

No. 21-148

**In the Supreme Court of the
United States**

CALIFORNIA RESTAURANT ASSOCIATION, INC.,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA, LOS ANGELES
COUNTY, ET AL.,

Respondents

**On Petition for Writ of Certiorari to
the Court of Appeal of the State of
California,
Second Appellate District**

**BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE¹

The City of Santa Clarita (the “City”) is one of the 88 incorporated cities within the County of Los Angeles and, accordingly, restaurants within the City are required to comply with the decision by the Los Angeles County Department of Public Health and Dr. Barbara Ferrer (collectively, “Respondents”) to ban outdoor dining at restaurants beginning on November 25, 2020 (the ‘Restaurant Closure Order’). The City’s economy relies heavily on food services, among other industries. The City’s inhabitants depend on the food services industry for work, and the sales tax revenues generated by the City’s restaurants is a major source of funding for the City. The City therefore has a vested economic interest in the decision by the trial court to enjoin Respondents from continuing the Restaurant Closure Order unless and until Respondents perform a risk-benefit analysis of the impacts likely to result from the Restaurant Closure Order.

The City, as a law and policy making authority itself, also has a vested interest in ensuring that government properly and adequately

¹ Pursuant to S. Ct. Rule 37.6, counsel for all parties were given timely notice of the City of Santa Clarita’s intent to file this brief and have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person or entity other than *amicus*, its members or counsel made a monetary contribution to its preparation or submission.

justifies its decisions to the public it serves. Respondents here deny such obligation by taking the position that the Superior Court of California in Los Angeles County (“trial court”) was wrong to require Respondents to perform the risk-benefit analysis. Contrary to Respondents’ arguments, public policy supports the trial court’s decision.

SUMMARY OF ARGUMENT

1. The Court should hear this case as the risks of COVID and measures taken to slow the spread of COVID will likely persist for months, if not years, to come. Leaving questions of government agency authority unanswered during a pandemic will open the door for California health officials to order closures and other restrictive edicts without showing the reasoning behind those actions.
2. Respondents’ position is that, during a period in which they declare a public health crises, County health officials can impose nearly any restriction at all and the officials do not need to justify the decision to anyone – the public or the courts. Respondents boldly assert: “Nor may the court demand that the County produce a risk-benefit analysis or indeed *any* empirical evidence to support its action in temporarily banning outdoor dining.” Respondents’ Petition for Writ of Mandate, Prohibition or Other Appropriate Relief; Request for Stay; Memorandum of Points and Authorities, Filed December 17, 2020 (“Pet.”) at 13 (emphasis added.) Respondents repeat essentially the same position

later in their petition: “In such circumstances [referring to an epidemic], government may act based on rational speculation and need not present *any* evidentiary support or empirical data.” Pet. at 51 (emphasis added.) Respondents’ position is contrary to law, and bad policy. The arguments in the City’s brief assert that legal authority requires governments to consider all relevant factors before imposing a specific rule or restriction and to articulate the reasoning. In the context of public health decisions, the relevant factors include the risks or costs that are likely to result from the rule or restriction under consideration. Public policy and the statutes under which Respondents purported to act when imposing the Restaurant Closure Order support the notion that they can be required to conduct a risk-benefit analysis. Thus, the trial court properly ordered Respondents to justify the Restaurant Closure Order by performing a risk-benefit analysis and to demonstrate to the public that it had done so.

3. The City also argues that a proper risk-benefit analysis includes tailored consideration of the effects on specific localities, like the City, which has consistently had lower rates of COVID-19 caused deaths compared to Los Angeles County overall. Considering the substantial negative economic, social, and psychological consequences the Restaurant Closure Order would have, the Respondents should have to undergo a reasoned analysis before the Restaurant Closure Order is imposed county-wide.

ARGUMENT

I. UNANSWERED QUESTIONS REGARDING GOVERNMENT AGENCY POWERS AND COVID RESTRICTIONS WILL CONTINUE FOR THE FORSEEABLE FUTURE

According to a recent update posted by the Centers for Disease Control and Prevention (CDC), there has been a reversal in the downward trajectory of COVID cases. The rise of COVID case and hospitalization rates around the country have been “rapid and alarming.” And data shows the Delta variant, currently the predominant strain of the virus in the United States, is more infectious and leads to increased transmissibility in comparison to other variants, even in vaccinated individuals. Delta Variant (Aug. 19, 2021)

<https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>. It is likely the Los Angeles County Department of Public Health will continue to take measures to mitigate the spread of COVID that will affect the entirety of Los Angeles County, including the City. A decision from the Court is necessary to ensure that government agency powers are not exercised in an arbitrary or capricious manner that may result in more harm than good.

II. CALIFORNIA'S PUBLIC POLICY OF OPEN GOVERNMENT SUPPORTS THE TRIAL COURT'S DECISION

The trial court decided to close its order with an important concept. Our government serves the people, and the government should be able to justify its decisions to the people. The trial court said: "This analysis [referring to the risk-benefit analysis ordered Respondents to perform before allowing the Restaurant Closure Order to remain in effect indefinitely] must be articulated for [real party in interest California Restaurant Association, Inc. ("CRA")] and the public to see." The trial court properly ordered Respondents to justify the Restaurant Closure Order by performing a risk-benefit analysis and to demonstrate to the public that it had done so.

Underpinning the trial court's order was a recognition that the government's decisions should be grounded in reasoned decision-making. The people are entitled to know the bases of its government's decisions, and whether the government has considered the relevant information before reaching its decisions. This concept can be traced to the beginning of this country. The Declaration of Independence provides for an open government: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of happiness.—That to secure these rights,

Governments are instituted among Men, *deriving their just powers from the consent of the governed*" (Italics added.) The principle that public bodies must hold open and public meetings (at which the public can view and judge their government) is enshrined in the California Constitution. *See* Cal. Const. Art. I, § 3(b) (guaranteeing public's right of access to public records and governmental meetings). The California Legislature also codified this intent at Section 54950 of the California Government Code, which states:

In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Cal. Gov. Code § 54950. The California Court of Appeal has said about this statute that governs open government in California:

It is clearly the public policy of this state that the proceedings of public agencies, and the conduct of the public's business, shall take place at open meetings, and that *the deliberative process by which decisions related to the public's business are made shall be conducted in full view of the public.*

Epstein v. Hollywood Entertainment Dist. II Bus. Improvement Dist., 87 Cal.App.4th 862, 867 (2001) (emphasis added). Requiring decisions related to the public's business to be made in full view of the public serves multiple goals, including facilitating public participation in all phases of local government and curbing misuse of the democratic process by secret legislation of public bodies. *See Cohan v. City of Thousand Oaks*, 30 Cal.App.4th 547, 555 (1994).

Contrary to Respondents' apparent desire to shield from the public view whatever support they may have to enact the Restaurant Closure Order,² the public policy of the state of California is otherwise. The trial court was therefore correct to

² “Nor may the court demand that the County produce a risk-benefit analysis or indeed *any* empirical evidence to support its action in temporarily banning outdoor dining.” Pet. at 13. (emphasis added.)

order Respondents (if they desire to continue the Restaurant Closure Order beyond its three week initial term) to demonstrate to Petitioner and to the public through a risk-benefit analysis the reasons Respondents believe the Restaurant Closure Order is necessary. This process the trial court mandated finds ample support in the law, and allows the people to be “informed so that they may retain control over the instruments they have created.” *See* Cal. Gov. Code § 54950.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REQUIRING RESPONDENTS TO PERFORM A RISK-BENEFIT ANALYSIS

The negative consequences of a decision are certainly among the factors relevant to an agency’s consideration of a given action. Failing to perform any risk-benefit analysis or consider at all the potential negative effects of the Restaurant Closure Order demonstrates that Respondents enacted the order arbitrarily, capriciously, and without evidentiary support.

Performing a risk-benefit analysis in the context of public health decisions finds support at least as far back as *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). That case involved a regulation adopted by the City of Cambridge Board Of Health that required all city inhabitants to be vaccinated or revaccinated against smallpox because the board found that the disease was “prevalent” in the city

and infections were increasing. *Id.* at 12. The board also found that the vaccination order was “necessary for the speedy extermination of the disease.” *Id.* This Court, like the supreme judicial court of Massachusetts before it, observed that vaccination is an accepted form of preventative measure that carries a low level of risk. This Court quoted the following language of the decision by the supreme judicial court of Massachusetts, which this Court upheld:

He [referring to the trial court] would have considered this testimony of experts in connection with the facts that for nearly a century most of the members of the medical profession have regarded vaccination, repeated after intervals, as a preventive of smallpox; that, *while they have recognized the possibility of injury to an individual from carelessness in the performance of it, or even in a conceivable case without carelessness, they generally have considered the risk of such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive*; and that not only the medical profession and the people generally have for a long time entertained these opinions, but legislatures and courts have acted upon them with general unanimity.

Id. at 23-24 (emphasis added). This Court also considered the possibility that Massachusetts' vaccination regulation could be applied in such a manner that risk or cost would outweigh the benefit. The Court said:

Until otherwise informed by the highest court of Massachusetts, we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death.

Id. at 39. The Court was satisfied by the maxim that all laws should receive a sensible construction and therefore the Cambridge Board of Health intended an exception to the vaccination requirement when there was a particular showing of resulting serious injury or possible death. *Id.* In other words, when the risks outweighed the benefits.

Later cases, in ensuring that the government has appropriately exercised its power, have explained that the courts' role is to "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.’”³ *Western States Petroleum Assn. v. Superior Court*, 9 Cal.4th 559, 577 (1995) (quoting *California Hotel & Motel Assn. v. Industrial Welfare Com.*, 25 Cal.3d 200, 212 (1979) (superseded by rule on other grounds as stated in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1036 (2012))); *see also Carrancho v. California Air Resources Board*, 111 Cal.App.4th 1255, 1265 (2003). Under this authority, unless an agency has “considered all relevant factors” (i.e., weighed the risks and benefits), the agency has acted arbitrarily and capriciously.

The statutes under which Respondents purported to act additionally support the notion Respondents can be required to conduct a risk-benefit analysis. California Health and Safety Code section 101040(a) states:

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 emergency,’ or ‘local emergency’ as defined by Section 8558 of the

³ The California Supreme Court’s direction that a government agency demonstrate a rational connection between the factors relevant to a decision, the choice made, and the purpose of the enabling statute means Respondents are wrong when they contend they have unfettered discretion to act during a pandemic. *See Pet.* at 13, 51.

Government Code, within his or her jurisdiction.

Section 120175 of the California Health and Safety Code 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 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.

Both of these statutes require that health officers act when “necessary.” A health officer cannot know whether he or she is acting only when “necessary” unless he or she weighs the foreseeable potential risks of not acting against the perceived benefits of proceeding with a contemplated course of action.

In the present case, the trial court correctly observed that Respondents failed to consider all factors relevant to their decision to ban in-person dining by failing to perform a 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.” *See Appendix C of Petitioner’s Application at 155a.* The Court of Appeal’s finding that a risk-benefit requirement is “inconsistent with the court’s appropriate role” and that all that is required is that the order not be entirely arbitrary is inconsistent with California’s public policy for transparent reasoning behind decisions related to the public’s business and inconsistent with the California Health and Safety Code’s requirement that government officials only take safety measures when they are actually “necessary.” *See Appendix B of Petitioner’s Application at 23a. 25a.*

IV. A PROPER RISK-BENEFIT ANALYSIS INCLUDES CONSIDERATION OF EFFECTS ON STAKEHOLDERS LIKE THE CITY

Respondents failed to articulate adequate factors or considerations to trigger implementation of the Restaurant Closure Order, and similarly have not identified any measureable factors or considerations that will result in rescission of the order. The trial court identified a number of relevant factors Respondents should have, but failed to consider prior to continuing the Restaurant Closure Order indefinitely. The court said:

A reasonable person would expect [Respondents] 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, [Respondents] 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.

See Appendix B of Petitioner's Application at 156a. There existed at the time additional relevant data that was available to Respondents to aid them in reasoned decision-making, but which Respondents failed to consider. Pandemic-related restrictions have had, and will have, a significant impact on local public entities like the City. In July 2020, the Bureau of Labor Statistics of the United States Department of Labor reported governments had shed

1.5 million jobs since February 2020.⁴ Despite Respondents' protestations that it is "impossible" to analyze the impacts of Respondents' "Covid-19 interventions" like the Restaurant Closure Order, local government entities like the City have estimated such impacts. As of May 2020, City staff projected a \$10 million loss in revenue to the City in Fiscal Year 2019-2020 as a result of the state Safer at Home Order.⁵ The City also estimates that economic activity in the City is down 13% overall when comparing the first three quarters of 2019 to the first three quarters of 2020. The restaurant and hotel sector in the City is down an estimated 25% in the same time period. Other local public entities have undoubtedly prepared their own economic estimates. The analyses prepared by the City and the data that support the analyses would have been shared with Respondents if requested. Respondents have offered no reasonable explanation for why this relevant data cannot (or should not) be a part of Respondents' decision-making process.

Further demonstrating the arbitrary and capricious nature of the Restaurant Closure Order is the fact that Respondents instituted the order county-wide and without regard to specific conditions

⁴ The report can be accessed at https://www.bls.gov/news.release/archives/empstat_07022020.pdf (see page 4).

⁵ The report can be accessed at <http://santaclaracityca.iqm2.com/Citizens/FileOpen.aspx?Type=1&ID=1605&Inline=True> (see page 93).

in various locales. Los Angeles County “is one of the nation’s largest counties with 4,084 square miles, and has the largest population of any county in the nation – nearly 10 million residents who account for approximately 27 percent of California’s population.”⁶ There are 88 incorporated cities within the county.⁷ Respondents did not demonstrate to the trial or appellate courts any rationale for imposing the Restaurant Closure Order county-wide. The COVID death rate of City residents has consistently tracked lower than the county-wide death rate.⁸

A reasoned analysis would consider whether, given this evidence, the Restaurant Closure Order should be imposed county-wide. Respondents admittedly conducted no such analysis. The trial court was therefore correct in its finding that instituting the Restaurant Closure Order indefinitely was arbitrary and capricious.

CONCLUSION

For the reasons specified in this brief, the City requests that a writ of certiorari be issued to review

⁶ See <https://lacounty.gov/government/about-la-county/>

⁷ See http://file.lacounty.gov/SDSInter/lac/1043530_09-10CitiesAlpha.pdf

⁸ Los Angeles County COVID Case Summary from County of Los Angeles County Public Health website (Aug. 24, 2021), <http://publichealth.lacounty.gov/media/coronavirus/locations.htm>

the decision of the California Court of Appeal and, ultimately, to reverse that decision.

Respectfully submitted,

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