, there were 149 available ICU beds. Hill Decl., ¶24. The County's ICU bed availability in the month of November has decreased to less than 5% of total capacity, with 4.44% available from November 22-28. Hill Decl., ¶25.

Appendix C

The numbers and the trajectory show a fast-moving and substantial upward trend of COVID hospitalizations. Hill Decl., ¶26. In one week, the number of COVID hospitalizations has increased by greater than 40%. *Id.* The surge in hospitalizations will further stress the County’s healthcare system, which can manifest itself in many ways. Hill Decl., ¶28. Hospitals will have to change what they do day-to-day to meet the needs of their patients. *Id.* For example, an emergency room may have to be re-purposed to treat ICU patients, which will impact the number of day-to-day medical emergencies that can be treated. *Id.* The healthcare workforce will also be taxed heavily because staffing and related costs will significantly increase. *Id.* Medical workers also have to comply with very restrictive precautions, such as the use of personal protective equipment, to treat COVID patients. *Id.*

The County’s projections concerning the demand for non-ICU hospital beds shows that demand could exceed the County’s available beds before the end of the year and within a couple of weeks. Hill Decl., ¶¶ 31-32. Typically, when a shortage occurs, the availability of ICU beds diminishes first because there are fewer alternatives where ICU-patients can be treated effectively. Hill Decl., ¶33.

On December 3, 2020, the state announced its Regional Stay at Home Order (“Regional Order”). Hill Decl., ¶34. For the purposes of the Regional Order, the Southern California Region includes Imperial, Inyo, Los Angeles, Mono, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura counties.

Appendix C

Hill Decl., ¶35. The Southern California Region was at 82% ICU capacity as of December 3, 2020, meaning 18% ICU availability. Hill Decl., ¶36. If the surge continues unchanged, it is projected that the Southern California Region, of which the County is a part, will cross this threshold and have less than 15% ICU availability by the end of this week. *Id.*

c. Reingold¹⁰

Arthur I. Reingold (“Reingold”) is the Division Head of Epidemiology and Biostatistics at the University of California, Berkeley, School of Public Health and has previously worked at the CDC on the prevention and control of infectious diseases. Reingold Decl., ¶1.

The rise in cases nationwide is not just a reflection of increased testing. Reingold Decl., ¶9. If the rate of COVID were stable or decreasing, increased testing would produce a lower proportion of tests being positive, as presumably a larger and more representative selection of the population (not only those with symptoms or known exposure) would be included. *Id.* Since the case rate and the proportion of tests positive rate have increased simultaneously, data suggest that the increase in confirmed cases indicates a true rise in cases. *Id.*

COVID can be spread when an infected person talks, breaths, coughs, sneezes, and the like, expelling droplets

10. The Reingold declaration is Exhibit 16 to the County’s request for judicial notice in support of its opposition to the OSC.

Appendix C

that can transmit the virus to others in their proximity. Reingold Decl., ¶18. Because of this, COVID can spread rapidly in crowded conditions, particularly indoors. *Id.* It is generally believed that such droplets can infect people who are within six feet of an infected person, and on this basis, it is recommended that people maintain at least six feet of distance from each other. *Id.*

There is now very strong evidence that the virus can also be aerosolized, such that microscopic droplets containing the virus are expelled into the air by breathing, talking, singing, sneezing, and coughing; they remain in the air; and they can be inhaled by others who subsequently come into contact with the air. Reingold Decl., ¶19. Multiple studies have shown that COVID may remain airborne for extended periods. *Id.* One study found that COVID remained viable in aerosols for the entire three-hour experiment. *Id.* Another analysis led by researchers at Tulane University concluded that “preliminary data suggest that COVID is resilient in aerosol form,” and that respirable-sized aerosols could retain infectivity for up to 16 hours. *Id.*

This research is consistent with studies showing that sharing indoor space increases the risk of infection. Reingold Decl., ¶20. When indoors, it is more likely that one will inhale respiratory droplets and aerosols from an infected person. *Id.* When outdoors, more frequent air movement disperses and dilutes respiratory droplets and aerosols making transmission less likely. *Id.* The CDC currently advises that activities are safer when held in outdoor spaces. *Id.*

Appendix C

Some individuals who are infected with COVID but do not develop symptoms are nonetheless infectious and can transmit the virus to others. Reingold Decl., ¶23. Those who do develop symptoms may be infectious up to 48 hours before the onset of symptoms. *Id.* This means that isolating only persons known to be ill with COVID or with symptoms of COVID will not stop the spread of COVID infection. *Id.*

It is currently unknown if those who have had COVID develop protective immunity from reinfection. Reingold Decl., ¶24. Only those who have been infected and recovered are possibly immune; there is no known population with pre-existing immunity to the virus. *Id.* Anyone who has not yet been infected with COVID is likely susceptible to infection. *Id.* For those who have been infected, it is unknown if any protective immunity is permanent, will exist for only a limited time, and whether reinfection is possible. *Id.* Research has found that the level of antibodies in those recovering from the virus appears to decline within a few months of infection, which may indicate a limited period of protective immunity. *Id.*

Epidemics and pandemics occur when the number of infections grows exponentially. Reingold Decl., ¶33. When describing exponential growth rates, epidemiologists often refer to the doubling period of a disease, which is the amount of time required for the number of infections to double. *Id.* The shorter the doubling time, the greater the growth rate of the epidemic/pandemic. If exponential growth rates are not moderated, the number of infections and resultant illnesses can quickly overwhelm a given

Appendix C

health system. *Id.* For this reason, public health officials often prioritize efforts to reduce the growth rate of infections, including lengthening the doubling time. *Id.* Reducing the growth rate of infections and resultant disease is achieved through both official policies and changes to individual social behavior. *Id.*

Easing or ending restrictions on the community spread of the COVID virus would lead to an increase in cases and risk exponential growth in the spread of the virus. Reingold Decl., ¶34. This would increase serious and potentially long-term illness and death caused by the disease. *Id.* It would also risk overburdening the healthcare system, particularly in areas where critical care facilities and beds are limited. *Id.*

It is true that development of herd immunity is another means through which dissemination of certain viruses in a population can cease. Reingold Decl., ¶35. Herd immunity occurs when a high percentage of the population becomes immune to an infectious agent such that the spread is dramatically slowed as infected persons become deadends for the infectious agent. *Id.* Approximately 40-95% of a population must be immune in order to achieve herd immunity, depending on the infectiousness of the agent. *Id.*

There are significant risks to pursuing a herd immunity approach without a vaccine, which is why the vast majority of epidemiologists and infectious disease experts reject the approach for COVID. Reingold Decl., ¶36. There is the risk that it would not work, as it has not been confirmed that those who have had the virus develop protective immunity. *Id.* Even if it does work, because

Appendix C

herd immunity may take a year or more to develop in the population, it is unlikely to prevent the spread of the virus in the near future. *Id.* The approach would result in very significant increases in illnesses, hospitalizations, and deaths for a disease that has already killed almost 250,000 over ten months—despite a concerted public health response to minimize those deaths. *Id.*

4. Reply Evidence

Davis misinterprets the CDC study in claiming that it has relevance to outdoor dining. Weiler Reply Decl., ¶6. The CDC study did not ask what risks come with outdoor dining compared to indoor dining. *Id.* Nor did it parse out the relative contribution of outdoor and indoor dining to the overall risk of transmission. Weiler Reply Decl., ¶¶ 7-8. Contrary to Davis’ statement, it cannot possibly be used to support a finding that outdoor dining is less or more risky than indoor dining, or whether outdoor dining poses a risk at all. *Id.*

Davis’s use of data related to the “number of cases” and the “number of deaths” is insufficient to show that outdoor dining presents any significant risk for increased COVID transmission. Weiler Reply Decl., ¶9. Population sizes change over time and increased testing or changes in testing protocols could lead to an artificially higher absolute number of positive tests. *Id.* In addition, the numbers reported in Davis’s declaration do not address the demonstrable false positive rate in the test results. Weiler Reply Decl., ¶10. Unless we know the false positive rate of RT-PCR testing in the County, we cannot know what

Appendix C

percentage of “laboratory confirmed” and “asymptomatic” cases are actually false positives. *Id.* Because Davis’ data does not account for false positives and because the CDC shifted in April to count all positive test results showing the presence of virus as COVID, some of the counted cases will be other infections with similar symptoms, including viral pneumonia, bacterial pneumonia, or pneumonia from other coronaviruses. Weiler Reply Decl., ¶11.

Crucially, Davis provides no estimates for expected new cases from outdoor dining. In other words, his data does not answer the single most important question whether any future spread may be attributed to outdoor dining rather than other activities. Weiler Reply Decl., ¶13.

Hill’s presentation of statistics as to the amount of beds occupied by COVID patients in both ICU and non-ICU settings does not provide relevant statistical context. Weiler Reply Decl., ¶14. There is seasonal variation in hospitalizations, and other diseases have similar symptom profiles to COVID, these figures are not meaningful without a comparison to hospitalizations in prior years, expressed per capita and per available bed. *Id.*

Hill does not provide any data on the key factor relevant to percentages and numbers of ICU beds being utilized. Weiler Reply Decl., ¶15. As both the total population size and the number of hospital beds both change over time, the relevant data set needs to address the number of hospital beds per capita. *Id.*

Appendix C

Hill's projection model fails to consider several key parameters, including changes in population size, the impact of changes in the number of tests applied and changes in testing protocols on the number of cases, increased immunity due to past exposure within the relevant population, and improvements over time in the medical care and treatment of COVID. Weiler Reply Decl., ¶17.

5. The Governor's December 3, 2020 Regional Order

The Governor issued the Regional Order on December 3, 2020. County Opp. to OSC, RJN Ex. 9. The Governor's Regional Order takes effect on December 5, 2020 and is triggered for the Southern California Region if its ICU capacity falls below 15%. The Governor's reasoning is that "we are at a tipping point" and "we need to take decisive action now to prevent California's hospital system from being overwhelmed in the coming weeks." The Governor acknowledged the burden the Regional Order will place on small businesses that are struggling and is helping those businesses with grants and tax relief to get through the month.

The Regional Order is effective for three weeks after the trigger and affects numerous activities and businesses. In pertinent part, the Regional Order prohibits restaurant dining, indoor or outdoor, permitting only take-out or pick-up. The Regional Order ends if a region's ICU capacity projection for four weeks (three weeks after the order) is above or equal to 15%. Conversely, the Regional Order

Appendix C

continues if the ICU projection for that period is less than 15%. The assessment will occur on a weekly basis.

D. Analysis

Petitioners CRA and MEC seek a preliminary injunction enjoining the County and the Department from enforcing the Restaurant Closure Order on the ground that it is an improper use of emergency powers. The County and Department oppose.

1. Standard of Review

The notion that a municipality's health officer has broad authority is well-established and long-standing. *Jacobson v. Commonwealth of Massachusetts*, (“*Jacobson*”) (1905) 197 U.S. 11, 25. “[A] community has a right to protect itself against an epidemic of disease which threatens the safety of its members.” *Id.* at 27. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety. *Ibid.*

The health officer's authority is not unbridled. Courts have the duty to evaluate an exercise of that authority to ensure actions taken have a “real and substantial relationship” to public health and safety:

“[I]f a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, *has no real or substantial*

Appendix C

relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.” *Id.* at 31 (emphasis added).

In addition, the health officer cannot engage in a “plain, palpable invasion of rights” secured by the Constitution or act arbitrarily or oppress. *Id.* at 31, 38. See also *Jew Ho v. Williamson*, (C.D. Cal. 1900) 103 F. 10 (whether the regulation in question is a reasonable one and directed to accomplish the apparent purpose is a question for the court to determine); *Cross Culture Christian Ctr. v. Newsom*, (E.D. Cal. 2020) 445 F. Supp. 3d 758, 766; *Six v. Newsom*, (C.D. Cal. 2020) 462 F. Supp. 3d 1060, 1068 (upholding physical distancing measures to slow down spreading of the virus).

As Justice Gorsuch recently explained, the *Jacobson* test is equivalent to rational basis review. See *Roman Catholic Diocese, supra*, 2020 WL 6948354 at *4 (Gorsuch, J. concurring). In the same case, the high court reaffirmed that because the “Constitution ‘principally entrusts the safety and the health of the people to the politically accountable officials of the States’[,]. . . courts therefore must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic. *Id.* at *8 (Kavanaugh, J. concurring).

Petitioners CRA and MEC both initially agree that their challenge to the Restaurant Closure Order, which is the exercise of the Department’s authority in a legislative

Appendix C

capacity, is a substantive due process claim subject to a rational basis standard of review.¹¹ CRA App. at 14; MEC App. at 13-14. In reply, MEC relies on *County of Butler v. Wolf*, (W.D. Pa. Sept. 14, 2020) 2020 WL 5510690 at *9, to argue that the deferential *Jacobson* standard no longer applies nine months into the pandemic. MEC Reply at 7.

For purposes of equal protection claims, the rational basis test does not allow a party to probe the decision-making processes of the government because the Constitution “does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification.” *Nordlinger v. Hahn*, (1992) 505 U.S. 1, 15; *FCC v. Beach Communications, Inc.*, (1993) 508 U.S. 307, 315. When a court applies rational basis review, “a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” *Warden v. State Bar*, (1999) 21 Cal.4th 628, 650. While the rational basis test is forgiving, the government action must still bear at least a rational relationship to some legitimate end. *Romer v. Evans*, 517 U.S. 620, 631(1996). Rational basis review is a forgiving standard for government acts, but it “is not a toothless one” *Mathews v. Lucas*, (1976) 427 U.S. 495, 510.

11. MEC also argues that the Restaurant Closure Order violates the California Constitution by interfering with its constitutional right to operate its business and is subject to strict scrutiny review. MEC Op. Br. at 6. As the County correctly notes (MEC Opp. at 12), neither the state nor the federal Constitution guarantees the unrestricted privilege of conducting business as one pleases. *Ex parte Maki*, (1943) 56 Cal.App.2d 635, 641.

Appendix C

The Due Process Clause of the Fourteenth Amendment includes a substantive component that bars arbitrary, wrongful, government action “regardless of the fairness of the procedures used to implement them.” *Zinermon v. Burch*, (1990) 494 U.S. 113, 125. The “core of the concept” of substantive due process is the protection against arbitrary government action. *Hurtado v. California*, (1884) 110 U.S. 516, 527 (1884). Indeed, “the touchstone of due process is protection of the individual against arbitrary actions of government” *Id.* When executive branch agencies act in a legislative capacity, courts evaluate whether the challenged agency action has been “arbitrary, capricious, or entirely lacking in evidentiary support.” *Davies v. Contractors’ State License Bd.*, (1978) 79 Cal. App. 3d 940, 946. While courts do not weigh evidence when applying this test, they must ensure that the agency has adequately considered all relevant factors and has demonstrated a rational connection between those factors and the choice made. *Carrancho v. California Air Resources Board*, (“*Carrancho*”) (2003) 111 Cal. App. 4th 1255, 1265.

“[A]ctions which are irrational, arbitrary or capricious do not bear a rational relationship to any end.” *Wolf, supra*, 2020 WL 5510690 at *26. In *Wolf*, a federal district court found constitutional violations in a governor’s COVID emergency restrictions limiting the number of people permitted to attend gatherings and determining which businesses could remain open based on whether they are “life-sustaining” in nature. Plaintiff’s challenge was rooted in claims of equal protection, due process, and First Amendment rights. The closures were temporary but had no certain end date. With respect to the open

Appendix C

ended uncertainty, the district court recognized the harm to the that would result to businesses: “A total shutdown of a business with no end-date and with the specter of additional, future shutdowns can cause critical damage to a business’s ability to survive, to an employee’s ability to support him/herself, and adds a government-induced cloud of uncertainty to the usual unpredictability of nature and life.” *Id.* at *26.¹²

2. Probability of Success

a. Petitioners’ Position

(i). Petitioners’ Evidence

Petitioners’ evidence may be summarized as follows. The CDC’s “Considerations for Restaurant and Bar Operators,” updated November 18th, 2020, states that outdoor dining may occur with relative safety at restaurants if precautionary measures are observed, including but not limited to, social distancing and mask wearing by servers and by patrons (when not eating). Bhattacharya Decl., ¶20. The CDC includes outdoor dining

12. Both CRA and MEC cite the recent United States Supreme Court case of *Roman Catholic Diocese, supra*, 2020 WL at 6948354 (CRA Op. Br. at 9; MEC Op. Br. at 13), but that case concerned the First Amendment rights of churches, synagogues, and their members with respect to COVID restrictions for which the high court applied a strict scrutiny standard of review. As such, it has little bearing on this case except to highlight that the government does not have unfettered discretion to restrict activities during a pandemic.

Appendix C

in the second lowest tier of risk, and notes that even this risk can be mitigated by reasonable accommodations such as spacing tables appropriately, encouraging mask wearing by servers, frequent sanitizing of surfaces, and other actions that are well within the capability of LA County restaurants. *Id.*

The County's Restaurant Closure Order has no scientific justification for imposing stricter requirements on these activities. The Department's available data does not contain any epidemiological or other model that shows prohibiting outdoor dining on a countywide basis has any relationship to avoiding circumstances that challenge the healthcare delivery system's ability to deal with a surge with space, supplies, and staff. Bhattacharya Decl., ¶28. The County has no basis to close outdoor dining because the Department has provided no supporting evidence and/or scientific studies, data, or evidence that the operating of outdoor dining establishments poses an unreasonable risk to public health. Allen Decl., ¶5.

The safety of outdoor dining has been well-established by numerous studies, including the China Study and the Japan Study. *See* Barke Decl. ¶¶ 7-10. The China Study found that only one of the 318 identified outbreaks – two infected persons – implicated an outdoor environment. *See id.* ¶ 8. The Japan Study found that closed, not open, environments contribute to the secondary transmission of COVID and that the odds of transmission of COVID in a closed environment was 18.7 times greater than an open-air environment. *See id.*, ¶ 9. An article from the Mayo Clinic described a general medical consensus

Appendix C

regarding “safe outdoor activities during the COVID-19 pandemic.” *See id.* ¶10. According to this article, “when the weather is appropriate to be outside, patio dining can be a good outdoor option. Outdoor patio dining at uncrowded restaurants where patio tables are spaced appropriately is safer than indoor dining.” *Id.* CRA Op. Br. at 18.

The Department’s own data provides no support for a shutdown of outdoor restaurant operations. Allen Decl., ¶6. The data tracks all non-residential settings at which three or more laboratory-confirmed COVID cases have been identified. *Id.* Of the 204 locations identified on this list, fewer than 7% are restaurants. *Id.* Based on the case data for October-November 2020, it is clear that the County’s increased cases are not due to restaurants, which only make up 3.10% of new infections during that period. Allen Decl., ¶7.

Contrary to Davis’s statement that the CDC study is the “best data” in support of the Restaurant Closure Order, the CDC study is not specific to restaurants and does not support a conclusion that outdoor dining should be banned. Kaufman Decl., ¶¶ 16-17. The study showed that a subset of COVID patients reported that they had recently dined at restaurants more than the general population. *Id.* The CDC study made no distinction between indoor and outdoor dining, even though all available evidence on the transmission of any airborne illness suggests that this is a key factor. Kaufman Decl., ¶17.¹³

13. The CDC report also is not specific to restaurants, let alone outdoor dining. *See* Kaufman Decl. ¶ 17; Ellis Decl., Ex. 20. At a general level, that study showed that a subset of COVID patients reported they had recently dined at restaurants more than

Appendix C

As a result, County public officials have cited no evidence that demonstrates that there is a measurable risk of transmission of COVID in an outdoor dining situation when the appropriate safety measures are implemented. Kaufman Decl., ¶19. With the precautions already implemented by most restaurants in the County prior to the Restaurant Closure Order -- socially distanced outdoor dining, masks, and temperature checks -- the transmission of the virus from one person to another is highly unlikely. *Id.*

The Department has provided no indication that it has taken into account any of the economic, social, and public health costs of restricting outdoor dining. Bhattacharya Decl., ¶29. Basic standards of public health policy design require a comparison of both costs and benefits of a policy to justify it from a scientific and ethical point of view. *Id.* A scientifically justified policy must explicitly account for these costs – including an explicitly articulated economic analysis – in setting, imposing and removing criteria for business restrictions such as the blanket prohibition on outdoor dining. *Id.*

The risks of COVID transmission should be considered against the substantial evidence that social eating provides

the general population. Kaufman Decl. ¶ 17. The CDC report also was limited to adults in eleven participating healthcare facilities and did not take into specific factors about the County, such as its climate, that might make it safer than other places for outdoor dining. For example, outdoor areas in Los Angeles may not need to be enclosed in the same way as a restaurant patio in Boston. *Id.* CRA Op. Br. at 15-16.

Appendix C

significant and tangible psychological and physiological benefits for diners that are lost through the imposition of such scientifically and epidemiologically unjustified blanket and untargeted bans. Bhattacharya Decl., ¶45. A comprehensive survey of 17,612 men and 19,581 women over age 65 found that eating alone has been linked to a higher incidence of depression among adults, particularly those who live alone. *Id.* Eliminating the possibility of all outdoor dining reduces or eliminates these important benefits. *Id.*

There is no rational and legitimate scientific or public health basis supporting the ban on outdoor dining in restaurants (Kaufman Decl., ¶21) and the Restaurant Closure Order is inconsistent with the CDC's guidance. Bhattacharya Decl., ¶20. Restaurants in the County can safely permit outdoor dining by following the CDC guidelines. Bhattacharya Decl., ¶20. The likelihood of symptomatic and pre-symptomatic transmission, reproduction rates, signs, symptoms, mortality, risks and other infectious disease characteristics of COVID in both child and adult populations do not rationally support the Restaurant Closure Order. Kaufman Decl., ¶22.

(ii). Petitioners' Argument

From this evidence, Petitioner CRA argues that restaurants across the County are on the verge of total economic collapse, with 89.6% of surveyed restauranteurs are at risk of closure. The outdoor dining ban is not the result of any rational thought process about how to mitigate the spread of COVID, but rather is a politically-

Appendix C

motivated decision to create merely the appearance of action. CRA Op. Br. at 8. The County has no data showing that outdoor dining is a significant risk for spreading COVID. CRA Op. Br. at 9.

The Restaurant Closure Order irrationally singles out the restaurant industry and its hundreds of thousands of workers. The County's explanation for the decision is the rise in positive COVID test results, even though a positive test does not show that the person actually is ill; a positive test includes persons who are asymptomatic as well as false positives. Nor does the order consider the number of deaths in the County. The County did not bother to assess evidence particular to outdoor dining or even consider the relative risks and benefits of such a sweeping order. Kaufman Decl. ¶¶ 15-19. CRA Op. Br. at 14-15.

Allowing restaurants to operate with outdoor dining has not produced significant coronavirus cases to date. The County's own data shows that restaurants are responsible for only 3.10% of new coronavirus infections, paling in comparison to sectors which have not been shut down like groceries, manufacturing, automotive, construction, aviation, and more. *See* Kaufman Decl. ¶ 19; Allen Decl., ¶¶ 6-9. Simply put, there is no scientific evidence that there is a significant risk of transmission of COVID in an outdoor dining situation when the appropriate safety measures are implemented. *See* Kaufman Decl. ¶¶ 21-31; Barke Decl. ¶ 7; Bhattacharya Decl. ¶¶ 18-29. In a recent interview, Health Director Ferrer, who is not a medical doctor, presented the County's rationale for the Restaurant Closure Order: "I think one of the sad realities

Appendix C

is that we've never seen a rate of increase as high as we've just seen. We know places where people are eating are places where transmission is easiest, and most likely." *See* Ellis Decl. Ex. 14. These assertions are not based on science or data showing restaurants as the cause of the problem. CRA Op. Br. at 15.

The Restaurant Closure Order actually is likely to exacerbate the spread of COVID. The Restaurant Closure Order will drive residents indoors, to gather with friends and family in their homes. *See* Bhattacharya Decl. ¶¶ 22, 45-46; Kaufman Decl. ¶ 28; Allen Decl. ¶ 10. Those indoor gatherings easily become super-spreader events; the scientific and medical data clearly show the danger of indoor gatherings. *See, e.g.*, Barke Decl. ¶¶ 7-11; Kaufman Decl. ¶ 28. These are the exact kind of unintended consequences that would have been avoided had the County considered actual evidence prior to the Restaurant Closure Order. CRA Op. Br. at 18-19.

In addition to the lack of scientific evidence, the Department has provided no indication that it has estimated or otherwise considered any of the economic, social and public health costs of restricting outdoor dining. Basic standards of public health policy require a comparison of both costs and benefits of a policy to justify it from a scientific and ethical point of view. *See* Kaufman Decl. ¶¶ 21-22, 29-31; Bhattacharya Decl. ¶ 29. A scientifically justified policy must explicitly account for these costs – including an explicitly articulated economic analysis – in setting, imposing, and removing criteria for business restrictions such as the blanket prohibition on outdoor dining. *Id.* CRA Op. Br. at 16.

Appendix C

CRA argues that the Restaurant Closure Order is an unmistakable example of the Politician’s Fallacy: “1. We must do something. 2. This is something. 3. Therefore, we must do this.” The actual scientific evidence—available to Respondents but ignored by them—shows that transmission of COVID in an outdoor dining scenario is negligible. *See* Lyons-Weiler Decl. ¶¶ 20-34; Barke Decl. ¶¶ 7-11; Bhattacharya Decl. ¶¶ 36-44; Kaufman Decl. ¶¶ 19-31. If closing an entire industry without evidence of any significant quantum of disease spread is not arbitrary, what is? CRA Op. Br. at 16-17.

CRA concludes that the Restaurant Closure Order infringes CRA’s fundamental rights under the Fifth and Fourteenth Amendments to pursue common professions. *See Truax v. Raich*, 239 U.S. 33, 41 (1915) (the Fourteenth Amendment secures “[t]he right to work for a living in the common occupations of the community”). “The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within both the ‘liberty’ and the ‘property’ concepts of the Fifth and Fourteenth Amendments.” *Greene v. McElroy*, (1959) 360 U.S. 474, 492 (citing cases). CRA Op. Br. at 19.¹⁴

14. CRA also makes a disparate treatment argument that the County did not close (a) parks or picnic tables for private gatherings and outdoor dining, (b) indoor nail and hair salons, tattoo parlors, and barbershops, (c) indoor day camps—where attendees undoubtedly eat meals, (d) indoor music, film, and television production, and (e) outdoor fitness centers, even though patrons are undoubtedly encouraged to drink beverages while exercising. *See* Restaurant Closure Order, §§ 3(a)(ii), 9.5(a), (b), (c), (f), (h). CRA argues that

Appendix C

MEC makes similar arguments concerning the measurable scientific and statistical data showing that outdoor dining with the correct precautionary measures is safe and has no correlation with the spread of COVID. Even under the most lenient standard of constitutional review, no rational reason exists for singling out Plaintiff's business activities. There is no rational reason to continue to ban MEC and the restaurant industry from providing outdoor dining as they continue to follow the County's recommended precautionary measures while doing so. MEC Op. Br. at 15-16. Not only will the ban not avert the crisis, but it has already contributed to the crisis of unemployment and severe economic damages and harm. MEC Op. Br. at 16.

MEC cites *Jew Ho v. Williamson*, (“*Jew Ho*”) (C.C. Cal. 1900) 103 F. 10 and *Wong Wai v. Williamson*, (“*Wong Wai*”)(C.C. Cal. 1900) 103 F. 1, where the courts found that public health officials could not quarantine 12 blocks of San Francisco Chinatown because of nine deaths due to bubonic plague. The courts found that there were more than 15,000 people lived in the twelve blocks to be quarantined. The courts found it arbitrary and unreasonable to shut down the ability of over 15,000 people to make a living because of nine deaths where the complainant had never contracted the bubonic plague, had

these activities and locations are much more likely to spread COVID than restaurants. *See* Kaufman Decl. ¶¶ 16-18, 30; Allen Decl. ¶¶ 6-9. CRA contends that, by singling out restaurants for disparate treatment without a rational basis, the Restaurant Closure Order violates CRA's members' equal protection rights under the Fourteenth Amendment. CRA Op. Br. at 16-17.

Appendix C

never been exposed to the danger of contracting it, and had never been in any locality where the bubonic plague existed. *Id.*¹⁵

MEC notes that California has a population of almost 40 million. As of November 29, 2020, California has sustained a total of 19,121 COVID deaths. This means one death for every 2,066 inhabitants. MEC concludes that, if public health officers were denied the ability to stop the people of Chinatown from operating their businesses for one death for every 1,666 inhabitants, then the County should not be allowed to deny restaurants the ability to make a living when the death rate is even lower than it was in *Jew Ho* and there is zero evidence that outdoor dining has contributed to the spread of the virus. MEC Op. Br. at 16.

According to the CDC, in the last seven days, California is ranked 44th in the nation for per capita COVID deaths. There are 43 other states with a higher COVID death rate than California. This data undercuts the need for the Department's draconian measures

15. The County properly distinguishes *Jew Ho* as a case which dealt with a discriminatory, arbitrary, and counterproductive quarantine enacted in response to a seemingly illusory public health threat. The quarantine's failure to limit travel within the quarantined district counterproductively increased the risk of bubonic plague transmission and the quarantine also impermissibly "discriminate[d] against the Chinese population of this city, . . . in favor of the people of other races." *Id.* at 21-23. The County points out that the companion case, *Wong Wai*, *supra*, 103 F. at 1, is similar. Opp. to MEC Ex Parte at 18.

Appendix C

targeting the restaurant industry. *See Ex Parte Jentzsch*, (1896) 112 Cal. 468, 474-75 (there must be a substantial reason why [a law] is made to operate only upon a class, and not generally upon all). MEC Op. Br. at 17.

b. The County's Position

(i). The County's Evidence

The County's evidence opposing the *ex parte* applications may be summarized as follows.

While older adults and those with underlying medical conditions are at higher risk of severe illness and death from COVID, the virus can cause severe illness and death in individuals of any age. Gunzenhauser Decl., ¶9. The effectiveness of treatment remains limited, and a widely available vaccine is still months away. Gunzenhauser Decl., ¶11.

Emerging evidence also suggests that some persons who recover from COVID experience serious effects that linger long after clearing the viral infection. Gunzenhauser Decl., ¶10. Some of these long-term effects may be attributable to organ damage caused by the COVID infection. *Id.* Scans and tests of some patients who recovered from COVID have shown damage to heart muscle and scarring in the lungs. *Id.* Some of this damage is believed to be the result of COVID-related blood clotting, including clots that weaken blood vessels and very small clots that block capillaries. *Id.*

Appendix C

There is consensus among epidemiologists that the most common mode of transmission for COVID is from person-to-person through respiratory droplets expelled when a person coughs, sneezes, or projects their voice. Gunzenhauser Decl., ¶13. There is no scientifically agreed-upon safe distance, but it is widely accepted that standing or sitting near an infectious person is riskier than being farther away. *Id.*

There is a consensus that in-person eating and drinking at restaurants, breweries, and wineries are among the riskiest activities in terms of COVID transmission. Gunzenhauser Decl., ¶48. Studies have demonstrated that COVID is less likely to be transmitted in outdoor spaces than in indoor spaces, where respiratory droplets and aerosols can accumulate. *Id.* The risk of transmission is further reduced when outdoor diners are spaced from each other, when restaurant staff wear face coverings and face shields, and when patrons only remove their face coverings to eat and drink. *Id.*

Studies show the role of masks in limiting the spread of COVID, and that situations where unmasked individuals from different households spend prolonged periods of time in proximity to one another present a higher risk of transmission than settings where one or more of these factors is absent. Gunzenhauser Decl., ¶51.

Not every exposure to the COVID virus will lead to infection. Gunzenhauser Decl., ¶15. Infection occurs when a person receives a dose of the virus large enough to overcome the body's defenses, which may vary from person

Appendix C

to person. *Id.* Measures to control the spread of COVID should therefore include efforts to limit interactions in conditions that support exposure to higher viral doses. *Id.* Conditions that pose a particularly high risk are present in gatherings. *Id.* It is widely accepted that a gathering of any size increases the risk of community transmission. Risk increases with the size of the gathering because the more people who gather, the likelier it is that one or more infected persons will be present. *Id.*

The risk of transmission increases when individuals are in close proximity for an extended period. Gunzenhauser Decl., ¶16. Risk is also increased when individuals are not wearing face coverings. *Id.* Close proximity to an unmasked infected person for a prolonged period presents an especially high risk of receiving a viral dose sufficient to cause COVID infection. *Id.* Evidence indicates that gatherings of non-family members facilitates the spread of COVID. Gunzenhauser Decl., ¶26.

There is wide consensus that risk reduction in a pandemic does not require definitive proof that a particular sector or activity is the cause of an increase in cases. Gunzenhauser Decl., ¶58. Best practices dictate that public health departments identify those sectors and activities that present a higher risk of transmission and take steps to mitigate those risks, especially during a surge in cases and hospitalizations like we are now experiencing. *Id.*

The County's experience bears out the effectiveness of systematic responses such as prohibitions on gatherings. Gunzenhauser Decl., ¶29. The County's experience also

Appendix C

demonstrates the risk inherent in relying on widespread individualized compliance alone to control the spread of COVID. Gunzenhauser Decl., ¶30. In September, the County reported that 20% of restaurants inspected were violating COVID protocols. *Id.*

A key part of any public health department's response to outbreaks involves conducting field investigations. The level of evidence required in a field investigation is not the same as that required in a clinical trial. Gunzenhauser Decl., ¶32. The purpose of a field investigation is to determine what steps can be taken to stop or slow the spread of an infectious disease. *Id.* The purpose of public health decisions based on field investigations is to take actions in a timely manner that will prevent or curtail the spread of the virus or other disease-causing agent. *Id.* Often, officials will have to make decisions in a brief period and when information is limited, especially in comparison to other medical studies such as full-blown, clinical trials when the urgency of the situation is not so severe. *Id.*

Despite improved treatment, the proportion of COVID patients requiring hospitalization has remained elevated above 10% throughout the pandemic. It has averaged about 10% in the most recent four months, with approximately 25-33% of hospitalized patients in the ICU and approximately one half of those ICU patients requiring ventilators. *Id.*

When community spread of the virus increases, the number of known and suspected COVID patients in both ICU and non-ICU beds increases as well. Gunzenhauser Decl., ¶43. On most days in June, there were fewer than

Appendix C

1,500 confirmed COVID cases in the County's hospital beds. *Id.* For ICU beds, that number rarely exceeded 500. *Id.* During the July surge, the number of confirmed COVID patients exceeded 1,500 every day and often approached 2,000. *Id.* For the ICU, those numbers never dropped below 500 and at times approached 700. *Id.*

On November 1, 2020, known and suspected COVID cases accounted for 721 non-ICU beds and 239 ICU beds. *Id.* By the day before Thanksgiving, those numbers had risen to 1,431 and 475, respectively. *Id.*

On November 21, 2020, the County reported 4,522 new confirmed cases and 1,391 people hospitalized, 26% of whom were in the ICU. On November 22, 2020, the County reported that the five-day average surpassed 4,000 new daily cases, the Department's threshold for suspending in-person dining. Gunzenhauser Decl., ¶40.

On November 23, 2020, the County reported its highest number of COVID cases in a single day at 6,124. Gunzenhauser Decl., ¶41. This brought the total number of COVID cases to 370,636, with 7,446 deaths. *Id.* As of November 23, 2020, the R number for the County was 1.27, meaning the daily number of new cases of COVID is expected to increase over time. Gunzenhauser Decl., ¶29.

As of November 29, 2020, 2,049 COVID patients were hospitalized in the County, with 24% of those patients in the ICU. Gunzenhauser Decl., ¶41. From October 27 to November 27, 2020, COVID hospitalizations jumped from 747 to 1,893. Gunzenhauser Decl., ¶43. The current surge

Appendix C

is accelerating much more rapidly than the prior surge in July. Between November 13 and November 27, 2020, hospitalizations of confirmed COVID patients increased by 101%. Gunzenhauser Decl., ¶41.

This indicates widespread and uncontrolled community transmission of the virus. *Id.* Currently, approximately one in 145 County residents is infectious to others. During the week of November 16, 2020, that number was 1 in 250. *Id.* The number of new cases and hospitalizations is expected to rapidly increase over the next 21 days without rapid public health interventions, which will lead to a major increase in the number of persons with severe illness and the number of deaths and will stress the healthcare system and healthcare workers. Gunzenhauser Decl., ¶37. This stress will limit the availability of ICU beds for patients who may need them, including patients hospitalized for conditions other than COVID. Gunzenhauser Decl., ¶37.

Increased hospitalizations due to COVID, including ICU admissions, risk overwhelming the County's hospital capacity. Gunzenhauser Decl., ¶45. A secondary effect of the COVID pandemic is that some individuals delay seeking treatment for other conditions for fear of being exposed to COVID at healthcare facilities. Gunzenhauser Decl., ¶46. Based on public health observations of the effects of the virus during this pandemic, hospitalizations typically increase two to three weeks after a spike in cases, and deaths increase thereafter. Gunzenhauser Decl., ¶49. Therefore, while the County is currently experiencing a surge in hospitalizations, it expects the current high case counts to lead to an even higher hospitalization rate in the coming weeks. *Id.*

*Appendix C***(ii). The County's Argument**

The County argued that the Restaurant Closure Order easily meets the highly deferential standard of a rational basis because of the recent surge in COVID cases and hospitalizations. Petitioners cannot refute the fact that the risk of spreading COVID becomes heightened when people are sitting in close proximity without face coverings, eating and drinking, and projecting their voices toward each other. Gunzenhauser Decl., ¶52. All of these things occur when diners are eating and drinking at restaurants. *Id.* Opp. to CRA Ex Parte at 11.

Courts have repeatedly held that orders limiting gatherings and requiring businesses to close in response to the pandemic bear a real and substantial relation to public health. *See, e.g., Six v. Newsom, supra*, 462 F. Supp. 3d at 1068 (“[P]hysical distancing measures like California’s Stay-at-Home Order are critical to slowing down the spread of the virus”); *Givens v. Newsom*, (E.D. Cal. 2020) 459 F. Supp. 3d 1302, 1311 (“[I]t is uncontroverted that the State’s stay at home order bears a real and substantial relation to public health.”). While striking down restrictions on religious worship based on New York Governor Cuomo’s order, the U.S. Supreme Court reiterated that government has “authority to impose tailored restrictions—even very strict restrictions—on attendance at religious services and secular gatherings.” *Roman Catholic Diocese, supra*, 2020 WL 6948354, at *8 (Kavanaugh, J., concurring). If the Supreme Court permits restrictions on enumerated, long-standing First Amendment rights like religious worship, then it would

Appendix C

clearly uphold the County’s ability to temporarily prohibit outdoor dining at restaurants. Opp. to CRA Ex Parte at 12.

Petitioners’ experts argue that the Department failed to consider relevant evidence and assess other evidence. But Petitioners’ experts cannot rebut the enhanced risk in eating and drinking at close proximity without face coverings, which is inherent in dining at restaurants, breweries, wineries, and bars. Moreover, Petitioners are asking the court to weigh the evidence by making this argument. Courts do not weigh evidence under the arbitrary and capricious standard. Therefore, the fact that Petitioners’ experts may have differing views about how to address the pandemic is irrelevant; rational basis review is not a “battle of the experts.” Opp. to CRA Ex Parte at 12-13.

Additionally, Petitioners do not establish why their experts’ opinions should be given more weight than the County Health Officer’s opinion when none has any advanced training or specialization in the study of epidemiology—the branch of medicine which studies the spread and control of infectious diseases. Barke is a primary care physician (Barke Decl., ¶1), Bhattacharya, the closest to an epidemiologist, is a researcher in the area of health economics (Bhattacharya Decl., ¶3-4), Lyons-Weiler is a biomedical researcher (Lyons-Weiler Decl., ¶3), Allen is a biostatistician (Allen Decl., ¶2), and Kaufman is trained as a public health behaviorist and biosafety expert (Kaufman Decl., ¶1, 3-4). The court should reject Petitioners’ attempts to replace the considered judgment

Appendix C

of the County's public health officials with the opinions of persons who do not have expertise in the relevant field. Opp. to CRA Ex Parte at 13.

Petitioners' argument that the County's Restaurant Closure Order lacks a rational basis is false.¹⁶ The law does not require the County to act with exacting scientific evidence when responding to a novel, evolving public health emergency. A key part of any public health department's response to a new virus involves conducting field investigations. Gunzenhauser Decl., ¶32. The purpose of public health decisions based on field investigations is to combat the spread of the virus when officials do not have sufficient time or information to conduct full-blown, peer-reviewed clinical trials. *Id.* This aids the public health experts' understanding of COVID continues to evolve and swift and aggressive actions must be taken to combat community transmission. *Id.* Opp. to CRA Ex Parte at 13-14.¹⁷

16. The County argues that CRA's assertion that the County's data shows "restaurants are responsible for only 3.10% of new coronavirus infections" is premised on an incorrect use of the statistics on workplace outbreaks. The list of workplace outbreaks on the County's COVID webpage is not an indication of the role played by the specific sector in community spread. Gunzenhauser Decl., ¶¶54-56. Further, essential sectors that were never required to cease indoor operations will necessarily be overrepresented on this list. *Id.*, ¶56. Opp. to CRA Ex Parte at 13, n.12.

17. The County argues that Petitioner MEC's reliance on *County of Butler v. Wolf*, ("Wolf") (W.D. Pa. Sept. 14, 2020) 2020 WL 5510690 is misplaced. In *Wolf*, a COVID "policy team" tasked with deciding what business were "life-sustaining" and

Appendix C

For these reasons, Petitioners cannot establish a likelihood of success on the merits of their claims. Opp. to CRA Ex Parte at 15; Opp. to MEC Ex Parte at 19.

c. The Court’s TRO/OSC Decision

Plainly, the County established that the surge is legitimately concerning, particularly hospitalizations, ICU load, and deaths. Increased hospitalizations due to COVID, including ICU admissions, risk overwhelming the County’s hospital capacity. Gunzenhauser Decl., ¶45. As a result, the County is entitled to act. The principal question is: Does the action of closing outdoor restaurants have rational support in furthering the reduction of this risk?

Assuming that *Jacobson* test applies to a pandemic nine months old, the County is correct that it is highly deferential to an agency’s public health action. Even if *Jacobson* no longer applies, the Department still has great discretion. The court may not weigh the evidence or substitute its judgment for that of the Department. For this reason, the fact that Petitioners’ experts have differing views than the County’s experts about how to address the pandemic is not significant; the court’s rational basis review is not a battle of the experts.

allowed to reopen and which were not, was comprised “solely of employees from the Governor’s policy and planning office, none of whom possess a medical background or [were] experts in infection control.” *Id.* at *2. In contrast, the County’s Restaurant Closure Order was formulated by County public health officials tasked with responding to the pandemic and with backgrounds in epidemiology. Opp. to MEC Ex Parte at 18-19.

Appendix C

The County further is correct that the law does not require the Department to act with exacting scientific evidence when responding to a novel, evolving public health emergency. The Department relies on field investigations, the purpose of which is to combat the spread of the virus when officials do not have sufficient time or information to conduct full-blown, peer-reviewed clinical trials. Gunzenhauser Decl., ¶32.

At the December 3, 2020 TRO/OSC hearing, the court acknowledged that the Department has the right to take prophylactic measures that require swift action to address public health during the COVID pandemic. Suppl. Siegel Decl., Ex. C, p. 14. In so doing, the court stated that the Department’s public health job is “to ensure that the [healthcare] system does not get overwhelmed.” Ex. C, p. 8.

The court further stated that the County has evidence to support the Restaurant Closure Order:

“The County’s evidence is *general in nature, but it’s real evidence*. The evidence is that when you don’t wear a mask and you’re sitting around, it’s a greater risk when you’re in a group. And we’re trying to reduce the risk, and we have this huge problem of a surge. *They have evidence*. It’s not specific to the risk of outdoor dining, but they do have evidence.” Ex. C, p. 19. *See also id.*, p. 33 (“[The County does] have a medical basis. . . . [T]hey have a generalized basis of the risk of taking your mask off with others around the table. They do have that.”).

Appendix C

The court further acknowledged that the County has evidence that “restaurants are not following the restrictions.” *Id.*, p. 15. The court concluded:

“We have a County that is taking actions in good faith based on a surge in cases, surge in hospitalizations. *And it has a duty to prophylactically try to address that to avoid overwhelming the health care system.* It has chosen to do that by a three-week limited restaurant closure, except for take-out. No outdoor dining in, other words. And, you know, *it sounds like it’s rational.*” *Id.*, p. 14 (emphasis added).

Because the County had a duty to act and had generalized evidence about dining at a restaurant without a mask, the court denied a TRO. *Id.*, pp. 32-33. According to the County, that should have been the end of the inquiry and the court also should have denied the request for an OSC. OSC Opp. at 6.

Not so. While the County had generalized evidence that outdoor dining necessarily means that diners will not wear masks while eating, and that not wearing masks in proximity to another increases the risk of COVID transmission, Petitioners had specific evidence that outdoor dining does not involve any significant COVID risk.

Petitioners’ evidence consisted of the following:
(a) the opinion of experts that there is no rational and

Appendix C

legitimate scientific or public health basis supporting the ban on outdoor dining in restaurants (Kaufman Decl., ¶21; Bhattacharya Decl., ¶20); (b) the fact that the safety of outdoor dining has been well-established by the China Study, the Japan Study, and a Mayo Clinic article (Barke Decl. ¶¶ 7-10); (c) the fact that the Department's data provide no support for a shutdown of outdoor restaurant operations (Allen Decl., ¶7); (d) the fact that 3.10% of new infections have occurred at restaurants; (e) expert conclusion that the CDC study relied upon by Davis as the Department's "best data" does not support the Restaurant Closure Order (Kaufman Decl., ¶¶ 16-17); (f) the CDC's updated November 18th, 2020 recommendation that outdoor dining may occur with relative safety at restaurants if precautionary measures are observed and that outdoor dining is in the second lowest tier of risk and can be mitigated further by reasonable accommodations (Bhattacharya Decl., ¶20), and (g) the fact that precautions already are in place for outdoor dining -- socially distanced outdoor dining, masks, and temperature checks. All of these opinions and facts supported the conclusion that the transmission of the virus from one person to another in an outdoor restaurant dining setting is highly unlikely. *See* Kaufman Decl., ¶19.

If the court were permitted to weigh evidence, it would have issued the TRO. Because it may not do so, the court concluded that the County's evidence may be sufficient if it provided certain additional information: (1) the actual numbers for hospital and ICU capacity (the County's evidence of the surge's impact on hospitalizations and ICU load lacked capacity numbers); (2) the articulated risk-

Appendix C

benefit analysis for restaurant closure which Plaintiffs' evidence showed is required; (3) why the only available study evidence suggests that outdoor dining is not a risk?; (4) the statistics on mortality from COVID; and (5) why the County is acting inconsistently with the Governor's order and his direction that restrictions would be based on science and data.

The County's OSC opposition addresses these issues.

(i). Actual Numbers for the Hospital and ICU Capacity

The court has consistently viewed the County's daily statistics of the daily number of positive tests and positivity (the rate at which persons who are tested test positive) as not particularly significant to the need for the Restaurant Closure Order. What is important is the burden on the health care system -- which means usage of hospital beds and ICU beds -- and the death rate.

Petitioners' evidence shows why. A person who tests positive for the presence of the virus may not be contagious. Weiler Decl., ¶18. The person's contagious nature depends on viral load, which is the amount of virus in his or her body. *Id.* All of the available empirical estimates support a minimum false positive rate of 0.48, meaning that 45-48% of persons who test positive for COVID have a nearly zero risk as a source of transmission. Weiler Decl., ¶19. As a result, concern over person-to-person transmission from people who test positive (and are thus given a presumptive diagnosis of COVID) must be adjusted downward by at least 50%. *Id.*

Appendix C

The County's evidence shows that positive tests and positivity are relevant to community spread. The rise in cases nationwide is not just a reflection of increased testing. Reingold Decl., ¶9. If the rate of COVID were stable or decreasing, increased testing would produce a lower proportion of tests being positive, as presumably a larger and more representative selection of the population (not only those with symptoms or known exposure) would be included. *Id.* Since the case rate and the proportion of tests positive rate have increased simultaneously, data suggest that the increase in confirmed cases indicates a true rise in cases. *Id.* This evidence indicates that positive tests, which must be taken with a grain of salt because of false positives, and positivity are relevant to COVID spread, but do not directly bear on the burden to the healthcare system.

Ferrer's comments to the Board show that she agrees: "[I] agree that it seems a little bit counterintuitive to talk about cases when *really all we are worried about is overwhelming the healthcare system*. And I think Dr. Ghaly spoke to this as well, you don't want to wait until the case numbers in the hospitals are really high. Siegel Decl., Ex B (emphasis added).

Finally, in issuing his March 4, 2020 State of Emergency and March 19, 2020 Stay-at- Home Order, Governor Newsom stated that the state's actions should be aligned to achieve the objectives of: (1) *ensuring the ability to care for the sick within the state's hospitals*.

Appendix C

Thus, the key information for COVID restrictions are hospitalizations and ICU bed utilizations.

The County now has provided this information. On average, there are approximately 14,000 licensed non-ICU beds and 2,500 licensed ICU beds available in the County. Hill Decl., ¶13. The actual number of beds can fluctuate from day-to-day. *Id.*

Beginning in November 2020, the number of COVID cases and hospitalizations began to surge. Hill Decl., ¶18. On November 1, 2020, there were approximately 960 COVID patients hospitalized in both ICU and regular hospital beds. Hill Decl., ¶19. On November 28, 2020, there were approximately 2,000 total COVID patients hospitalized in both ICU and regular hospital beds. Hill Decl., ¶20.

That number has continued to rise in the beginning of December. Hill Decl., ¶21. On December 1, 2020, 2,690 COVID patients were hospitalized. *Id.* Approximately 25% of the ICU beds were occupied by COVID patients: 573 COVID positive patients and 42 PUIs (persons under investigation), a total of 615. *Id.* Approximately 15% of the regular hospital beds were occupied by COVID patients: 1,858 COVID positive patients and 217 PUIs, a total of 2,075. *Id.* The number of COVID patients hospitalized in the County has nearly tripled. Hill Decl., ¶22.

As a result of the recent surge, the number of available ICU beds in the County has significantly decreased. In mid-October, there were 149 available ICU beds. Hill

Appendix C

Decl., ¶24. The County's ICU bed availability in November decreased to less than 5% of total capacity, with 4.44% available from November 22-28. Hill Decl., ¶25.

Projections for ICU beds show that demand could exceed the County's available beds within a couple of weeks. Hill Decl., ¶32. Typically, when a shortage occurs, the availability of ICU beds diminishes first because there are fewer alternatives where ICU-patients can be treated effectively. Hill Decl., ¶33. The surge in hospitalizations will further stress the County's healthcare system, which can manifest itself in many ways. Hill Decl., ¶28. Hospitals will have to change what they do day-to-day to meet the needs of their patients. *Id.* For example, an emergency room may have to be repurposed to treat ICU patients, which will thus impact the number of day-to-day medical emergencies that can be treated, such as heart attacks. *Id.*

The Governor's Regional Order includes the County in the Southern California Region, which was at 82% ICU capacity (18% ICU availability) as of December 3, 2020. Hill Decl., ¶36. If the surge continues unchanged, it is projected that the Southern California Region will cross this threshold and have less than 15% ICU availability by the end of this week. *Id.* As of December 6, 2020, the threshold has been reached and the Regional Order is in effect.

The County has sufficiently shown the actual numbers for hospital and ICU capacity.

*Appendix C***(ii). Risk-Benefit Analysis for the Restaurant Industry**

In issuing his March 4, 2020 State of Emergency and March 19, 2020 Stay-at-Home Order Governor Newsom stated that the state's actions should be aligned to achieve the objectives of: (4) *reducing social, emotional, and economic disruptions*. Ellis Decl., Ex. 18.

The unrebutted evidence is that public health decisions require a risk/benefit analysis of health restrictions. In making public health decisions, it is important for health officials to weigh the overall risk of the given disease to the overall benefits of the imposed public health policy. Kaufman Decl., ¶22. Public health recommendations regarding behavior by private actors (such as the decision to protest) should weigh the benefits of that behavior against the public health costs. Bhattacharya Decl., ¶50. If the benefits of the undertaking are important enough relative to the public health risks, and care is taken to minimize those risks by adhering to the extent possible to safe practice guidelines, then the activity should receive approval by public health experts. *Id.*

Basic standards of public health policy design require a comparison of both costs and benefits of a policy to justify it from a scientific and ethical point of view. Bhattacharya Decl., ¶29. A scientifically justified policy must explicitly account for these costs – including an *explicitly articulated economic analysis* – in setting, imposing, and removing criteria for business restrictions such as the blanket prohibition on outdoor dining. *Id.*

Appendix C

With respect to economic cost, Allen opines that the state's California Risk Tier System and trigger definitions are too simple and too blunt. Allen Decl., ¶11. There is no effort to conduct a comprehensive risk-benefit analysis by looking at the economic consequences of the move and whether the constricting actions are targeting the greatest risk businesses and activities based on business sector data and statistics in the specific country. *Id.*

Petitioners also present evidence concerning the social and psychological costs of restaurant closure. One of the risks of restaurant closure is increased feelings of isolation and depression among some members of the public. A comprehensive survey of 17,612 men and 19,581 women over the age of 65 found that eating alone has been linked to a higher incidence of depression among adults, particularly those who live alone. *Id.*

Finally, Petitioners note the comparative health risk of outdoor restaurant dining. Scientists recognize that all forms of human death should be avoided if possible. Weiler Decl., ¶31. Nevertheless, all forms of human activity, including eating at restaurants, carry some risk. Weiler Decl., ¶33. The risks associated with COVID from outdoor dining are far smaller than the risks of choking or food poisoning. *Id.* While on average, there is about one death due to COVID for every 124 days of outdoor restaurant operation -- assuming that every restaurant in the County is operating at full capacity with 40 outdoor seats -- about 250 people die each year in the County from either choking or food poisoning. *Id.* Given the information available on outdoor transmission, the risk is "lower than a convenience store". Weiler Decl., ¶33.

Appendix C

The County presents no evidence that it conducted a risk-benefit analysis. The Department merely “regrets” that the preventative measures have an emotional and economic impact on businesses, families, and individuals and states that it must implement measures to fulfill its day-to-day statutory responsibility for communicable disease control. Davis Decl., ¶14. The Department recognizes that it has asked businesses and its more than ten million residents to make significant adjustments to fight this pandemic. Davis Decl., ¶19. Yet, it is the considered opinions of the Department’s communicable disease experts that these temporary adjustments and modifications are necessary to combat the ongoing surge in COVID cases and hospitalizations, and the resulting strain on the County’s healthcare system. *Id.*

Davis purports to conclude that, based on the data, the Department determined that the risks and harms of uncontrolled community spread, strain on the health care system, and excess preventable deaths outweighed the social and economic harm of a temporary suspension on in- person restaurant dining. Davis Decl., ¶31. This conclusion is unsupported by any evidence or analysis. The required risk-benefit analysis must be explicitly articulated in setting, imposing, and removing criteria for business restrictions. Bhattacharya Decl., ¶29. An expert’s opinion is no better than the facts upon which it is based (*Turner v. Workmen’s Comp. Appeals Board*, (1974) 42 Cal.App.3d 1036, 1044) and an expert opinion is not substantial evidence when it is based upon conclusions or assumptions not supported by evidence. *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Med. Center*,

Appendix C

(1998) 62 Cal.App.4th 1123, 1137; *Rorges v. Department of Motor Vehicles*, (2011)192 Cal.App.4th 1118, 1122. Davis' conclusion carries no weight.

The County argues that it is not required to show that it conducted a cost-benefit analysis of the Restaurant Closure Order to meet the arbitrary and capricious standard of review. The Restaurant Closure Order is valid unless Petitioners disprove "every conceivable basis which might support it." *FCC v. Beach Communications, Inc.*, *supra*, 508 U.S. at 314-15. This analysis does not allow a party to probe the decision-making processes of the government because the Constitution "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, *supra*, 505 U.S. at 15. Opp. to OSC at 10.

The County wrongly relies on equal protection cases. In *FCC v. Beach Communications, Inc.*, the United States Supreme Court reviewed the federal Cable Communications Policy Act of 1984, which requires that cable television systems be franchised by local governmental authorities. One provision exempted facilities serving subscribers in one or more multiple unit dwellings under common ownership, control, or management. After petitioner FCC ruled that a satellite master antenna television system -- which typically receives a satellite signal through a rooftop dish and then retransmits the signal by wire to units within a building -- is subject to the franchise requirement, satellite operators

Appendix C

petitioned for review. The high court reversed the court of appeals and held that the common ownership classification does not violate equal protection. 508 U.S. at 307.

In *Nordlinger v. Hahn*, the petitioner recently had purchased a house and filed suit against the County and its tax assessor, claiming that Prop. 13 violates the Equal Protection Clause of the Fourteenth Amendment because of dramatic disparities in the taxes paid by long-term owners and newer owners. 505 U.S. at 1. The high court disagreed, finding that the classifications had a rational basis. *Id.*¹⁸

These equal protection cases have no bearing on the risk-benefit analysis requirement because Petitioners make no equal protection claim other than a cursory disparate treatment argument. This is a substantive due process case under the Due Process Clause of the Fourteenth Amendment, which includes a substantive component that bars arbitrary, wrongful, government action “regardless of the fairness of the procedures used to implement them.” *Zinermon v. Burch*, (1990) 494 U.S. 113, 125. The “core of the concept” of substantive due process is the protection against arbitrary government action. *Hurtado v. California*, (1884) 110 U.S. 516, 527 (1884). When executive branch agencies act in a legislative capacity, courts evaluate whether the challenged agency

18. Additionally, in *Warden v. State Bar*, the plaintiff attorney made an equal protection challenge to the constitutional validity of the State Bar’s mandatory continuing legal education (MCLE) program because categories of attorney-retired judges, elected officials of the state, and full-time law professors were exempt from the MCLE requirements. 21 Cal.4th at 633.

Appendix C

action has been “arbitrary, capricious, or entirely lacking in evidentiary support.” *Davies v. Contractors’ State License Bd.*, (1978) 79 Cal. App. 3d 940, 946. While courts do not weigh evidence when applying this test, they must ensure that the agency has adequately considered all relevant factors and has demonstrated a rational connection between those factors and the choice made. *Carrancho*, *supra*, 111 Cal. App. 4th at 1265.¹⁹ This is true even under the highly deferential review set forth in *Jacobson*.

19. In *Carrancho*, the court addressed an amended statutory scheme to phase down the practice of burning rice straw left over after harvest. 111 Cal. App. 4th at 1255. As part of the amendment, state agencies responsible for managing the phasedown were required to develop a plan to divert at least 50% of the straw to off-field uses by 2000 and to make a progress report to the Legislature on progress in achieving that goal. *Id.* The rice grower plaintiffs filed a petition for traditional mandate, alleging that the diversion plan and progress report failed to comply with the statute. *Id.* The court noted that the plan and report performed the quasi-legislative function of gathering information and making recommendations in aid of prospective legislation, acts that are reviewed under a deferential standard. *Id.* at 1266-67.

While the plaintiffs could compel the agencies to issue the statutorily required documents, review of their discretionary manner of preparation and the contents was limited to whether the actions were arbitrary, capricious, or unsupported by substantial evidence. *Id.* at 1269. The judicial review must “ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.” *Id.* at 1273-74 (citation omitted). This required deferential, but not perfunctory, review. *Ibid.*

Appendix C

The undisputed evidence required the County to perform and articulate a risk-benefit analysis in imposing the Restaurant Closure Order and it clearly did not do so.

**(iii). Why the Only Available Evidence
is that Outdoor Dining Is Not a
Significant Risk?**

In issuing his March 4, 2020 State of Emergency and March 19, 2020 Stay-at-Home Order Governor Newsom specified that California's response to the coronavirus pandemic "must be done using a *gradual, science-based and data-driven framework*." Ellis Decl., Ex. 18.

The federal, state, and local governments have done a poor job of supporting COVID restrictions with science. In March 2020, it was acceptable not to have studies at the outset of the pandemic. This is less true nine months into it. The County relies on field investigations instead of studies. Should not the relevant federal, state, and county government agencies be committing all their resources to this problem? Why isn't it an all hands-on-deck situation when the public and small and large businesses are being asked to sacrifice so much? What have these agencies been doing besides keeping track of statistics and making public pronouncements? Should they not be obtaining the best information about who is at risk, what spreads the disease, and what tasks and activities are safe?

The Department admits that the CDC recommendation on the effectiveness of physical distancing in controlling the spread of COVID shows that outdoor well-ventilated

Appendix C

spaces, such as an open patio at a restaurant, where unmasked persons have prolonged contact, present a moderate risk of transmission. Davis Decl., ¶37. The Department argues that sitting outdoors reduces risk but does not eliminate it. *Id.* This risk of transmission outdoors is more elevated at a restaurant where people are sitting close to each other for a prolonged period of time, not wearing masks, not socially distancing, eating and drinking, and projecting their voices (and respiratory and aerosol droplets) toward each other. *Id.*

The Department adds that the benefits of being outdoors are reduced when a space is partially enclosed, such as is often the case on a restaurant patio. Davis Decl., ¶38. Even partial enclosures affect airflow and the extent to which virus-containing respiratory droplets and aerosols can accumulate. *Id.* The benefits of being outdoors are further diminished when people from different households gather for prolonged periods without wearing masks. Davis Decl., ¶39. The Department consulted with members of the restaurant industry in an attempt to avoid an outdoor dining restriction through other measures. *Id.* The Department proposed that restaurants take steps to ensure that all persons seated at a table were from the same household but was informed that restaurants had no way of verifying that information for their diners. *Id.*

The Department defends the fact that it has not conducted a clinical study on how outdoor dining in specific affects the transmission rates of COVID because it has limited time and resources to conduct clinical studies during a pandemic when it must act swiftly and proactively

Appendix C

to halt the spread of the disease. Davis Decl., ¶48. Clinical studies provide minimal value in deciding how to respond to an emergency like the COVID pandemic because they have a higher evidentiary standard and take longer to complete. Davis Decl., ¶49. Field investigations, on the other hand, are intended to identify those factors and behaviors that impose a higher risk of transmission so that these factors can be quickly addressed. *Id.*

The Department disputes that the September 2020 CDC report has little bearing on outdoor dining. Davis Decl., ¶42. The fact that the study did not distinguish between indoor and outdoor dining does not undermine its usefulness and validity in determining the Department's responses to the recent surge in COVID cases. Davis Decl., ¶42. The study looked at dining in any area designated by the restaurant, including indoor, patio, and outdoor seating. *Id.*

Davis made the decision to issue the Restaurant Closure Order based on the evidence that COVID spreads most easily when individuals from different households are in close proximity to one another, for prolonged periods of time, without wearing masks. Davis Decl., ¶51. Restaurant dining was the only remaining setting where this was largely still permitted. While dining outdoors is less risky than dining indoors, the nature of dining together at a restaurant still presents a substantial risk of viral transmission. *Id.*

Based on this evidence, the County argues that its time is better spent in directly responding to the virus

Appendix C

than focused on a study effort that would yield macro results to better inform its decision-making. Opp. to OSC at 13.

This argument – that clinical studies have little value -- is spurious. Clinical studies plainly have more scientific and medical value than anecdotal field investigations. The County does not have any evidence of the risks of *outdoor* dining beyond the generalized evidence of its syllogism: (a) COVID is spread by expelled droplets that transmit the virus to others in proximity, (b) people eating in outdoor restaurants are in proximity to others and are not wearing masks, (c) therefore outdoor restaurant eating creates a risk of spreading COVID. Yet, outdoor dining is considered by the CDC to be only a moderate risk, one that can be mitigated further by proper controls.

The County's argument that it does not have time in the pandemic to conduct clinical studies does not explain why the state, federal, and local governments cannot perform a study (or some other reliable evaluation) of the COVID risk for outdoor restaurants nine months into a pandemic. To say the least, it is disappointing that governmental agencies have yet to conduct a study on the risks of outdoor dining, particularly in California where outdoor dining is a viable concept even in winter (with heaters).

(iv). The Statistics on Mortality

Although not widely publicized, the evidence shows that the pandemic is not so overwhelming that the public

Appendix C

should live in fear. It is sadly true that large numbers of people have died from COVID: 282,000 in the United States, 19,876 in California, and 7,886 in the County. But the mortality rates have gone down as healthcare professionals have learned to treat the disease and the vulnerable groups are known. There is now a widespread scientific consensus that COVID does not affect all people equally. Kaufman Decl., ¶26. Over 41% of the COVID deaths in the United States have occurred in nursing homes. *Id.* 94% of all deaths associated with the COVID involve victims with pre-existing underlying medical conditions such as diabetes and heart disease. *Id.* It is now understood that most of the severe cases of the disease occur in individuals over the age of 65. *Id.* In California through August 2020, 74.2% of all COVID-related deaths occurred in patients 65 and older. There have been only two deaths among COVID patients below age 18.

Of those who are infected, the median survival rate is 99.77%. Bhattacharya Decl., ¶37. In September 2020, the CDC updated its current best estimate of the ratio of deaths to the number of people infected for various age groups. Bhattacharya Decl., ¶39. Infected children ages 0-19 years have a 99.997% survival rate. *Id.* Persons ages 20-49 years have a 99.98% survivability rate. *Id.* Persons ages 50-69 years have a 99.5% survivability rate. *Id.* Persons age 70+ years have a 94.6% survival rate. *Id.* A focus on symptomatic COVID patients also shows very high survival rates. Bhattacharya Decl., ¶40. These statistics provide the American public with a very high probability that healthy people will not die from COVID and that we should be protecting the most vulnerable – aged persons and/or those with other risk factors.

Appendix C

The County argues that “a large portion” of the County’s population consists of people of all ages with underlying medical conditions -- medical conditions include cancer, heart conditions, obesity, diabetes, smoking, and even pregnancy -- that pose an increased risk of severe illness and death as a result of contracting COVID. *See* RJN Ex. 10. People with pre-existing conditions should not be left to die prematurely when the County can proactively try to stop the spread of the virus. This is even more true when a vaccine will soon be available, and those deaths can be prevented. OSC Opp. at 16-17.

The County notes that COVID is currently the third leading cause of death in the United States, behind heart disease and cancer. Davis Decl., ¶55. In 2017, the most recent year for which a published mortality report is available, heart disease was the leading cause of death in the County at 11,211. *Id.* As of December 3, 2020, the County had recorded 7,782 COVID deaths. *Id.* Opp. to OSC at 17. Emerging evidence also suggests that some number of patients who recover from active COVID infection experience long-term effects. The full extent of the health consequences of COVID is not yet known, but the evidence available is concerning. Davis Decl. ¶62; Gunzenhauser Decl., ¶10. Opp. to OSC at 17.

The County does not explain what it means by “a large portion” of the population, but nothing in Petitioners’ argument suggests that those persons at serious risk of contracting COVID and death should not be protected. Nothing in Petitioners’ papers undermines the County’s conclusion that the mortality from COVID is serious

Appendix C

and that the Department must take action to protect those vulnerable and to avoid long-term effects for those who recover. Petitioner CRA simply points out that the County has not shown any link between outdoor dining and COVID transmissions, hospitalizations, or mortality. CRA Reply at 11.

(v). Why the County Acted Inconsistently with the Governor's Order

When issued, the County's Restaurant Closure Order was inconsistent with the Governor's Blueprint outlining a four-tiered system of community disease transmission risk with activity and business tiers for each risk level. Ellis Decl. Ex. 7. Restaurants were listed as a separate sector in the Blueprint. *Id.* A county in Tier 2 may allow indoor dining at a maximum capacity of 25% or 100 people, whichever is fewer, while a county in Tier 1 may permit only outdoor dining. *Id.* Even in the most restrictive tier, outdoor dining was expressly permitted. *Id.*

The County notes that it is expressly empowered to adopt measures more restrictive than the Blueprint: "This framework lays out the measures that each county must meet, based on indicators that capture disease burden, testing, and health equity," but that "[a] county may be more restrictive than this framework." Opp. to OSC, RJN Ex. 5. The Blueprint also provides that local health jurisdictions "may continue to implement or maintain more restrictive public health measures if the local health officer determines that health conditions in that jurisdiction warrant such measures." *Id.* The Legislature's statutory instruction to Davis provides that he "shall take

Appendix C

measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.” H&S Code §120175. OSC Opp. at 17-18.

The County notes that it has suffered disproportionately from COVID compared to the rest of the state. With a population of 10 million, the County accounts for 25% of California’s population. Over the past week, the County has accounted for 32.6% of new cases. Opp. to OSC, RJN Ex. 6. Because of the recent surge, Davis imposed restrictions that are more stringent than the state’s in several sectors—not just limited to outdoor dining at restaurants, breweries, bars, and wineries. The County has taken a more aggressive approach than the state framework because the pandemic has been felt more severely in the County than the state overall. The County thus implemented its own plan to close outdoor dining once the County reached a five-day average of 4,000 cases/day, which it has. Because hospitalizations trail new cases by about two weeks, this 4,000 cases/day threshold indicates that the surge has become so widespread that it risks overwhelming County hospitals and resulting in a shortage of critical ICU staffed beds. Davis Decl. ¶¶ 64-66.²⁰

In any event, on December 3, 2020 the State announced its Regional Order. Hill Decl., ¶34. Under the Regional Order, the Southern California Region

20. As CRA argues (CRA Reply at 12), the County’s argument does not demonstrate any rationale for the 4000 cases/day trigger, even though the court asked for it. A trigger of 4000 new cases per day is not directly related to the burden on hospitalizations and ICU beds.

Appendix C

includes Imperial, Inyo, Los Angeles, Mono, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura counties. Hill Decl., ¶35. The Regional Order will prohibit on-site dining at restaurants for three weeks, while restaurants can still provide drive-thru, take-out and delivery services.

The Regional Order takes effect on December 5, 2020 and, pertinent to the Southern California Region, is triggered if the Southern California Region's ICU capacity falls below 15%. The Regional Order is effective for three weeks after the trigger. It affects numerous activities and businesses. In pertinent part, the order prohibits restaurant dining, indoor or outdoor, permitting only take-out or pick-up. The Regional Order will end if the region's ICU capacity projection for four weeks (three weeks after the order) is above or equal to 15%. Conversely, the order continues if the ICU projection for that period is less than 15%. The assessment will occur on a weekly basis.

The County argues the identical restrictions are at issue in the County's Restaurant Closure Order. The County argues that the Regional Order proves that (1) the health emergency is ongoing, and courts must give deference to the public health officials responsible for protecting the public; and (2) the County's Restaurant Closure Order, is not arbitrary and capricious. If the Regional Order takes effect, the OSC and Petitioners' request for relief will be moot. Opp. to OSC at 6-7.

As of December 6, 2020, the Regional Order has been triggered by the fact that the Southern California

Appendix C

Region has less than 15% ICU capacity. Sur-Reply RJN Exs. 20, 21. However, the County has drawn overbroad conclusions from the Regional Order. The Regional Order does not moot this case. Petitioners are entitled to attack the County's Restaurant Closure Order without regard to the viability of the Governor's Regional Order, which they may separately attack if they wish. It is true that the Regional Order takes some of the urgency out of Petitioners' application. It is also true that it serves some evidentiary value, including that the issue why the County acted inconsistently with the Governor's Blueprint is no longer significant.

3. Balance of Hardships

In determining whether to issue a preliminary injunction, the second factor which a trial court examines is the interim harm that plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction. *Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach*, (2014) 232 Cal.App.4th 1171, 1177. This factor involves consideration of the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo. *Id.*

Petitioners argue that the supposed benefit, if any, of the Restaurant Closure Order is unclear, while its negative impact is apparent and imminent. The Restaurant Closure Order has put at least tens of thousands of economically fragile Los Angelenos out of work since before Thanksgiving and will cause businesses

Appendix C

to permanently close. *See* Gay Decl., ¶24 (“The loss of revenue associated with an outright ban on outdoor dining, especially in conjunction with the amounts already spent on making outdoor dining possible, would likely drive many restaurants out of business entirely.”), ¶26 (“Outdoor dining also maintains jobs for a large number of servers who would otherwise not be able to work at all during the Pandemic.”); Leon Decl., ¶¶ 7-8 (144 jobs would be eliminated due to outdoor dining ban); Declaration of John Terzian of h.wood Group ¶¶ 7-8 (350 jobs would be eliminated); Rosenthal Decl., ¶4 (potential closure of restaurant and hotel due to outdoor dining ban), ¶6 (describing potential permanent loss of jobs); Thornberg Decl. ¶¶ 6-15. CRA Op. Br. at 20-21.

A significant number of restaurants will shutter their doors completely as they will be uncertain as to the future, unable to retrain employees and reopen due to lack of capital, which has already been severely depleted by the pandemic. *See* Gay Decl., ¶12; Thornberg Decl., ¶¶ 6-15. Expert analysis and statistical evidence confirm that outdoor dining was, for many restaurants, the difference between staying in business and closing permanently, allowing thousands of restaurant workers to avoid permanent unemployment until the Restaurant Closure Order took effect. Gay Decl., ¶¶ 24-26; Thornberg Decl., ¶14 (outdoor dining is a “critical revenue lifeline” for restaurants until vaccines become available). Out of nearly 1,000 surveyed restauranteurs, 96.7% responded that the outdoor dining ban will require them to fire staff and 89.6% responded that they are at risk of closing their restaurants. Shams Decl., ¶¶ 8-9, Ex. B (29 restaurateur

Appendix C

declarations detailing irreparable harm due to the Restaurant Closure Order). Depriving restaurants of significant holiday income will further the devastation. *See* Gay Decl., ¶¶ 20-28. Restaurants would be forced to close, even those that invested heavily in the equipment and procedures that Respondents had previously advised would be sufficient to allow them to operate safely. *See id.* CRA Op. Br. at 21.²¹

The County argues that the Restaurant Closure Order is a critical part of efforts by public health officials to prevent the further spread of a highly contagious disease, protect the health and safety of residents from exposure, illness and possibly death, and avoid overwhelming the healthcare system at a time of increasing rates of infection. Opp. to CRA Ex Parte at 18; Opp. to MEC Ex Parte at 19. Petitioners are temporarily prevented from being allowed to conduct outdoor dining. They are not precluded, however, from continuing to provide take-out, drive-thru and delivery services for customers. Comparing this harm to the harm an injunction would do to the County's efforts to protect its more than ten million residents, the balance of equities tips sharply in the County's favor. The potential consequences of community spread of COVID and concomitant risk of death to members

21. Petitioners also argue that enjoining the Restaurant Closure Order will save lives because a closure of all dining options at restaurants will cause individuals to move into homes and encourage indoor gatherings, one of the highest-risk areas for the spread of COVID. *See* Bhattacharya Decl., ¶¶ 22, 45-46; Kaufman Decl., ¶28; Allen Decl., ¶10. CRA Op. Br. at 21. The court views this evidence and argument as speculative.

Appendix C

of the community outweigh the harm from temporary restrictions on businesses. Opp. to CRA Ex Parte at 18-19; Opp. to MEC Ex Parte at 19-20.

The court cannot adequately balance the harms without the County's performance of a risk-benefit analysis. While the County clearly may take action to reduce COVID's impact on hospital bed space and ICUs, it is not clear that the closure of restaurants may aid in reducing that stress to the system or that the benefits of doing so outweigh the costs.

E. Conclusion

As the County argues, the alarming surge in COVID cases, hospitalizations, and deaths entitle the Department to act. OSC Opp. at 6. The County has shown that the greatly decreased capacity of hospitals and ICUs are burdening the healthcare system and action is necessary. However, the County's syllogism – (a) COVID is spread by expelled droplets that transmit the virus to others in proximity, (b) people eating outdoors in restaurant are in proximity to others and they are not wearing masks, (c) therefore outdoor restaurant dining has a risk of spreading COVID – only weakly supports closure of outdoor restaurant dining because it ignores the outdoor nature of the activity, which the CDC says carries only a moderate risk (and less with mitigations). Nonetheless, the County is correct that the court cannot weigh evidence in deciding whether the restriction has a rational basis, and the Department does have generalized evidence of a COVID risk in outdoor dining.

Appendix C

However, the County clearly has failed to perform the required risk-benefit analysis. By failing to weigh the benefits of an outdoor dining restriction against its costs, the County acted arbitrarily and its decision lacks a rational relationship to a legitimate end. The balance of harms works in Petitioners' favor until such time as the County concludes after proper risk-benefit analysis that restaurants must be closed to protect the healthcare system.

The applications for an OSC are granted in part. The proper remedy is not to enjoin the County's Restaurant Closure Order. The Governor's Regional Order is in effect and outdoor restaurant dining in the County cannot open at this time. Instead, the County should be prevented from continuing the Restaurant Closure Order indefinitely. As proposed on November 22, 2020, the Department planned to ban outdoor dining for at least three weeks. Ellis Decl., Ex. 1. Three days later the County's Restaurant Closure Order made the ban indefinite. Ellis Decl., Ex. 17. The County will be limited to the initially proposed three-week period which ends on December 16, 2020, and it is enjoined from extending the Restaurant Closure Order only after conducting an appropriate risk-benefit analysis.

This means that the outdoor restaurant dining portion of the County's revised Restaurant Closure Order (Sur-Reply RJN Ex. 21) must be enjoined. The revised Restaurant Closure Order was revised to "align and comply" with the Governor's Regional Order because it may not be less restrictive than that order. Ex. 21. Fair enough, but the County has no basis for the outdoor dining

Appendix C

portion of the order and it must be enjoined until the risk-benefit analysis is performed for outdoor dining.

The court cannot dictate what the Department must do as part of the risk-benefit analysis. A reasonable person would expect the County to consider all pertinent evidence on the benefits of closure, including its own expert evidence, the opinions of other experts such as Kaufman and Bhattacharya (and criticisms of their opinions), the China Study, the Japan Study, and the Mayo Clinic article (and criticisms of their significance), the CDC study, the CDC recommendation concerning outdoor dining, the precautions already in place for outdoor dining -- socially distanced outdoor dining, masks, and temperature checks, and whether its trigger of 4000 new cases has any bearing on hospital burden. As part of the risks of closure, the County could be expected to consider the economic cost of closing 30,000 restaurants, the impact to restaurant owners and their employees, and the psychological and emotional cost to a public tired of the pandemic and seeking some form of enjoyment in their lives. This analysis must be articulated for Petitioners and the public to see. *See* Bhattacharya Decl., ¶29.

**APPENDIX D — RELEVANT STATUTORY
PROVISIONS**

West's Ann. Cal. Health & Safety Code § 101040

**§ 101040. Authority to take preventive
measures during emergency**

(a) The local health officer may take any preventive measure that may be necessary to protect and preserve the public health from any public health hazard during any “state of war emergency,” “state of emergency,” or “local emergency,” as defined by Section 8558 of the Government Code, within his or her jurisdiction.

(b) “Preventive measure” means abatement, correction, removal or any other protective step that may be taken against any public health hazard that is caused by a disaster and affects the public health. Funds for these measures may be allowed pursuant to Sections 29127 to 29131, inclusive, and 53021 to 53023, inclusive, of the Government Code and from any other money appropriated by a county board of supervisors or a city governing body to carry out the purposes of this section.

(c) The local health officer, upon consent of the county board of supervisors or a city governing body, may certify any public health hazard resulting from any disaster condition if certification is required for any federal or state disaster relief program.

Appendix D

West's Ann. Cal. Health & Safety Code § 120175

§ 120175. Prevention of spread of disease

Each health officer knowing or having reason to believe that any case of the diseases made reportable by regulation of the department, or any other contagious, infectious or communicable disease exists, or has recently existed, within the territory under his or her jurisdiction, shall take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.

**APPENDIX E — ORDER OF THE HEALTH
OFFICER OF THE COUNTY OF LOS ANGELES
DEPARTMENT OF PUBLIC HEALTH,
DATED NOVEMBER 25, 2020**

COUNTY OF LOS ANGELES DEPARTMENT
OF PUBLIC HEALTH
ORDER OF THE HEALTH OFFICER

**REOPENING SAFER AT WORK AND IN THE
COMMUNITY FOR CONTROL OF COVID-19
BLUEPRINT FOR A SAFER ECONOMY—TIER 1
SURGE RESPONSE**

Revised Order Issued: November 25, 2020

Effective as of November 25, 2020

**Please read this Order carefully. Violation of
or failure to comply with this Order is a crime
punishable by fine, imprisonment, or both.
(California Health and Safety Code § 120295;
Los Angeles County Code § 11.02.080.)**

SUMMARY OF THE ORDER: This Revised County of Los Angeles Health Officer Order (Order) supersedes all prior Safer At Home orders (Prior Orders) issued by the County of Los Angeles Health Officer (Health Officer). This Order is issued to comply with State Executive Orders N-33-20 and N-60-20 issued by Governor Gavin Newsom, and the accompanying orders of the State Public Health Officer issued on March 19, May 7, July 13, July 17, 2020, August 28, 2020, and November 19, 2020.

This Order's intent is to continue to ensure that County of Los Angeles (County) residents remain in their residences

Appendix E

as much as practicable, to limit close contact with others outside their household in both indoor and outdoor spaces. All persons who can telework or work from home should continue to do so as much as possible during this pandemic. This Order allows persons to engage in all permitted activities, as defined by the Order, but requires that persons practice Social (Physical) Distancing, at all times while out in public and wear a cloth face covering over both the nose and mouth when in or likely to be in contact with others, to lower the risks of disease transmission through person-to-person contact for themselves and others.

This Order is issued to account for the recent steep surge of COVID-19 cases and large increases in hospitalizations and testing positivity rates in the County. This Order will be revised in the future to reflect the State Executive Orders and State Public Health Officer Orders and guidance that progressively designate sectors, businesses, establishments, or activities that may reopen with certain modifications, based on health and safety needs and at a pace designed to protect health and safety, and that may also progressively close specific activities and business sectors based on increases in daily reported COVID-19 cases, hospitalizations, and the testing positivity rates. Should local COVID-19 conditions warrant, the Health Officer may, after consultation with the Board of Supervisors, issue Orders that are more restrictive than those of the State Public Health Officer. Changes from the previous Order are highlighted.

This Order is effective within the County of Los Angeles Public Health Jurisdiction, defined as all cities and unincorporated areas within the County of Los Angeles,

Appendix E

with the exception of the cities of Long Beach and Pasadena that must follow their respective City Health Officer orders and guidance. This Order is effective immediately and will continue until further notice.

**UNDER THE AUTHORITY OF CALIFORNIA
HEALTH AND SAFETY CODE SECTIONS 101040,
101085, AND 120175, THE COUNTY OF LOS
ANGELES HEALTH OFFICER ORDERS:**

1. This Order supersedes the Health Officer's Prior Orders. This Order mainly aligns the County with both the Governor's July 13, 2020, announcement requiring the closure of specific activities and business sectors and the State's August 28, 2020 issuance of a Blueprint for a Safer Economy, which describes a tiered approach to relaxing and tightening restrictions on activities based upon specified criteria and as permitted by this Order based on County health conditions and circumstances, as well as the State's November 19, 2020 *Limited Stay At Home Order*. The Health Officer will continue to assess the phased reopening allowed by the State Public Health Officer and this Order on an ongoing basis and determine, after consultation with the Board of Supervisors, whether this Order needs to be modified if the public health risk associated with COVID-19 increases in the future.
2. This Order's intent is to continue to ensure that County residents remain in their residences as much as practicable, to limit close contact with others outside

Appendix E

their household in both indoor and outdoor spaces. All persons who can telework or work from home should continue to do so as much as possible during this pandemic. Sustained Social (Physical) Distancing and infection control measures will continue slowing the spread of COVID-19 and diminishing its impact on the delivery of critical health care services. All provisions of this Order must be interpreted to effectuate that intent. Failure to comply with any of the Order's provisions constitutes an imminent threat and menace to public health, and a public nuisance, and is punishable by fine, imprisonment or both.

3. All persons living within the County of Los Angeles Public Health Jurisdiction should remain in their residences whenever practicable.
 - a) Nothing in this Order prohibits persons living together as a single household in a household or living unit ("household") from engaging in permitted activities together. For purposes of this Order, and in relationship to private gatherings, a "household" shall not include institutional group living situations such as dormitories, fraternities, sororities, monasteries, convents, or residential care facilities, nor does it include such commercial group living arrangements as boarding houses, hotels, or motels.¹ Private gatherings are defined

1. Los Angeles County Code, Title 22. §22.14.060- F. Family definition. (Ord. 2019-0004 § 1, 2019.) https://library.municode.com/ca/los_angeles_county/codes/code_of_ordinances?nodeId=TIT22PLZO_DIV2DE_CH22.14DE_22.14.060F

Appendix E

as social situations that bring together people from different “households” at the same time in a single space or place. When people from different “households” mix, the risk of COVID-19 transmission increases. Private gatherings of people who are *not* part of a single household or living unit must comply with the following requirements:

- i. *Attendance.* 1) Private gatherings that include more than three different “households” are prohibited. This includes everyone present, including hosts and guests. Private gatherings of persons from three different “households” or less are limited to a maximum of 15 people. The smaller the number of people, the lower the risk. 2) Keep the up to 3 “households” that choose to privately gather or interact together constant or stable over time. Participating in multiple gatherings with different “households” and communities poses a higher risk of transmission and spread of COVID-19 if one or more attendees is/are discovered to be infected with the virus. 3) Persons from the “households” who do choose to privately gather together should discuss and agree upon the specific group rules for reducing the risk of exposure among the attendees at the private gathering before convening together. 4) The host “household” of the private gathering should collect names of all attendees and contact information in case contact tracing is needed later.

Appendix E

- ii. *Outdoors only.* 1) All private gatherings must be held outside; they are permitted in a public park or other outdoor space. Unlike indoor spaces, wind and air in outdoor spaces can help reduce the risk of spread of the virus from one person to another. Attendees may go inside to use restrooms as long as the restrooms are frequently sanitized. 2) Private gatherings may occur in outdoor spaces that are covered by umbrellas, canopies, awnings, roofs, and other shade structures provided that at least three sides of the space (or 75%) are open to the outdoors. 3) Multiple private gatherings of three “households” may not be jointly organized or coordinated to occur in the same public park or other outdoor space at the same time - this would constitute a private gathering exceeding the permitted size. 4) Mixing between unrelated private gatherings in the same public space or other outdoor space at the same time is not allowed.
- iii. *Keep it short.* Private gatherings should be limited to two hours or less in duration. The longer the duration, the risk of transmission increases.
- iv. *Physical distancing and hand hygiene.* 1) All attendees must follow the Social (Physical) Distancing Protocol requirements of Paragraph 19 of this Order. 2) The outdoor space must be large enough so that everyone

Appendix E

at the private gathering can maintain at least a 6-foot physical distance from others (not including their own “household”) at all times. 3) A place to wash hands or hand sanitizer must be available for participants to use. 4) Shared items may not be used during a private gathering. As much as possible, any food or beverages at outdoor gatherings must be in single-serve disposable containers. If providing single-serve containers is not possible, food and beverages must be served by an attendee who washes or sanitizes their hands frequently and wears a face covering over their nose and mouth. Self-serve items from communal containers may not be used.

- v. *Singing, Chanting, and Shouting at Outdoor Gatherings.* Singing, chanting, shouting, and physical exertion significantly increases the risk of COVID-19 transmission because these activities increase the release of respiratory droplets into the air. Because of this, singing, chanting, and shouting are strongly discouraged. If they occur and to reduce the spread of respiratory droplets, all attendees who are singing or chanting 1) must wear a face covering at all times while singing or chanting, including anyone who is leading a song or chant, and 2) must maintain at least 8-10 feet of physical distance from others. 3) Instrumental music is allowed as long as the musicians maintain at least 8-foot

Appendix E

physical distancing. Musicians must be from only one of the three “households”. Playing of wind instruments (any instrument played by the mouth, such as a trumpet or clarinet) is strongly discouraged.

- vi. Anyone who develops COVID-19 within 48 hours after attending a private gathering should notify the other attendees as soon as possible regarding the potential exposure. If you have not been contacted by Public Health within a week of your diagnosis, please call and report your case at 833-540-0473.
- b) People leaving their residences must strictly comply with the Social (Physical) Distancing requirements stated in this Order and specified in guidance or protocols established by the County Department of Public Health. This Order, beginning June 19, 2020, requires all persons wear a cloth face covering over both the nose and mouth whenever they leave their place of residence and are or can be in contact with or walking near or past others who are non-household members in both public and private places, whether indoors or outdoors. This includes wearing a cloth face covering when patronizing a business. Wearing a cloth face covering reduces the risk of transmission to others from people who do not have symptoms and do not know they are infected. The use of face coverings is commonly referred to as “source control.”

Appendix E

- i. Pursuant to the November 19, 2020 Limited Stay At Home Order issued by the State Public Health Officer, all gatherings with member of other households and all activities conducted outside the residence, lodging, or temporary accommodation with members of other households must cease between 10:00 pm PST and 5:00 am PST, except for those activities associated with Healthcare Operations, Essential Infrastructure or Essential Government Functions, and as expressly restricted in this Order. This provision does not apply to persons experiencing homelessness. Nothing in this Order prevents any number of persons from the same household from leaving their residence, lodging or temporary accommodation, as long as they do not engage in any interaction with (or otherwise gather with) any number of persons from any other household, except as permitted herein.
- c) Persons and businesses within the County of Los Angeles Public Health Jurisdiction are required to follow the COVID-19 infection control protocols and guidance provided by the County Department of Public Health. In instances where the County has not provided a specific guidance or protocol, specific guidance or protocols established by the State Public Health Officer shall control.

Appendix E

- i. In the event that an owner, manager, or operator of any business knows of three (3) or more cases of COVID-19 among their employees within a span of 14 days, the employer must report this outbreak to the Department of Public Health at (888) 397-3993 or (213) 240-7821.
 - ii. In the event that an owner, manager, or operator of any business is informed that one or more employees of the business has tested positive for, or has symptoms consistent with COVID-19 (case), the employer must have a protocol to require the case(s) to isolate themselves at home and require the immediate self-quarantine of all employees that had a workplace exposure to the case(s).
- d) Pursuant to the State of California's action² and the United States District Court Central District of California's order,³ jurisdictions within the County of Los Angeles Public Health Jurisdiction

2. Office of Governor Gavin Newsom, Action re: Project Roomkey, 4/3/2020, <https://www.gov.ca.gov/2020/04/03/at-new!y-converted-motel-governor-newsom-launches-project-roomkey-a-first-in-the-nation-initiative-to-secure-hotel-motel-rooms-to-protect-homeless-individuals-from-covid-19/>; 2020-21 May Rev's on to the Governor's Budget, Project Roomkey, pg. 78-79

3. Order re: Preliminary Injunction (Case No. LA CV 20-02291-DOC-KES), LA Alliance for Human Rights et al v. City of Los Angeles et al, States District Court Central District of California, 5/15/2020.

Appendix E

are expected to comply with the provision of hotel and motel rooms for vulnerable people experiencing homelessness through Project Roomkey, which slows the spread of COVID-19 and retains capacity of the healthcare system.

4. All people residing within the County of Los Angeles Public Health Jurisdiction who are age 65 or older and all people of any age who have active or unstable pre-existing health conditions, should remain in their residences as much as possible during the pandemic. People in these categories should leave their residences only when necessary to seek medical care, exercise or obtain food or other necessities. People in these categories should avoid any gatherings. The Health Officer strongly recommends that all employers offer telework or other accommodations to persons who are age 65 or older and all people of any age who have an active or unstable preexisting health condition(s).
5. All government agencies working in the course and scope of their public service employment are Essential Government Functions.
 - a) All government employees are essential, including but not limited to, health care providers and emergency responders including employees who serve in the following areas: law enforcement; emergency services and management; first responders; fire; search and rescue; juvenile detention; corrections; healthcare services and operations; public health; laboratory or medical

Appendix E

testing; mental health; community health; public works; executive management employees serving in these fields; all employees assigned to serve in or support the foregoing fields; and all employees whose services are otherwise needed to assist in a declared emergency.

- b) While all government employees are essential, the employees identified here, and others called to serve in their Disaster Service Worker capacity, must be available to serve the public or assist in response or continuity of operations efforts during this health crisis to the maximum extent allowed under the law.
- c) This Order does not, in any way, restrict (a) first responder access to the site(s) named in this Order during an emergency or (b) local, state or federal officers, investigators, or medical or law enforcement personnel from carrying out their lawful duties at the site(s) named in this Order.
- d) All persons who perform Essential Governmental Functions are categorically exempt from this Order while performing such governmental functions or services. Each governmental entity shall identify and designate appropriate employees, volunteers, or contractors to continue providing and carrying out any Essential Governmental Functions. All Essential Governmental Functions should be performed in compliance with Social (Physical) Distancing Protocol, to the extent possible.

Appendix E

6. This Order does not supersede any stricter limitation imposed by a local public entity within the County of Los Angeles Public Health Jurisdiction.
7. The Health Officer orders the closure of the following types of higher-risk businesses, recreational sites, commercial properties, and activities, where more frequent and prolonged person-to-person contacts are likely to occur:
 - a) Lounges and nightclubs;
 - b) Bars and craft distilleries that possess a valid low risk restaurant public health permit issued by the County of Los Angeles.
 - c) [Intentionally omitted];
 - d) Public entertainment venues: movie theaters, live performance theaters, concert venues, theme parks, and festivals;
 - e) Family entertainment centers for indoor operations only and other prohibited activities under **Appendix V**;
 - f) All restaurants, but only for indoor and outdoor in-person onsite dining until further notice;
 - g) Satellite wagering facilities, and racetrack onsite wagering facilities until further notice;

Appendix E

- h) Indoor playgrounds;
 - i) Indoor portions and exhibits of museums, zoos and aquariums are closed to the public until further notice;
 - j) Hot tubs, steam rooms and saunas not located on a residential property;
 - k) All events and gatherings, unless specifically allowed by this Order.
8. All Essential Businesses, unless specific modifications are required by this Order, may remain open to the public and conduct normal business operations, provided that they implement and maintain the Social (Physical) Distancing Protocol defined in Paragraph 20 and attached to this Order as **Appendix A**. Further, an essential business must also comply with the applicable Los Angeles County Department of Public Health Protocol(s) for its business sector. An Essential Business' owner, manager, or operator must prepare and post a Social (Physical) Distancing Protocol and any other applicable protocol for each facility or office located within the County of Los Angeles Public Health Jurisdiction and must ensure that the Essential Business meets all other requirements of all applicable protocols and the Social (Physical) Distancing Protocol.
9. Lower-Risk Businesses are businesses that are not specified in Paragraph 7 of this Order, and not

Appendix E

defined as an Essential Business in Paragraph 18 of this Order. There are four categories of Lower-Risk Businesses that may reopen under this Order: (1) retailers (“Lower-Risk Retail Businesses”), (2) manufacturing and logistics sector businesses that supply Lower-Risk Retail Businesses, (3) Non-Essential office-based businesses (although telework is strongly encouraged), and (4) Indoor Malls and Shopping Centers .. These four categories of Lower-Risk Businesses may reopen subject to the following conditions:

- a) For any Lower-Risk Retail Business that sells goods and services, the owner, manager, or operator must, for each facility located within the County of Los Angeles Public Health Jurisdiction, prior to reopening, prepare, implement and post the Reopening Protocols for Retail Establishments: Opening for In Person Shopping, attached to this Order as **Appendix B**. Lower-Risk Retail Businesses that are open for indoor operations must limit indoor capacity to 25% of maximum occupancy. Lower-Risk Retail Businesses must close for indoor retail operations between the hours of 10:00 pm - 5:00am PST but may remain open for delivery and curbside pick-up.
- b) For any non-retail Lower-Risk Business, that is a manufacturing and logistics sector business that supplies Lower-Risk Retail Businesses, the owner, manager, or operator must, prior

Appendix E

to reopening, prepare, implement and post the required Los Angeles County Department of Public Health Reopening Protocol, applicable to the business type or location, attached to this Order as **Appendix C**.

- c) For any Non-Essential office-based business, all indoor portions and operations must cease in-person operations until further notice. Non-essential office-based businesses whose operations require employees to work from an office worksite, and that this Order does not identify as an Essential Business, Healthcare Operation, or Essential Infrastructure, may operate via telework and for Minimum Basic Operations only. Essential Businesses, Healthcare Operations, or Essential Infrastructure whose operations require that employees operate from an office worksite, must require employees to telework to the extent feasible and any in-person operations must be in accordance with the required Los Angeles County Department of Public Health Reopening Protocol Office-Based Worksites, attached to this Order as **Appendix D**. Essential office-based businesses that are open for indoor operations must limit indoor capacity to 25% of maximum occupancy. This restriction does not apply to Healthcare Operations, Essential Infrastructure, and Essential Government Functions.

Appendix E

- d) For Indoor Malls and Shopping Centers, defined as: A building with (7) or more sales or retail establishments with adjoining indoor space, beginning October, 7, 2020, the owner or operator of the Indoor Mall or Shopping Center, including indoor swap meets, may reopen at up to 25% of overall mall or shopping center capacity. Higher-risk businesses located within an Indoor Mall or Shopping Center must continue to comply with Paragraph 7 of this Order and remain closed until each of those types of establishments is allowed to resume modified or full operations. Food court dining areas and specified common areas located within an Indoor Mall or Shopping Center must remain closed to the public until further notice. Members of the public may not consume food or beverages inside the Indoor Mall or Shopping Center. All businesses located within an Indoor Mall or Shopping Center, and not subject to Paragraph 7 of this Order, must adhere to the applicable requirements of this Order. Indoor Malls and Shopping Centers must close for indoor retail operations between the hours of 10:00 pm- 5:00 am, but retailers may remain open for delivery and curbside pick-up. The owner or operator of the Indoor Mall or Shopping Center must, prior to reopening, prepare, implement and post the required Los Angeles County Department of Public Health Protocols for Shopping Center Operators, attached to this Order as **Appendix E**.

Appendix E

9.5. The State Public Health Officer has provided guidance for certain sectors, businesses and activities in Stage 3 of the California Pandemic Resilience Road map to conditionally reopen with workplace and operational modifications. The Health Officer, after considering local epidemiological data and after consultation with the Board of Supervisors, approves the reopening of the following specific sectors, businesses and activities subject to the following conditions:

- a) Music, film and television production. Operations for music, film and television production may resume on June 12, 2020. The owner, manager, or operator of music, film and television production must, prior to reopening, prepare, implement and post the required Los Angeles County Department of Public Health Reopening Protocol for Music, Film and Television Production, attached to this Order as **Appendix J**, as well as abide by applicable industry-generated protocols.
- b) Day camps. Day camps may reopen on June 12, 2020. Day camp owners and operators must implement and post the required Los Angeles County Department of Public Health Reopening Protocol for Day Camps, attached to this Order as **Appendix K**. Day camps must close in-person operations between the hours of 10:00 pm - 5:00 am.
- c) Fitness facilities. Fitness facilities, including private gymnasiums, may be open for outdoor

Appendix E

operations only. The indoor portions of Fitness facilities are closed to the public until further notice. The owner, manager, or operator of fitness facilities must, prior to reopening, prepare, implement and post the required Los Angeles County Department of Public Health Reopening Protocol for Gyms and Fitness Establishments attached to this Order as **Appendix L**. Fitness facilities must close in-person operations between the hours of 10:00 pm - 5:00 am.

- d) Outdoor portions of museums, galleries, botanical gardens, and outdoor facilities at zoos, aquariums, and other similar exhibition spaces (collectively, “Museums”) may remain open to the public. The indoor portions of Museums are closed to the public until further notice. The owner, manager, or operator of Museums and exhibition spaces must, prior to reopening, prepare, implement and post the required Los Angeles County Department of Public Health Reopening Protocol for Museums, Galleries Zoos, and Aquariums attached to this Order as **Appendix M**. Museums must close in-person operations between the hours of 10:00 pm- 5:00am.
- e) Professional sports without audiences. Professional sports teams and franchises may restart operations and competitions without audiences on June 12, 2020. The owner, manager, or operator of professional sports teams and franchises must, prior to reopening, prepare,

Appendix E

implement and post the required Los Angeles County Department of Public Health Protocol for Professional Sports Leagues and Facilities Opening for Training Sessions and Spectator-Free Events, attached to this Order as **Appendix N**, as well as abide by applicable industry-generated protocols.

- f) Campgrounds, RV Parks and associated outdoor activities. Campgrounds and recreational vehicle parks may reopen on June 12, 2020. The owner, manager, or operator of campgrounds and RV Parks must, prior to reopening, prepare, implement and post the required Los Angeles County Department of Public Health Reopening Protocol for Campgrounds, RV parks and Cabin Rental Units, attached to this Order as **Appendix O**.
- g) Schools (K-12) and School Districts. The County Public Health Officer requires all public and private schools (K-12) and school districts within the County of Los Angeles to conduct distance learning only. Beginning September 14, 2020, K-12 schools may offer in-school services for a small, stable cohort of students with Individualized Education Programs (IEPs) or English Learners (ELs) needing assessments and/or specialized in-school services, with priority given to students with disabilities. Other prioritized groups for in person support and services include students not participating

Appendix E

in distance learning, students at risk of abuse or neglect, foster youth, and students experiencing homelessness. Permissible in-person specialized services that require cohorting of students, must limit the maximum stable cohort size to twelve (12) students and two (2) staff (not including aides assigned to children with special needs), and adhere to all provisions for safe opening of schools, as outlined in **Appendix T1: Reopening Protocols for K-12 Schools**. Schools must limit the number of students with IEPs and ELs, and other prioritized students allowed at any one time on campus for essential assessments and/or specialized in-school services to 25% or less of the total student body. In addition, Schools may reopen TK-2nd Grades for classroom instruction with a waiver application approved by the County Department of Public Health. Schools and School Districts that are permitted to reopen for prioritized individual and cohorted students (K-12) or upon an approved waiver application (TK-12) must follow the Reopening Protocols for K-12 Schools and the Protocol for COVID-19 Exposure Management Plan in K-12 Schools, attached to this Order as **Appendices T1 & T2**.

- h) **Personal Care Establishments.** Personal Care Establishments may reopen for indoor operations with required modifications. Personal Care Establishments also include hair salons, nail salons, barbershops, esthetic, skin care, electrology, body art professionals, tattoo

Appendix E

parlors, and piercing shops, tanning salons and massage therapy (in non-healthcare settings). Indoor capacity at Personal Care Establishments is limited to 25% of maximum capacity at all times. Services at Personal Care Establishments may only be provided by appointment. Customers and staff must keep their face coverings on, over both their nose and mouth, at all times; services that require a customer/client or a personal care attendant to remove their face covering, e.g., facials and shaves, are prohibited. The owner, manager or operator of a personal care establishment must, prior to reopening, prepare, implement and post the required Los Angeles County Department of Public Health Reopening Protocol for Personal Care Establishments, attached to this Order as **Appendix R**. Personal Care Establishments must close in-person operations between 10:00 pm - 5:00am.

- i) Institutes of Higher Education. Colleges and universities in Los Angeles County will not be able to resume all in-person academic instruction, at this time. Institutions may continue to offer in person training and instruction for essential workforce for required activities that cannot be accomplished through virtual learning. All other academic instruction must continue to be done via distance-learning as specified in the County's Protocols for Institutes of Higher Education attached to this Order as **Appendix U**. Faculty and other staff may come to campus for the

Appendix E

purpose of providing distance learning, and other activities related to the purposes above, as well as maintaining minimum basic operations. The institution must comply with all relevant portions of the County's Protocols for Institutes of Higher Education to maximize safety for all employees, also noted in Appendix U.

- j) Cardrooms. On October 5, 2020, Cardrooms may reopen for outdoor operations only. The indoor portions of cardrooms remain closed to the public until further notice. Capacity of outdoor operations at cardrooms is limited to 50% maximum occupancy of the outdoor operations area. No food or beverages are permitted at or near the gaming tables or machines. The owner or operator of a cardroom must, prior to reopening, prepare, implement and post the required Los Angeles County Department of Public Health Reopening Protocol for Card rooms attached to this Order as **Appendix Q**. Cardrooms must close in-person operations between 10:00 pm - 5:00 am.
- k) Miniature Golf, Batting Cages, and Go Cart Racing. On October 23, 2020, Miniature Golf, Batting Cages, and Go Cart Racing may reopen for outdoor operations only. The indoor portions of these businesses remain closed to the public until further notice. Capacity of outdoor operations at Miniature Golf, Batting Cages, and Go Cart Racing businesses is limited to 50% maximum occupancy of the outdoor operations area.

Appendix E

Arcade and other amusement games may not be operated outside. Food and beverages may not be consumed during use of the miniature golf course, batting cages or go carts. The owner or operator of an establishment that offers miniature golf, batting cages, and/or go cart racing must, prior to reopening, prepare, implement and post the required Los Angeles Public Health Protocols for Miniature Golf, Batting Cages, and Go Cart Racing attached to this Order as **Appendix V**. These establishments must close in-person operations between 10:00 pm- 5:00 am.

REASONS FOR THE ORDER

10. This Order is based upon the following determinations: evidence of continued community transmission of COVID-19 within the County; continued uncertainty regarding the degree of undetected asymptomatic transmission; scientific evidence and best practices regarding the most effective approaches to slow the transmission of communicable diseases generally and COVID-19 specifically; evidence that a significant portion of the County population is at risk for serious health complications, including hospitalizations and death from COVID-19, due to age or pre-existing health conditions; and further evidence that other County residents, including younger and otherwise healthy people, are also at risk for serious negative health outcomes and for transmitting the virus to others. The Order's intent is to protect the public from the avoidable risk of serious illness and death resulting from the spread of COVID-19.

Appendix E

11. Existing community transmission of COVID-19 in Los Angeles County remains widespread and continues to present a substantial and significant risk of harm to residents' health. There is still no vaccine available yet to protect against COVID-19, and no treatment for it. As of November 24, 2020, there have been at least 37 4,134 cases of COVID-19 and 7,497 deaths reported in Los Angeles County. There remains a strong likelihood that increased interactions among members of the public will result in a significant and increasing number of cases of community transmission. Making the community transmission problem worse, some individuals who contract the virus causing COVID-19 have no symptoms or have only mild symptoms, and so are unaware that they carry the virus and are transmitting it to others. Further, evidence shows that the virus can, at times, survive for several hours on surfaces and can be indirectly transmitted between individuals. Because even people without symptoms can transmit the virus, and because evidence shows the infection is easily spread, preventing, limiting, and placing conditions on various types of gatherings and other direct and indirect interpersonal interactions have been proven to reduce the risk of transmitting the virus.
12. Evidence suggests that until recently the restrictions and requirements imposed by Prior Orders slowed the rate of increase in community transmission and hospitalizations by limiting interactions among people, consistent with the efficacy of similar measures in other parts of the country and world.

Appendix E

Unfortunately, the daily number of new cases is substantially increasing, and COVID-19 remains increasingly widespread in Los Angeles County. Moreover, because there is not yet a vaccine or ample therapeutic drugs, the public health emergency and attendant risks to the public's health by COVID-19 still predominate.

13. In line with the State Public Health Officer, the Health Officer is monitoring several key indicators (COVID-19 Indicators) within the County. Activities and business operations that are permitted must be conducted in accordance with the required Social (Physical) Distancing, reopening protocols, and other infection control protocols ordered by the Health Officer.
14. The Health Officer will continue monitoring COVID-19 Indicators to assess the impact of easing restrictions and re-opening sectors. Those Indicators include, but are not limited to:
 - a) The number of new cases, hospitalizations and deaths and the testing positivity rate.
 - b) The capacity of hospitals and the healthcare system in the County, including acute care beds, Intensive Care Unit beds, and ventilators to provide care for existing COVID-19 patients and other patients, and capacity to surge with an increase of COVID-19 cases.

Appendix E

- c) The supply of personal protective equipment (PPE) available for hospital staff, nursing home staff and other healthcare providers and personnel who need PPE to safely respond to and treat COVID-19 patients and other patients.
- d) The ability and capacity to quickly and accurately test persons to determine whether individuals are COVID-19 positive, especially those in vulnerable populations or high-risk settings or occupations, and to identify and assess outbreaks.
- e) The ability to conduct case investigation and contact tracing for the volume of future cases and associated contacts, isolating confirmed cases and quarantining persons who have had contact with confirmed cases.

DEFINITIONS AND EXEMPTIONS

15. The following activities are permitted under this Order:
 - a) Engaging in activities or performing tasks important to the health and safety of family or household members (including pets), such as, visiting a health or veterinary care professional, obtaining medical supplies or medication, visiting a physician or child's pediatrician for routine care, such as, well-child visits and vaccinations;

Appendix E

- b) Obtaining necessary services and supplies for family or household members, or delivering the same, such as, obtaining grocery items or necessary supplies from Essential Businesses for one's household or for delivery to others;
- c) Performing work for or accessing businesses that are open, or to carry out Minimum Basic Operations for businesses that are closed or operating remotely.
- d) Obtaining or accessing services from Essential Governmental Functions, such as, accessing court, social and administrative services, or complying with an order of law enforcement or court;
- e) Caring for minors, the elderly, dependents, persons with disabilities, or other vulnerable persons;
- f) Obtaining in-person behavioral health or substance use disorder support in therapeutic small group meetings, such as Alcoholics Anonymous or Narcotics Anonymous, provided that the gathering is limited to 10 people or fewer and Social (Physical) Distancing is practiced.
- g) Obtaining in-person faith-based counselling services where the service cannot reasonably be practiced remotely, provided that the gathering is limited to 10 people or fewer and Social (Physical) Distancing is practiced.

Appendix E

- h) Attending in-person faith-based services, provided that the faith-based service is held outdoors. There is no maximum attendance for faith-based services that are held outdoors, provided that the attendees have enough space to observe strict Social (Physical) Distancing, including a minimum of six feet between attendees from different households, and are wearing cloth face coverings. Faith-based organizations holding in-person outdoor services, must follow the Department of Public Health Places of Worship Protocols, attached to this Order as **Appendix F**.
- i) Engaging in outdoor recreation activity, in compliance with Social (Physical) Distancing requirements and wearing a face covering, subject to the following limitations:
 - i. Outdoor recreation activity at parks, trails, piers, and beaches, and other open spaces must comply with any access or use restrictions separately established by the Health Officer, government, or other entity that manages the area to reduce crowding and the risk of COVID-19 transmission.
 - ii. Use of shared outdoor facilities for recreational activities, including but not limited to golf courses, tennis and pickleball courts, children's playgrounds, shooting and archery ranges, equestrian centers, model airplane areas, community gardens, skate parks, and

Appendix E

bike parks, must comply with any access or use restrictions separately established by the Health Officer, government, or other entity that manages the area to reduce crowding and the risk of COVID-19 transmission.

- iii. Local public entities may elect to temporarily close certain streets or areas to automobile traffic, to allow for increased space for persons to engage in recreational activity permitted by and in compliance with Social (Physical) Distancing requirements specified in this Order.
- iv. Swimming pools and splash pads in any non-residential setting may reopen on June 12, 2020, with the owner, manager, or operator of the swimming pool or splash pad implementing and posting the required Los Angeles County Department of Public Health Protocol for Swimming Pools. All hot tubs, saunas, and steam rooms located on non-residential property remain closed.
- v. For-hire fishing, guided fishing, or small-group chartered boat trips may resume operating on June 12, 2020, with the owner, manager, or operator of the charter business implementing the required Los Angeles County Department of Public Health Protocols for Small Water Vessel Charters.

Appendix E

- j) Participating in a Vehicle-Based Parade. The host of the Vehicle-Based Parade must comply with all local ordinances, traffic control requirements, and state and local laws. Further, the host of Vehicle-Based Parades must comply with the Los Angeles County Department of Public Health Vehicle-Based Parade Protocol, attached to this Order as **Appendix G**. Vehicle-Based Parades may not occur during the hours of 10:00 pm - 5:00am.
 - k) Participating in an in-person protest as long as the protest is held outdoors. Outdoor protests are permitted without a limit on attendees. Persons participating in a protest must wear a cloth face covering and maintain physical distancing of six (6) feet between persons or groups of persons from different households at all times, as well as observe the Department of Public Health Protocol for Public Demonstrations.
16. Individuals may work for, train for, volunteer at, or obtain services at Healthcare Operations: hospitals, clinics, laboratories, dentists, optometrists, pharmacies, physical therapists, rehabilitation and physical wellness programs, chiropractors, pharmaceutical and biotechnology companies, other licensed healthcare facilities, healthcare suppliers, home healthcare service providers, mental or behavioral health providers, alcohol and drug treatment providers, cannabis dispensaries with a medicinal cannabis license and all other required

Appendix E

state and local licenses, blood and blood product donation organizations, medical or scientific research companies, or any related and/or ancillary healthcare services, manufacturers, distributors and servicers of medical devices, diagnostics, and equipment, veterinary care, and other animal healthcare. This exemption shall be construed to avoid any impact to the delivery of healthcare, broadly defined.

17. Individuals may provide any service, train for, or perform any work necessary to the operation and maintenance of Essential Infrastructure, which is defined as, public health operations, public works construction, airport operations, port operations, food supply, water, sewer, gas, electrical, oil extraction and refining, roads and highways, public transportation, solid waste collection, removal and processing, flood control and watershed protection, cemeteries, mortuaries, crematoriums, and internet and telecommunications systems (including the provision of essential global, national, local infrastructure for computing services, business infrastructure, communications, and web-based services), and manufacturing and distribution companies deemed essential as part of the Essential Infrastructure supply chain, provided that they carry out those services or that work. In providing these services, training for, or performing this work, individuals must comply with Social (Physical) Distancing requirements to the extent practicable.
18. For purposes of this Order, Essential Businesses are:

Appendix E

- a) Grocery stores, certified farmers' markets, farm and produce stands, supermarkets, food banks, convenience stores, warehouse stores, and other establishments engaged in the retail sale of canned food, dry goods, fresh fruit and vegetables, pet supply, water, fresh meats, fish, and poultry, and any other household consumer products (such as cleaning or personal care products). This includes stores that sell groceries and other non-grocery products, such as products necessary to maintaining the safety, sanitation, and essential operation of residences. Retail food markets, including but not limited to grocery stores, convenience stores, liquor stores and other retail locations that sell food or beverage products and that are required to have a health permit issued by the Department of Public Health as a Food Market Retail, must comply with the Los Angeles County Department of Public Health Protocols for Grocery Stores and Retail Food Markets, attached to this Order as **Appendix B-1**;
- b) Food processors, confectioners, food packagers, food testing labs that are not open to the public, and food cultivation, including farming, livestock, and fishing;
- c) Organizations and businesses that provide food, shelter, social services, and other necessities of life for economically disadvantaged or otherwise needy individuals (including gang prevention and intervention, domestic violence, and homeless service agencies);

Appendix E

- d) Newspapers, television news, radio, magazine, podcast and journalism activities, including taped, digitally recorded or online-streamed content of any sort that is produced by one or more members of a single household, within the household's residence and without the physical presence of any non-member of the household;
- e) Gas stations, auto-supply, mobile auto repair operations, auto repair shops (including, without limitation, auto repair shops adjacent to or otherwise in connection with a retail or used auto dealership), and bicycle repair shops and related facilities;
- f) Banks, credit unions, financial institutions and insurance companies;
- g) Hardware stores, nurseries; building supply stores;
- h) Plumbers, electricians, exterminators, custodial/janitorial workers, handyman services, funeral homes and morticians, moving services, HVAC installers, carpenters, vegetation services, tree maintenance, landscapers, gardeners, property managers, private security personnel and other service providers who provide services to maintain the safety, sanitation, and essential operation to properties and other Essential Businesses;

Appendix E

- i) Businesses providing mailing and shipping services, including post office boxes;
- j) Educational institutions (including public and private K-12 schools, colleges, and universities);
- k) Laundromats, dry cleaners, and laundry service providers;
- l) Restaurants and other food facilities that prepare and serve food, but only for delivery, drive thru, and carry out. Indoor and outdoor dining is not permitted. Restaurants may continue to offer delivery, drive thru and carry out between the hours of 10:00 pm - 5:00 am. Restaurants with a moderate risk or high risk restaurant permit issued by the County of Los Angeles Department of Public Health and other food facilities must follow the revised Department of Public Health Protocols for Restaurants, attached to this Order as **Appendix I**. Cafeterias, commissaries, and restaurants located within hospitals, nursing homes, or other licensed health care facilities may provide dine-in service, as long as Social (Physical) Distancing is practiced;
- m) Businesses that supply office or computer products needed by people who work from home;
- n) Businesses that supply other Essential Businesses with the support or supplies necessary to operate;

Appendix E

- o) Non-manufacturing, transportation or distribution businesses that ship, truck, transport, or provide logistical support to deliver groceries, food, goods or services directly to residences, Essential Businesses, Healthcare Operations, and Essential Infrastructure. This exemption shall not be used as a basis for engaging in sales to the general public from retail storefronts;
- p) Airlines, taxis, ride sharing services and other private transportation providers providing transportation services necessary for activities of daily living and other purposes expressly authorized in this Order;
- q) Businesses that manufacture parts and provide necessary service for Essential Infrastructure;
- r) Home-based care for seniors, adults, disabled persons, or children;
- s) Residential facilities and shelters for homeless residents, disabled persons, seniors, adults, children and animals;
- t) Professional services, such as legal, payroll or accounting services, when necessary to assist in compliance with legally mandated activities, and the permitting, inspection, construction, transfer and recording of ownership of housing, including residential and commercial real estate and anything incidental thereto, provided that

Appendix E

appointments and other residential viewings must only occur virtually or, if a virtual viewing is not feasible, by appointment with no more than two visitors at a time residing within the same household or living unit and one individual showing the unit (except that in-person visits are not allowed when the occupant is still residing in the residence);

- u) Childcare facilities. All childcare facilities, including those operating at schools, must operate under the LAC DPH Childcare Guidance and the following conditions: (1) Child care must be carried out in stable cohorted groups of 12 or fewer (“stable” means the same twelve (12) or fewer children are in the same group each day); (2) Children shall not change from one group to another; (3) If more than one group of children is cared for at one facility, each group shall be in a separate room. Groups shall not mix with each other; (4) Childcare providers shall remain solely with one group of children;
- v) Hotels, motels, shared rental units and similar facilities. Beginning June 12, 2020, these may reopen for tourism and individual travel, in adherence with the required Los Angeles County Department of Public Health Reopening Protocol for Hotels, Lodging and Short-Term Rentals, attached to this Order as **Appendix P**;

Appendix E

- w) Construction, which includes the operation, inspection, and maintenance of construction sites and construction projects for construction of commercial, office and institutional buildings, residential and housing construction;
 - x) [Intentionally omitted].
19. For purposes of this Order, “Social (Physical) Distancing” means: (1) Maintaining at least six (6) feet of physical distance from individuals who are not members of the same household; (2) Frequently washing hands with soap and water for at least 20 seconds, or using hand sanitizer that contains at least 60% alcohol; (3) Wearing a cloth face covering when whenever an individual leaves their home or place of residence, and when an individual is or can be in contact with or walking by or past others who are non-household members in both public and private places, whether indoors or outdoors. Wearing a cloth face covering over both the nose and mouth reduces the risk of transmission to others from people who do not have symptoms and do not know they are infected; and (4) Avoiding all physical interaction outside the household when sick with a fever or cough, except for necessary medical care.
20. For purposes of this Order, the “Social (Physical) Distancing Protocol” that must be implemented and posted must demonstrate how the following infection control measures are being implemented and achieved, as applicable:

Appendix E

- a) Limiting the number of people who may enter into the facility at any one time to ensure that people in the facility can easily maintain a minimum six (6) foot physical distance from others, at all times, except as required to complete a business activity or transaction. Members of a single household or living unit may stand or move together but must be separated from others by a physical distance of at least six (6) feet.
- b) Where lines may form at a facility, marking six (6) foot increments at a minimum, establishing where individuals should stand to maintain adequate Social (Physical) Distancing, whether inside or outside the facility.
- c) Providing hand sanitizer, soap and water, or effective disinfectant at or near the entrance of the facility and in other appropriate areas for use by the public and employees, and in locations where there is high-frequency employee interaction with members of the public (e.g., cashiers). Restrooms normally open to the public shall remain open to the public.
- d) Posting a sign in a conspicuous place at all public entries that instructs the public not to enter if they are experiencing symptoms of respiratory illness, including fever or cough, to wear face coverings, and to maintain Social (Physical) Distancing from one another.

Appendix E

- e) Providing for the regular disinfection of high-touch surfaces, and disinfection of all payment portals, pens, and styluses after each use. All businesses are encouraged to also offer touch less payment mechanisms, if feasible.
- f) Providing face coverings to employees and contracted workers whose duties require close contact with other employees and/or the public. Those who have been instructed by their medical provider that they should not wear a face covering should wear a face shield with a drape on the bottom edge, to be in compliance with State directives, as long as their condition permits it. A drape that is form fitting under the chin is preferred. Masks with one-way valves should not be used.
- g) Requiring that members of the public who enter the facility wear a face-covering over both the nose and mouth, which reduces the risk of “asymptomatic” or “presymptomatic” transmission to workers and others, during their time in the facility.
- h) Adhering to communicable disease control protocols provided by the Los Angeles County Department of Public Health, including requirements for cleaning and disinfecting the site. See protocols posted at www.publichealth.lacounty.gov/media/Coronavirus/.

Appendix E

21. Operators of businesses that are required to cease in-person operations may conduct Minimum Basic Operations, which means:
 - a) The minimum necessary activities to maintain and protect the value of the business's inventory and facilities; ensure security, safety, and sanitation; and process payroll and employee benefits;
 - b) The minimum necessary activities to facilitate the business's owners, employees, and contractors being able to continue to work remotely from their residences, and to ensure that the business can deliver its services remotely.

ADDITIONAL TERMS

22. The County shall promptly provide copies of this Order by: (a) posting it on the Los Angeles Department of Public Health's website (www.publichealth.lacounty.gov), (b) posting it at the Kenneth Hahn Hall of Administration located at 500 West Temple Street, Los Angeles, CA 90012, (c) providing it to any member of the public requesting a copy, and (d) issuing a press release to publicize the Order throughout the County.
 - a) The owner, manager, or operator of any facility that is likely to be impacted by this Order is strongly encouraged to post a copy of this Order onsite and to provide a copy to any member of the public requesting a copy.

Appendix E

- b) Because guidance may change, the owner, manager, or operator of any facility that is subject to this Order is ordered to consult the Los Angeles County Department of Public Health's website (www.publichealth.lacounty.gov) daily to identify any modifications to the Order and is required to comply with any updates until the Order is terminated.
23. If any subsection, sentence, clause, phrase, or word of this Order or any application of it to any person, structure, gathering, or circumstance is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, then such decision will not affect the validity of the remaining portions or applications of this Order.
24. This Order incorporates by reference, the March 4, 2020 Proclamation of a State of Emergency issued by Governor Gavin Newsom and the March 4, 2020 declarations of a local and public health emergency issued by the Los Angeles County Board of Supervisors and Los Angeles County Health Officer, respectively, and as they may be supplemented.
25. This Order is issued in consideration of the County's current status within the tiered reopening approach of California's Blueprint for a Safer Economy issued August 28, 2020, as well as the November 19, 2020 Limited Stay At Home Order issued by the State Public Health Officer. This Order may be revised in the future as the State Public Health Officer

Appendix E

progressively designates sectors, businesses, establishments, or activities for reopening with required modifications or closure at a pace designed to protect health and safety. Should local COVID-19 conditions warrant, the Health Officer may, after consultation with the Board of Supervisors, issue orders that are more restrictive than the guidance and orders issued by the State Public Health Officer.

26. This Order is consistent with the provisions in the Governor's Executive Order N-60-20 and the State Public Health Officer's May 7, 2020 Order, that local health jurisdictions may implement or continue more restrictive public health measures in the jurisdiction if the local health officer believes conditions in that jurisdiction warrant them. Where a conflict exists between this Order and any state public health order related to controlling the spread of COVID-19 during this pandemic, the most restrictive provision controls. Consistent with California Health and Safety Code section 131080, except where the State Health Officer may issue an order expressly directed at this Order or a provision of this Order and based upon a finding that a provision of this Order constitutes a menace to the public health, any more restrictive measures in this Order may continue to apply and control in the County of Los Angeles Public Health Jurisdiction.
27. Pursuant to Sections 26602 and 41601 of the California Government Code and Section 101029 of the California Health and Safety Code, the Health Officer requests that the Sheriff and all chiefs of police in all cities

202a

Appendix E

located in the Los Angeles County Public Health Jurisdiction ensure compliance with and enforcement of this Order. The violation of any provision of this Order constitutes an imminent threat and menace to public health, constitutes a public nuisance, and is punishable by fine, imprisonment or both.

28. This Order shall become effective at 10:00 pm on November 25, 2020 and will continue to be until it is revised, rescinded, superseded, or amended in writing by the Health Officer.

IT IS SO ORDERED:

/s/
Muntu Davis, M.D., M.P.H.
Health Officer,
County of Los Angeles

11/25/2020
Date

203a

Appendix E

Appendices At-A-Glance

All DPH protocol is available at:
[http://www.publichealth.lacounty.gov/media/
Coronavirus/](http://www.publichealth.lacounty.gov/media/Coronavirus/)

Appendix A: Protocol for Social Distancing [Revised 10/5/2020]

Appendix B: Protocols for Retail Establishments Opening for In-person Shopping [Revised 11/19/2020]

Appendix B-1: Protocols for Grocery Stores and Retail Food Markets [Revised 11/19/2020]

Appendix C: Reopening Protocol for Warehousing, Manufacturing and Logistic Establishments [Revised 7/18/2020]

Appendix D: Protocols for Office Worksites [Revised 11/19/2020]

Appendix E: Protocols for Shopping Center Operators [Revised 11/25/2020]

Appendix F: Protocol for Places of Worship [Revised 7/17/2020]

Appendix G: Protocol for Vehicle-Based Parades [Revised 10/13/2020]

Appendix E

Appendix H: [Rescinded and Incorporated into Appendix R on 10/23/2020]

Appendix I: Protocol for Restaurants, Breweries and Wineries [Revised 11/25/2020]

Appendix J: Reopening Protocol for Music, Film, and Television Production [Revised 8/18/2020]

Appendix K: Reopening Protocol for Day Camps [Revised 8/11/2020]

Appendix L: Reopening Protocol for Gyms and Fitness Establishments [Revised 11/25/2020]

Appendix M: Reopening Protocol for Museums, Galleries, Zoos, and Aquariums [Revised 11/25/2020]

Appendix N: Protocol for Professional Sports Leagues and Facilities Opening for Training Sessions and Spectator-Free Events [Revised 11/4/2020]

Appendix O: Reopening Protocol for Campgrounds, RV parks and Cabin Rental Units [Revised 8/21/2020]

Appendix P: Reopening Protocol for Hotels, Lodging, and Short-Term Rentals [Revised 10/26/2020]

Appendix Q: Reopening Protocol for Cardrooms [Revised 11/25/2020]

205a

Appendix E

Appendix R: Reopening Protocol for Personal Care Establishments [Revised 11/25/2020]

Appendix S: [Rescinded 6/28/2020]

Appendix T1: Reopening Protocols for K-12 Schools [Revised 10/27/2020]

Appendix T2: Protocol for COVID-19 Exposure Management Plan in K-12 Schools [Revised 10/18/20]

Appendix U: Reopening Protocol for Institutes of Higher Education [Revised 9/14/2020]

Appendix V: Protocols for Miniature Golf, Batting Cages, and Go Cart Racing [Revised 11/25/2020]