No. 21-148

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

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF PURSUANT TO RULE 15.8

California Restaurant Association, Inc. ("CRA") respectfully submits this supplemental brief pursuant to this Court's Rule 15.8 in connection with its pending Petition for a Writ of Certiorari (the "Petition") in order to draw this Court's attention to new decisions by the trial court below and intervening matters not available at the time CRA filed its Petition.

THE TRIAL COURT BELOW HAS INTERPRETED THE COURT OF APPEAL'S OPINION AS ALLOWING GOVERNMENT AGENCY ACTION BASED SOLELY ON "RATIONAL SPECULATION"

The trial court below has recently concluded that even discovery may not proceed while the ruling by the Court of Appeals stands, because the County need not justify its actions at any time, whether back in November 2020 when it issued the November 25, 2020 order closing all on-premises dining in Los Angeles County (the "Restaurant Closure Order"), now, or in the future should the County decide to reinstate a complete ban of on-premises dining. *See* Supplemental Appendix ("Supp. App.") 17a-18a. Specifically, on August 26, 2021, the trial court denied CRA's attempts to compel the depositions of the County's medical officers. Supp. App. 1a-2a. The trial court interpreted the Court of Appeal's decision as authorizing County officials to regulate an industry out of existence on the basis of "rational speculation,"

without even having to articulate the basis for those decisions to the public. Pet. at 11-12. In other words, in an action challenging whether the County had any scientific underpinning to promulgate the County's Restaurant Closure Order, the trial court held that it cannot allow CRA to take depositions of the officials who purportedly had a non-arbitrary basis to conclude that shutting down all outdoor dining was "necessary" to combat the spread of COVID-19. That holding contradicts well-established federal law that litigants are entitled to offer factual showings rebutting a government actor's purportedly rational basis. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) ("Although rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by *adducing evidence of irrationality*.") (emphasis added).

As CRA pointed out in its Petition, the Court of Appeal's logic, as accepted by the trial court, upends decades of case law that holds that government agencies act arbitrarily and capriciously when they fail to consider "important aspect[s] 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), by insulating those government actors from any judicial review of the considerations that contributed to their decisions. *See* Pet. at 18-22.

The Court of Appeal decision has also had a chilling effect on lower court review of the County's actions now and in the future, as the trial court not only refused to allow discovery to proceed, it *sua*

sponte ordered that CRA's claims for mandamus and declaratory relief must be dismissed without further briefing, Supp. App. 24a, even though the Court of Appeal's grant of a writ of mandate *at most* vacated a preliminary injunction on an incomplete record, which is not a ruling on the merits of the underlying action as a matter of law. *See Dep't of Fair Emp. & Hous. v. Super. Ct.*, 54 Cal. App. 5th 356, 390 (2020) ("[A] court is typically 'without jurisdiction to determine the merits upon the hearing of a motion for a temporary injunction and the orders purporting to do so are void.'") (quoting *Anderson v. Joseph*, 146 Cal. App. 2d 450, 454 (1956)).

By denying CRA the opportunity to brief the disposition of its claims, the trial court improperly refused to allow CRA to point out why the recent decisions in *Alabama Association of Realtors v. Department of Health and Human Services*, 594 U.S. ___ (2021) ("*Ala. Ass'n*") and *Brach v. Newsom*, 6 F.4th 904 (9th Cir. 2021) foreclose the conclusion of the Court of Appeal. These more recent decisions demonstrate that the courts *must* police the limits of what measures are "necessary" to combat the spread of disease in order to limit governmental overreach into private conduct, including by analyzing whether or not a given measure is justified by its practical impact on the spread of disease. *See Ala. Ass'n*, slip op. at 6-7 (rejecting broad claim of authority to take whatever measures the Centers for Disease Control and Prevention deem "necessary").

Trial courts around the country will almost certainly continue to abdicate their judicial

responsibility unless this Court grants a writ of certiorari and reverses the Court of Appeal's decision.

TAKINGS ISSUES ARE ALL THE MORE HEIGHTENED NOW

CRA's argument in its Petition that the County's actions have implications for the Takings Clause has also recently been confirmed by the creation and rapid depletion of the United States Small Business Administration ("SBA") Restaurant Revitalization Fund (the "Fund"). The Fund, established under the American Rescue Plan Act, Pub. L. No. 117-2 (2021), provided eligible restaurants up to $10 Million in emergency assistance, which would not have to be repaid. *See* Small Business Administration, *Restaurant Revitalization Fund Program Details*, https://www.sba.gov/funding-programs/loans/covid-19-relief-options/restaurant-revitalization-fund#section-header-1 (last accessed Sept. 4, 2021). The Fund closed after providing $28.6 billion in grants to 105,000 of its 370,000 applicants. Stacy Cowley, *Restaurant Grant Program Ends in a Cloud of Errors and Confusion*, N.Y. Times, https://www.nytimes.com/2021/07/01/business/restaurant-revitalization-fund-sba.html (July 1, 2021).

Both the existence of the SBA Fund and its rapid depletion support CRA's contention that, if left intact, the Court of Appeal's decision will have implications for Takings Clause jurisprudence. *See* Pet. at 28-32. When, as here, a "regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v.*

Mahon, 260 U.S. 393, 415 (1922). With respect to the County's restaurant closure order, the devastating economic impact, *see E. Enters. v. Apfel*, 524 U.S. 498, 529 (1998), and interference with reasonable investment-backed expectations, *see Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001), is apparent from the SBA's recognition of the restaurant industry's overwhelming need for emergency relief.

In addition to the dozens of declarations from restauranteurs that CRA introduced showing the ruinous economic impact of the County's orders in Los Angeles County, *see* Pet. at 30, there is now clear and unambiguous evidence of the impact of COVID-19 restrictions on restaurants across the country. Hundreds of thousands of restaurants sought relief from the SBA Fund, including many within Los Angeles County. *See* Kristine de Leon, *Pandemic relief fund granted nearly $2 billion to L.A.-area restaurants, but many missed out*, KTLA5, https://ktla.com/news/local-news/pandemic-relief-fund-for-restaurants-granted-nearly-2-billion-to-l-a-area-food-businesses-but-many-still-miss-out/ (July 27, 2021). It is now even clearer that COVID-19 regulations have had devastating economic impacts. These impacts have interfered with reasonable, investment backed expectations, including, for example, restaurants that purchased specialized equipment and implemented outdoor dining procedures. As a result, the Court of Appeal's flawed opinion has clear implications on Takings Clause jurisprudence in the context of regulations purportedly justified by COVID-19.

Without guidance from this Court, lower courts may be willing to hold that overly burdensome government restrictions are permissible government regulations and not takings, so long as the regulations pay lip service to the exigencies created by COVID-19. *See* Pet. at 32. Unless this Court grants certiorari, it is almost certain that the Court of Appeal's opinion will create significant doubt about what ought to be straightforward applications of Takings jurisprudence.

CONCLUSION

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

Dated: September 7, 2021

Respectfully submitted,

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SUPPLEMENTAL APPENDIX A — NOTICE OF RULING ON CALIFORNIA RESTAURANT ASSOCIATION, INC.'S MOTION TO ENFORCE DEPOSITION ORDER, FILED AUGUST 26, 2021

TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the motion of Petitioner and Plaintiff California Restaurant Association, Inc. ("CRA"), seeking an order compelling depositions and enforcing the Court's order dated February 11, 2021 (the "Motion"), came on regularly for hearing in Department 85 of the above-referenced Court, the honorable James C. Chalfant, judge presiding. Dennis S. Ellis, Esq. and Richard A. Schwartz of Browne George Ross O'Brien Annaguey & Ellis LLP appeared on behalf of CRA, and Amnon Z. Siegel of Miller Barondess LLP appeared on behalf of Respondents and Defendants County of Los Angeles Department of Public Health and Barbara Ferrer. After reviewing the papers submitted by the parties, and hearing the arguments of counsel, the Court ruled in accordance with its tentative ruling, making the following rulings:

1. The Court denied the Motion, and issued a written order, a true and correct copy of which is attached hereto as **Exhibit A**;

2. The Court determined that the Court of Appeal decision in *County of Los Angeles Department of Public Health v. Superior Court*, 61 Cal. App. 5th

478 (2021) was dispositive as to the Restaurant Closure Order challenged by CRA's mandamus and declaratory relief claims;

3. The Court ordered the dismissal of the mandamus and declaratory relief claims to occur upon the resolution of the remaining claim under 42 U.S.C. § 1983 by an independent calendar court; and

4. The Court ordered the matter transferred to Department One for review and reassignment to an independent calendar court for the resolution of the 42 U.S.C. § 1983 claim.

The Court prepared a minute order containing these rulings. A true and correct copy of the minute order is attached hereto as Exhibit B.

DATED: August 30, 2021
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Exhibit "A"

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

Decision on Motion for Order to Enforce Deposition: Denied

Petitioner California Restaurant Association, Inc. ("CRA") moves for an order enforcing the court's February 11, 2021 ruling on Defendants' motion for a protective order (the "Ruling") allowing it to take the depositions of Dr. Barbara Ferrer ("Ferrer"), Dr. Muntu Davis ("Davis"), Dr. Marianne Gausche-Hill ("Hill"), and Dr. Jeffrey D. Gunzenhauser ("Gunzenhauser") (collectively "Deponents").

The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

1. Petition

Petitioner CRA commenced this action on November 24, 2020. The operative pleading is the Second Amended Petition ("SAP") filed on December 17, 2020 against Respondents County of Los Angeles Department of Public Health ("DPH" or "Department") and Ferrer, in her capacity as Director of the Department, alleging causes of action for administrative and traditional mandamus and

declaratory relief and seeks the remedy of injunctive relief. The verified SAP 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 (sometimes, the "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.

On November 17, 2020, the Department held a hearing at which COVID and restaurant closures

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

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.

The Department has not conducted any review of the potential impact or effectiveness of the Restaurant Closure Order, or if they have, they have not disclosed or articulated any such study to the public. Nothing in the publicly-available materials indicates that Respondents conducted a careful study of the potential harm or impact of the Order.

In addition to the lack of scientific evidence establishing the public health benefits of prohibiting outdoor dining on a county-wide basis, the Department 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. 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. The public record shows no provision of data whatsoever regarding the very substantial costs that arise from prohibitions such as that imposed by Los Angeles County.

There is no rational and legitimate medical basis supporting the breadth and scope of the Department's total shutdown of outdoor dining.

2. 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* 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 2, 2020, the court denied CRA's *ex parte* application for a TRO and 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, designating 20STCP03881 as the lead case for the hearing.

On December 8, 2020, the court granted in part CRA's application for a preliminary injunction. The court enjoined Respondents from extending the Restaurant Closure Order past December 16, 2020 until it conducted an appropriate risk-benefit analysis.

On December 18, 2020, the Court of Appeal, Second Appellate District, Division Four issued a temporary stay of the preliminary injunction and issued an order to show cause why a preemptory writ of mandate should not issue ordering the court to vacate the preliminary injunction.

On February 11, 2021, the court conditionally denied Respondents' motion for a protective order requiring Ferrer, Davis, Hill, and Gunzenhauser to submit to a deposition unless the appellate court did not uphold the Restaurant Closure Order as a matter of law.

On March 1, 2021, the appellate court reversed the December 8, 2020 preliminary injunction.

B. Applicable Law

Every court shall have the power to compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein. CCP §128(a)(4). This enforcement power is also an inherent power of the court. *See* Security Trust & Say. Bank v. Southern Pac. R. Co., (1935) 6 Cal.App.2d 585, 588 ("It is a well-established principle of law that a court possesses power to enforce its judgments."); Machado v. Myers,

(2019) 39 Cal.App.5th 779, 796 n.13, 252 ("Trial courts have the inherent authority to enforce their rulings.")

C. Statement of Facts

1. Petitioner's Evidence[2]

On February 11, 2021, the court held a hearing on Respondents' motion for a protective order seeking to bar the depositions of County officials Ferrer, Davis, Gausche-Hill, and Gunzenhauser. Schwartz Decl., Ex. 1. The court conditionally denied Respondents' motion, stating that: (1) the depositions were not precluded simply because CRA's claims may require rational basis review; (2) both prongs of the apex deposition rule were satisfied as to each deponent; and (3) the alleged burden on deponents was insufficient to justify a protective order. Id., pp. 6, 8-10.

Because Respondents' petition for writ of mandate was pending in the Court of Appeal at the

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[2] In support of its reply, the CRA requests judicial notice of its Petition for a Writ of Certiorari ("Certiorari Petition"), filed in the Supreme Court of the United States on July 20, 2021, and placed on the docket of the Court as Case No. 21- 148 (Ex. 1). The existence of Exhibit 1, 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). *See* Fontenot v. Wells Fargo Bank, N.A., (2011) 198 Cal.App.4th 256, 264-65 (judicial notice of the existence and recordation, as well as the parties, dates, and legal consequences of, recorded documents may be judicially noticed).

time the motion for protective order was heard, the court recognized the possibility that Respondents could "prevail on appeal as a matter of law — meaning that the appellate court will decide that the Restaurant Closure Order had a rational basis as a matter of law." Id., p.7. The court conditionally ordered the depositions to proceed only if the appellate court's decision does not uphold the Order as a matter of law. Id., p. 9.

On March 1, 2021, the Court of Appeal issued an opinion ("Appeal Decision") granting Respondents' writ petition and vacating the court's preliminary injunction. Schwartz Decl., Ex. 2. Shortly after the Appeal Decision was issued, CRA contacted Respondents to arrange for the depositions of the Deponents. Schwartz Decl., Exs. 3, 4. Respondents refused to produce the Deponents for deposition, claiming that the Appeal Decision forecloses any further proceedings in this case. Schwartz Decl., Ex. 5.

2. Respondents' Evidence[3]

On December 21, 2020, CRA noticed the following depositions: Davis, the County's Health

[3] Respondents request judicial notice of (1) a November 22, 2020 LA County Public Health Press Release, "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," accessed on January 29, 2021 (Ex. 1); (2) a Los Angeles County Department of Public Health Press Release, dated January 29, 2021, titled "Outdoor Dining Service Returns with New Mandatory Safety Measures 228 New Deaths and 7,112 New Confirmed Cases of COVID-19 in Los

Officer; Ferrer, the Director of DPH; Gausche-Hill, the Medical Director of the County's Emergency Medical Services Agency; and Gunzenhauser, the Medical Director and Director of the Disease Control Bureau of DPH. Tokoro Decl., ¶5, Exs. C-F.

CRA's counsel did not confer with the County's counsel before unilaterally selecting the December 31, 2020 date for the depositions. Tokoro Decl., ¶6. The deposition notices were the first discovery served by CRA in the action. Tokoro Decl., ¶7.

The County moved for a protective order to bar CRA from taking the depositions. On February 11, 2021, the court held a hearing on the County's motion

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Angeles County (Ex. 2); (3) a Los Angeles County Department of Public Health Press Release, dated June 21, 2021, titled "As COVID-19 Rates Decrease Overall, More than 10 Million Vaccine Doses Administered in L.A. County - 3 New Deaths and 124 New Confirmed Cases of COVID-19 in Los Angeles County (Ex. 3); (4) a Los Angeles County Department of Public Health Press Release, dated August 10, 2021, titled "Vaccinated People Remain Well Protected from Severe COVID-19 Illness; Los Angeles County to Align with State on Vaccine Mandate for Healthcare Workers - 22 New Deaths and 2,622 New Confirmed Cases of COVID-19 in Los Angeles County (Ex. 4); (5) the Los Angeles County Department of Public Health's COVID-19 Vaccine Dashboard — COVID-19 Vaccinations in LA County, updated as of August 9, 2021 (Ex. 5); (6) the Los Angeles County Department of Public Health's Order of the Health Officer, issued July 30, 2021 (Ex. 6); and (7) a federal appellate "Order of Court" in Calvary Chapel of Bangor v. Mills, entered July 19, 2021 (Ex. 7).

The request is granted as to Exhibits 6 and 7. Evid. Code §452(c), (d). The remaining exhibits (Exs. 1-5) are not official acts subject to judicial notice and the requests are denied.

for protective order. Tokoro Decl., ¶8, Ex. G. At the conclusion of the hearing, the Court adopted its tentative order that conditionally denied the County's motion for protective order. Tokoro Decl., ¶9, Ex. H.

CRA's petition for rehearing was denied by the Court of Appeal. Tokoro Decl. Ex. L. CRA's subsequent petition for review was denied by the California Supreme Court. Tokoro Decl., Ex. M.

D. Analysis

Petitioner CRA moves for an order enforcing the Ruling allowing it to take the depositions of the Deponents. The County opposes.

1. The Appeal Decision

In the Appeal Decision, the appellate court relied on the highly deferential standard of review for legislative acts in epidemic emergencies set out by the United States Supreme Court in Jacobsen v. Massachusetts, ("Jacobsen") (1905) 197 U.S. 11, 39 that government action to protect public health will be upheld unless it has "no real or substantial relation" to the object of public health or is "a plain, palpable invasion" of rights. 61 Cal.App.5th at 488. The appellate court acknowledged that the Jacobsen test predates the tiers of scrutiny used in modern constitutional law and it has been criticized in recent Supreme Court opinions. Id. Nonetheless, it has not been overruled and the Appeal Decision relied on it and a more recent dissenting opinion by Justice Kavanaugh to conclude that a standard of "extreme deference" applies. Id. at 488-89.

The Appeal Decision described CRA's claim as a substantive due process claim subject to a rational basis test and noted that the Restaurant Closure Order was a quasi-legislative act which must be upheld unless arbitrary and capricious, or entirely lacking in evidentiary support, which is identical to the rational basis test. Id. at 490. In reviewing a quasi-legislative act, the court cannot reweight the evidence. Id. (citation omitted). The appellate court described the core issue as whether the County's temporary suspension of outdoor dining is rationally related to a legitimate state interest of limiting the spread of COVID-19. Id. at 491.

The Appeal Decision reversed this court's conclusion that the Department's generalized evidence of a COVID-19 risk in outdoor dining was arbitrary because DPH failed to perform the required risk-benefit analysis. Id. at 493. The appellate court described a mandate for a "nebulous risk-benefit requirement" as inconsistent with the trial court's role. Ibid. The trial court's review begins and ends with a determination whether the Restaurant Closure Order is arbitrary, capricious, or entirely lacking in evidentiary support and it is none of these. Id. The court concluded that "there is no likelihood the Restauranteurs will prevail on the merits of their claims". Id. at 487. It declined to second-guess public health actions "in an `area[ ] fraught with medical and scientific uncertainties.'" (Id. at 495 (citation omitted)) and held that "[b]ecause the Restauranteurs failed to satisfy their burden of demonstrating the [Restaurant Closure] Order is arbitrary, capricious, or without rational basis, we

conclude they cannot ultimately succeed on the merits of their claims." Id. at 495.

Although the court is not required to agree with the Appeal Decision, it is bound by it under the doctrine of *stare decisis*. *See* Auto Equity Sales, Inc. v. Superior Court, (1962) 57 Ca1.2d 450, 455 (decisions of every division of the district courts of appeal are binding upon all superior courts of California).

2. Whether the Appeal Decision Precludes the Depositions

CRA argues that the Appeal Decision does not preclude it from taking the depositions the court's Ruling permitted because the Appeal Decision did not uphold the Restaurant Closure Order as a matter of law. Rather, the Appeal Decision only addressed the single issue whether the trial court abused its discretion in granting a preliminary injunction enjoining enforcement of the Order. Mot. at 6; Reply at 3-4.

CRA points out that black letter law provides that an interlocutory appellate ruling cannot resolve disputed facts in the underlying litigation. "A ruling on a petition for a writ of mandate involving a preliminary injunction is not a decision on the merits and does not operate as the law of the case which would be binding on the trial court." Huntington Park Club Corp. v. City of Los Angeles , (1988) 206 Cal.App.3d 241, 248, n. 5. CRA argues that the appellate court did not wade into the question of what

facts discovery might reveal about Respondents' disputed evidence that supported a rational basis for the Restaurant Closure Order, and the court could not have determined that the declarations were actually true. Mot. at 7; Reply at 4, 7-8. The appellate court was limited sharply by the procedural posture created by Respondents' petition and could only answer the question whether the record supported a preliminary injunction. Mot. at 8; Reply at 4-5. Indeed, the Appeal Decision is replete with examples of the appellate court's uncritical acceptance of Respondents' declarations that contain conclusions contradicted by CRA's experts. Mot. at 9; Reply at 7-8. CRA concludes that the Appeal Decision did not decide that CRA could not negate Respondents' rational basis showing as a matter of law. Mot. at 7; Reply at 5.

CRA contends that case law establishes that a party is entitled to offer factual showings rebutting a government agency's purported rational basis. *See, e.g.*, St. Joseph Abbey v. Castille, (5th Cir. 2013) 712 F.3d 215, 223, 226 (plaintiffs may negate a seemingly plausible basis for a law by adducing evidence of irrationality and court not required to accept nonsensical explanations for regulation). CRA contends that numerous factual issues remain for the trial court to resolve, including the conclusions in Respondents' declarations that COVID-19 transmission is an especially high risk in unmasked outdoor dining. Mot. at 9; Reply at 7-8. Despite the Appeal Decision's acceptance of Respondents' declarations stating that they considered the risks of outdoor dining (61 Cal.App.5th at 491), CRA is entitled

to depose Respondents' health officials to assess the credibility of their declarations and determine what evidence, if any, was considered before issuing the Restaurant Closure Order. Mot. at 10; Reply at 7-8.

While it is true that a "ruling on a petition for a writ of mandate involving a preliminary injunction is not a decision on the merits and does not operate as the law of the case which would be binding on the trial court" (Huntington Park Club Corp. v. City of Los Angeles, *supra*, 206 Cal.App.3d at n.5), this case concerns the quasi-legislative action of issuance of the Restaurant Closure Order for which judicial review is limited. An agency's quasi-legislative decision is an abuse of discretion only if it is "arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." Kahn v. Los Angeles City Employees' Retirement System, (2010) 187 Cal.App.4th 98, 106. Although mandate will not lie to control the agency's discretion, it will lie to correct abuses of discretion. California Public Records Research, Inc. v. County of Alameda, (2019) 37 Cal.App.5th 800, 806. The court may not substitute its judgment for that of the agency, and it must uphold the decision if reasonable minds can differ. Id.

A record is required for traditional mandamus review of quasi-legislative decisions if the law requires a hearing as which evidence is presented and fact-findings made. *See* SN Sands Corp. v. City and County of San Francisco, ("SN Sands," (2008) 167 Cal.App.4th 185, 191 (award of public contract is quasi-legislative decision for which judicial review is limited to administrative record); Cypress Security,

Inc. v. City and County of San Francisco, (2010) 184 Cal.App.4th 1003, 1010 (same). If the hearing does not require the presentation of evidence, the quasi-legislative decision is challenged based on declarations and exhibits. The court cannot disturb the decision if it is supported by substantial evidence. SN Sands, *supra*, 167 Cal.App.4th at 191. Extra-record evidence is not admissible to contradict evidence upon which the agency relied in making a quasi-legislative decision, or to raise a question regarding the wisdom of that decision. Western States Petroleum Assn. v. Superior Court, ("Western States") (1995) 9 Cal.4th 571, 579. A potential exception exists for extra-record evidence that provides background information for the quasi-legislative decision, establishes whether the agency fulfilled its duties in making the decision, or assists the court in understanding the decision. Id. at 578-79.

In this case, it is unclear whether the Restaurant Closure Order required a Board of Supervisors hearing at which evidence was presented, and therefore whether an administrative record is required. Assuming that no record is required and that the parties can submit evidence by declaration, CRA can only present evidence that DPH did not fulfill its duties in issuing the Order, the Order is not supported by substantial evidence, or the Order is arbitrary and capricious. CRA cannot simply contradict Respondents' experts or attack their credibility because to do so would require impermissible weighing of evidence. For this reason, CRA's argument that there are factual disputes about

the credibility of Respondents' experts is untenable. Even with such disputes, the Restaurant Closure Order would still be upheld because it may be based on rational speculation unsupported by evidence or empirical data. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Heller v. Doe by Doe, (1993) 509 U.S. 312, 320.

Contrary to CRA's argument (Reply at 7-8), the Appeal Decision forecloses CRA from attacking the syllogism behind the Restaurant Closure Order as not supported by substantial evidence or as arbitrary and capricious. The Appeal Decision concluded that the County established that it had a plausible basis for the Order through the statements of Davis, Gunzenhauser, and Gausche-Hill, all of whom detailed how and why they reached the conclusion that the Restaurant Closure Order was necessary. 61 Cal.App.5th at 492. Based on this evidence, the appellate court expressly stated that "there is no likelihood the Restauranteurs will prevail on the merits of their claims" (Id. at 487) and that "[b]ecause the Restauranteurs failed to satisfy their burden of demonstrating the [Restaurant Closure] Order is arbitrary, capricious, or without rational basis, we conclude they cannot ultimately succeed on the merits of their claims." 61 Cal.App.5th at 495. The appellate court did not simply say that CRA failed to show a probability of success; it held that there was no prospect of prevailing. In other words, the appellate court found that sufficient evidence exists to conclude as a matter of law that the Restaurant Closure Order

is not arbitrary and capricious. No further evidence or discovery is necessary on this claim.

In its Ruling, this court imposed a clear condition that the depositions would not go forward if the Court of Appeal decision did not uphold the Restaurant Closure Order as a matter of law. Opp. at 9; Tokoro Decl., Ex. H, p.9. The court explained that the Court of Appeal decision would function as an "on/off switch" and if the preliminary injunction was reversed, there would be no basis to go forward with the depositions. Opp. at 9-10; Tokoro Decl., Ex. G, pp. 15-16. Contrary to the CRA's assertions (Reply at 5), that is exactly what happened. CRA may not take the depositions based on its mandamus claim.

2. CRA's Declaratory Relief Claim

CRA asserts that it has a viable declaratory relief claim because the Appeal Decision's analysis was limited to the record, which is incomplete and insufficient for a determination of the ultimate merits of the case. Mot. at 10; Reply at 9-10. The CRA is entitled to discovery to assist it in proceeding with litigation and disproving the County's claim that it had a rational basis for issuing the Restaurant Closure Order. Mot. at 11-12; Reply at 9-10.

The County claims that the issue is moot. A claim for declaratory relief becomes moot when some event has occurred which deprives the controversy of its life. Ctr. for Local Gov't Accountability v. City of San Diego, (2016) 247 Cal.App.4th 1146, 1157. The County notes that in analogous cases involving

COVID-related restrictions in other contexts, such as religious activities, courts have found controversies moot when there was no credible threat of reinstatement of the applicable restrictions. Opp. at 14-15. The County argues that there is no longer any live controversy with respect to the closure of outdoor restaurant dining. Opp. at 14. Restaurants were reopened for outdoor dining on January 29, 2021, aligning with the sector re-openings permitted under the State's Blueprint for a Safer Economy, which the County contends without admissible evidence has been revoked.

This court and the Court of Appeal both stated the issue was not moot despite the lifting of the Restaurant Closure Order, based on the reasonable expectation that restrictions could be re-imposed. The County disputes that closure of outdoor dining could reoccur, noting that it eliminated nearly all COVID-related restrictions on June 15, 2021 and has not re-imposed any such restrictions, or indicated that it will, despite a recent increase in infections caused by the COVID-19 Delta variant. Opp. at 15.

The County's argument is undermined by facts subject to common knowledge. It is well known that the Delta variant is the basis for what the press describes as a "surge" for which the State, County, and federal authorities have imposed new restrictions, including extending eviction moratoriums, imposing indoor mask requirements and, most recently, outdoor mask requirements in large gatherings — e.g., football and baseball games. Given these continuing and recently increased

restrictions, no reasonable person would conclude that the County will not re-impose an outdoor dining restaurant closure in the future. CRA's claim for declaratory relief is not moot.

Although not moot, the declaratory relief claim is subsumed within the mandamus claim. Declaratory relief is available for a declaration of rights or duties. CCP §1060. There must be an actual present controversy over a proper subject. Friends of the Trails v. Blasius, (2000) 78 Cal.App.4th 810, 831. Declaratory relief may encompass future and contingent legal rights. Eye Dog Foundation v. State Bd. of Guide Dogs for the Blind, (1967) 67 Ca1.2d 536, 541. A court may adjudicate only a case or controversy and may not give an advisory opinion. Selby Realy Co. v. City of San Buenaventura, (1973) 10 Cal.3d 110.

The SAP alleges that an actual controversy exists between CRA and Respondents in that CRA contends that Respondents are acting arbitrarily and capriciously and without legal or evidentiary foundation by closing restaurants in the County notwithstanding the evidence demonstrating that restaurants are not the cause of the spread of COVID-19. SAP ¶49. The prayer for this claim seeks a declaration that the Restaurant Closure Order is invalid as arbitrary and capricious and/or entirely lacking in evidentiary support. This claim seeks adjudication of the parties' rights and duties with respect to the Restaurant Closure Order, not existing or future rights. Declaratory relief may not be used to seek adjudication of past wrongs or historical

rights. Cardellini v. Casey, (1986) 181 Cal.App.3d 389, 396; Brownfield v. Daniel Freeman Marina Hospital, (1989) 208 Cal.App.3d 405, 414. The declaratory relief claim is subsumed within the mandamus claims.[4]

E. Conclusion

The motion for an order to enforce depositions is denied. The court will inquire at hearing whether (a) it may dismiss the mandamus and declaratory relief claims against Respondents (SAP's first three causes of action) and (b) should transfer the remaining 42 U.S.C. section 1983 claim to an independent calendar court.

[4] The court offers no opinion when a declaratory relief claim that the County is contemplating or has issued a new restaurant closure order would be ripe. Nor does this ruling affect CRA's 42 U.S.C. section 1983 claim.

Exhibit "B"

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse,
Department 85

20STCP03881 August 26, 2021

CALIFORNIA RESTAURANT
ASSOCIATION, INC., A CALIFORNIA
CORPORATION

vs

CALIFORNIA OF LOS ANGELES
DEPARTMENT OF PUBLIC HEALTH A
GOVERNMENTAL ENTITY

Judge: Honorable James C. Chalfant

CSR: C. Cameron, CSR # 10315

Judicial Assistant: J. De Luna

ERM: None

Courtroom Assistant: C. Del Rio

Deputy Sheriff: None

APPEARANCES:

For Petitioner(s): Dennis Sean Ellis (X) ; Richard A. Schwartz (X)

For Respondent(s): Amnon Zvi Siegel (Video)

NATURE OF PROCEEDINGS: Trial Setting Conference; Hearing on Motion of Petitioner for Order to Enforce Deposition Order

The court's tentative ruling is published to all parties via posting on the court's website. The matters are called for hearing.

After argument of counsel, the court rules in accordance with its tentative ruling which is filed and adopted as the final ruling of the court and incorporated herein by reference.

Summary of the court's ruling:

Petitioner California Restaurant Association, Inc. moves for an order enforcing the court's February 11, 2021 ruling on Defendants' motion for a protective order allowing it to take the depositions of Dr. Barbara Ferrer, Dr. Muntu Davis, Dr. Marianne Gausche-Hill, and Dr. Jeffrey D. Gunzenhauser.

The court has read and considered the moving papers and opposition (no reply was filed), and renders the following decision.

The motion for an order to enforce depositions is denied.

The court indicates that the Court of Appeal decision is dispositive of the Restaurant Closure Order which is what is at issue in the mandamus and declaratory relief claims.

The court orders the dismissal of the mandamus and declaratory relief claims against Respondents (SAP's first three causes of action) to occur upon the resolution of the remaining 42 U.S.C. section 1983 claim by an independent calendar court.

The matter is ordered transferred to Department One for review and reassignment to an independent calendar court for resolution of the 42 U.S.C. section 1983 claim.

Petitioner is to give notice.