No. 21-

IN THE

Supreme Court of the United States

MARK'S ENGINE COMPANY NO. 28 RESTAURANT, LLC, A LIMITED LIABILITY COMPANY,

Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY *et al.*,

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

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QUESTIONS PRESENTED

1. Whether the appellate court's decision improperly expands the holding set forth in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and its progeny, thereby giving states unfettered authority to exercise their emergency powers during a public-health crisis without the possibility of any meaningful review.

2. Whether the Los Angeles County Department of Public Health's order temporarily suspending outdoor restaurant dining violates the First Amendment right to freedom of assembly such that heightened scrutiny must be applied.

3. Whether banning outdoor restaurant dining in the absence of any study specifically demonstrating that outdoor restaurant dining contributes to the spread of COVID-19 is narrowly tailored to achieve the government's legitimate interest in limiting the spread of the disease.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Mark's Engine Company No. 28 Restaurant, LLC ("MEC"), a limited liability company, is the petitioner in this Court. MEC was a real-party-in-interest in the Superior Court of the State of California, County of Los Angeles ("trial court" or "Los Angeles Superior Court") proceedings, a real-party-in-interest in the Court of Appeal of the State of California, Second Appellate District ("Court of Appeal") writ proceeding, and a petitioner in the Supreme Court of the State of California ("California Supreme Court").

The County of Los Angeles Department of Public Health and Muntu Davis, M.D., M.P.H., in his official capacity as Los Angeles County Health Officer (collectively, the "County") are respondents in this Court. The County was the defendant and respondent in the trial-court proceedings, the petitioner in the Court of Appeal writ proceeding, and the respondent in the California Supreme Court.

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

California Restaurant Association, Inc. ("CRA") was a real-party-in-interest in the Los Angeles Superior Court. CRA was also a real-party-in-interest in the Court of Appeal writ proceeding and a petitioner in the California Supreme Court. On July 30, 2021, CRA petitioned this Court for certiorari

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

RELATED CASES

- *Mark's Engine Company No. 28 Restaurant, LLC v. County of Los Angeles, Department of Public Health et al.*, No. 20STCV45134, Los Angeles Superior Court. Granting a preliminary injunction on December 15, 2020.*

- *County of Los Angeles, Department of Public Health et al. v. Superior Court of Los Angeles County*, No. B309416, Court of Appeal. Staying preliminary injunction on December 18, 2020. Issuing peremptory writ directing the Superior Court to vacate its December 15, 2020 preliminary-injunction order 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*, No. S268101, California Supreme Court. Denying petition for review on June 9, 2021.

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* This proceeding was consolidated with *California Restaurant Association, Inc. v. County of Los Angeles, Department of Public Health et al.* (Los Angeles Super. Ct. Case No. 20STCP03881) for purposes of the hearing on the motions for preliminary injunction and for the writ proceeding in the Court of Appeal.

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The trial court's December 8, 2020 ruling and December 15, 2020 order granting a preliminary injunction are unpublished.[1] Appendix ("App.")[2] 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 published and 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 MEC's petition for review is unpublished. App. 1a.

1. The December 15, 2020 order is available at 2020 WL 8410014 but the version accessible there omits the referenced Exhibit A: the trial court's December 8, 2020 ruling granting the application for preliminary injunction in part.

2. MEC's Appendix materials for this Petition are included in the Petition for a Writ of Certiorari filed by California Restaurant Association, Inc. in the case *California Restaurant Association, Inc. v. Superior Court of California, Los Angeles County et al.* (United States Supreme Court Case No. 21-148) and all citations herein are to that appendix.

JURISDICTION

On June 9, 2021, the California Supreme Court denied MEC's petition for review. App. 1a.

Pursuant to this Court's July 19, 2021 Order extending the deadline to file a petition for a writ of certiorari by 150 days in any case in which the relevant lower court judgment or order was issued prior to July 19, 2021, MEC's deadline to file its petition was extended to November 6, 2021, which in accordance to Rule 30.1, moved the deadline to file to November 8, 2021. Thus, this petition is timely.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . . .

U.S. Const. amend. I.

The Fifth Amendment to 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.

U.S. CONST. amend. V.

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

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

U.S. CONST. amend. XIV, § 1.

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

On November 22, 2020, the County announced a temporary ban on all outdoor and indoor restaurant dining due to a surge in COVID-19 infections. MEC and CRA filed separate suits against the County in Los Angeles Superior Court. In response to several applications for injunctive relief, the trial court issued an order to show cause re: preliminary injunction ("OSC") and set the consolidated actions for hearing.

On December 8, 2020, the trial court held a hearing on the OSC and issued a tentative decision, which it adopted after oral argument. One week later, the court entered an order in which it found that the County's evidence did not support closure of outdoor restaurant dining because the evidence failed to account for the outdoor nature of the activity, which had been found by the CDC to carry little risk. The trial court found that the County had acted arbitrarily in issuing its order because the County had failed "to perform the required risk-benefit analysis." App. 68a. The trial court's order therefore enjoined the County from enforcing or enacting any ban on outdoor dining after December 16, 2020 (the date the County had originally contemplated as the end date for its ban) until and unless the County's public health officers "conduct[ed] an appropriate risk-benefit analysis" and articulated this analysis for the public to see. The County petitioned the Court of Appeal for a writ of mandate directing the trial court to set aside the injunction.

The Court of Appeal stayed the trial court's preliminary injunction and issued an order to show cause on December 18, 2020. On March 1, 2021, the Court of Appeal issued a writ of mandate in a published opinion

directing the trial court to vacate its December 15, 2020 order enjoining the County's outdoor-dining ban and to enter a new order denying MEC and CRA's requests for a preliminary injunction.

STATEMENT OF THE CASE

This petition arises from an action brought by MEC against the County on November 24, 2020, alleging causes of action for declaratory relief and violations of the California Constitution and seeking the remedy of injunctive relief. Specifically, MEC sought an injunction barring the County from enforcing its November 25, 2020 order entitled "Reopening Safer at Work and in the Community for Control of COVID 19, Blueprint for a Safer Economy–Tier 1 Surge Response" (the "Restaurant Closure Order").

The County has issued a series of health orders in an effort to halt the spread of COVID-19. Its initial June 2020 Health Order (the "June Order") allowed many businesses, including MEC, to operate, so long as they followed guidelines established by the state and County to help curb the spread of COVID-19. As of June 1, 2020, MEC and other Los Angeles County restaurants were not permitted to provide dine-in service indoors. They were permitted only to provide outdoor dining and take-out dining under the County safety protocols set forth in the June Order.[3]

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3. Following the promulgation of the June Order, MEC complied with all state and local protocols relating to the safe operation of its restaurant. Doing so required MEC to make a large investment of time and resources to pivot from its previous indoor-dining concept to a takeout and outdoor-dining model. Among the many steps that MEC had to take to comply with the June Order

On November 19, 2020, the County implemented a new order that limited the number of customers at restaurants with outdoor operations to 50% of outdoor capacity, thus placing even harsher restrictions on the number of diners that MEC and businesses like it could serve. In addition, the November 19, 2020 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, the County announced the Restaurant Closure Order, this time prohibiting outdoor restaurant dining entirely for a period of at least three weeks. The Restaurant Closure Order took effect on November 25, 2020 at 10:00 p.m. and ultimately banned outdoor restaurant dining entirely. Take-out, delivery, and drive-thru services remained unaffected.

The County's own data provided no support for the shutdown of outdoor-restaurant operations as an effective means of combatting COVID-19. In attempting to justify the Restaurant Closure Order, Barbara Ferrer, Ph.D., M.P.H., M.Ed., Director of Public Health for the County, said that there had been a 61% increase in hospitalizations involving COVID-19 in Los Angeles County between November 7 and November 20, 2020, which could potentially have led to the local healthcare system becoming overwhelmed. App. 38a. Further, Dr. Ferrer claimed that while most restaurants had complied with safety mandates, many had had issues, mainly regarding social distancing. App. 38a.

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was to physically distance its outdoor-dining tables by at least eight feet and spend thousands of dollars on outdoor seating, heating, and protection. These measures severely limited the number of patrons that MEC could accommodate.

Dr. Ferrer conceded that she did not have any concrete data regarding how many people had been infected as a result of outdoor-restaurant dining. App. 38a. While the County pointed to a CDC study as its "best data" in support of the Restaurant Closure Order, that study was not specific to restaurants and made no distinction between indoor and outdoor dining. There was no evidence for the conclusion that outdoor dining should have been banned. App. 85a. The CDC study showed only that a subset of COVID-19 patients reported that they had recently dined at restaurants more than the general population. App. 69a. The CDC study did not make any distinction between indoor and outdoor dining, even though all available evidence regarding the transmission of any airborne or aerosol illness suggested that this was a key factor. App. 69a.

In actuality, the County's data indicated that COVID-19 cases traced back to its restaurants and bars accounted for a mere 3.1% of confirmed cases countywide from over 204 outbreak locations—the vast majority of which were chain or fast-food type restaurants that did not follow MEC's business model (i.e., restaurants whose typical take-out and drive-thru model was unaffected by the Restaurant Closure Order). App. 70a. Of 2,257 confirmed COVID-19 cases, 2,249 of were traced to staff members at workplaces and just eight came from non-staff members. App. 38a.

Not only did the County fail to present scientific evidence of the public-health benefits of prohibiting outdoor dining, it also failed to estimate or otherwise account for any of the economic, social, or public-health costs of its outdoor dining prohibition. App. 60a. Basic standards of public-health-policy design require a

comparison of the costs and benefits of a policy to justify it from a scientific and ethical point of view. App. 60a. Yet the record in the trial court showed no contemplation by the County of the very substantial costs associated with its outdoor-dining ban. App. 65a.

Because there was no rational or legitimate basis supporting the County's total shutdown of outdoor dining, the trial court partially granted MEC's application for a preliminary injunction on December 8, 2020. App. 30a. In fact, California Health & Human Services Agency Secretary, Mark Ghaly, M.D., M.P.H., admitted, when asked about the trial court's decision in an interview on December 8, 2020, that in reality the idea was to drive people indoors. App 50a. The trial court enjoined the County from maintaining the Restaurant Closure Order beyond December 16, 2020 unless the County conducted a risk-benefit analysis to support the Order. App. 67a.

The County petitioned the Court of Appeal for a writ of mandate reversing the trial court's order. On December 18, 2020, the Court of Appeal issued a temporary stay of the preliminary injunction and issued an order to show cause why a preemptory writ of mandate should not issue directing the trial court to vacate its order granting the preliminary injunction.

On March 1, 2021, the Court of Appeal reversed the trial court's order granting the preliminary injunction MEC had sought. The Court of Appeal's opinion relied on the highly deferential standard of review applicable to legislative acts in epidemic emergencies that was established by this Court in *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905). Under *Jacobson*, 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. *Cty. of Los Angeles Dep't of Pub. Health v. Superior Ct. of Los Angeles Cty.* (*Restaurant Closure Writ*), 61 Cal. App. 5th 478, 488 (2021) (quoting *Jacobson*, 197 U.S. at 31), *reh'g denied* (Mar. 12, 2021), *review denied* (June 9, 2021). The Court of Appeal acknowledged that the *Jacobson* test predates the tiers of scrutiny used in modern constitutional law and that it has been criticized in recent U.S. Supreme Court opinions. *Id.* Nonetheless, it has not been overruled, and the Court of Appeal relied on *Jacobson* and a recent dissenting opinion by this Court's Justice Kavanaugh in *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020), to conclude that a standard of "extreme deference" applies. *Restaurant Closure Writ*, 61 Cal. App. 5th at 488–89.

The Court of Appeal's decision described MEC's claim as a substantive-due-process claim subject to a rational-basis test. *Id.* at 490. The Court of Appeal reasoned that the Restaurant Closure Order was a quasi-legislative act that had to be upheld unless arbitrary and capricious, or entirely lacking in evidentiary support. *Id.* The court further stated that in reviewing a quasi-legislative act, a court cannot reweigh the evidence. *Id.* The Court of Appeal described the core issue as whether the County's temporary suspension of outdoor dining was rationally related to a legitimate state interest of limiting the spread of COVID-19. *Id.* at 491.

The Court of Appeal disagreed with the trial court's conclusion that the County's implementation of its Restaurant Closure Order based on generalized evidence of a COVID-19 risk associated with outdoor dining was arbitrary absent a risk-benefit analysis. *Id.* at 493. The Court of Appeal described a mandate for a "nebulous

risk-benefit requirement" as inconsistent with the trial court's role. *Id.* It found that the County's imposition of the Restaurant Closure Order was not arbitrary, capricious, or entirely lacking in evidentiary support. *Id.*

The Court of Appeal declined to second-guess public-health actions "in an 'area[ ] fraught with medical and scientific uncertainties,'" *id.* at 495 (alteration in original), and held that "[b]ecause the Restaurateurs failed to satisfy their burden of demonstrating the [Restaurant Closure] Order is arbitrary, capricious, or without rational basis . . . they cannot ultimately succeed on the merits of their claims," *id.* at 495.

REASONS FOR GRANTING CERTIORARI

I. The Court of Appeal's Decision Threatens to Give States Unfettered Authority to Exercise Their Emergency Powers During a Public Health Emergency Without the Possibility of Any Meaningful Review.

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). The Court of Appeal relied heavily on *Jacobson* in reaching its decision, but essentially ignored a crucial holding in that case. The *Jacobson* Court recognized that a local government could exercise power "in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere." *Jacobson*, 197 U.S. at 28. The trial court in the instant matter concluded that court interference was

warranted. After considering extensive evidence, the trial court carefully explained its rationale in a decision spanning more than fifty pages. The length of this ruling was necessitated by the nuances of the issues in question. The County had presented evidence purporting to justify its outdoor-dining ban, but this evidence in fact spoke only to the general dangers of COVID-19 and the most basic concepts underlying prevention of the transmission of this disease. None of the County's evidence came close to suggesting that that the outdoor-dining ban was an effective means for preventing the spread of the virus. The trial court actually gave the County three opportunities to produce evidence, but the County failed on each occasion.

Despite a highly deferential abuse-of-discretion standard, the Court of Appeal overturned the trial court in a relatively brief decision that fixated on the notion that it had been improper for the trial court to require the County to conduct a risk-benefit analysis. The Court of Appeal, however, oversimplified the trial court's ruling, which had allowed the County's outdoor-dining ban to stand for the three-week timespan originally proposed and merely mandated a risk-benefit analysis to enable the ban to continue indefinitely. The trial court's ruling was entirely consistent with *Jacobson*, which stands for the proposition that a local government's power to take public health measures is very broad—but not unlimited. The Court of Appeal misapplied *Jacobson* to give unelected bureaucrats carte blanche during public-health emergencies and to shield the actions of these officials from any meaningful scrutiny.

Despite the County's total lack of evidence that outdoor dining significantly increases the spread of

COVID-19, the trial court still upheld the County's ban for a limited duration of three weeks. It is the *indefinite* nature of the ban that lies at the heart of this case. Before allowing the ban to stand indefinitely, the trial court simply required additional evidence linking outdoor dining to the spread of COVID-19. The mere speculative idea that outdoor dining could lead to an increase in COVID-19 transmission may have been enough to justify a three-week ban under *Jacobson*, but an indefinite ban promulgated without evidence supporting this speculative idea crossed into *Jacobson*'s category of governmental actions that are so arbitrary and unreasonable as to justify court interference.

Though MEC promptly sought review of the Court of Appeal's decision in the Supreme Court of California, review was denied, and hence the instant petition is MEC's last resort. MEC is one of tens of thousands of Los Angeles County businesses now bound by precedent that essentially allows local public-health departments to shutter them on a whim. So overreaching is the opinion here at issue that it virtually eliminates the possibility of meaningful judicial review of acts by the public-health departments within California. Following the Court of Appeal's logic, a county would be entirely justified in halting all commerce within its borders at the sound of a single sneeze. Such a scenario is clearly incompatible with *Jacobson*.

This Court should grant the instant petition so that it may render competent judgment on the pressing constitutional questions here at issue. If the Court does not grant certiorari, its role as the final arbiter of U.S. Constitutional questions in this context will effectively

be usurped by a disparate body of lower courts around the nation, whose decisions will undoubtedly vary widely, escape scrutiny, and allow *Jacobson* to be transmogrified.

II. The Questions Presented Are Important, and This Case Presents a Good Vehicle for Resolving Them.

Unfortunately, the COVID-19 pandemic is far from over. With recent surges of the highly contagious Delta variant around the United States, local public-health orders have already started to return, and it is entirely possible that mandatory closures of businesses will once again be imposed in the coming months. Thus, definitive resolution of the questions here presented is essential so that business owners throughout the United States are not deprived of their livelihoods without justification or appropriate compensation.

While it is hoped that the United States has already come through the worst of the COVID-19 pandemic and that no additional state-mandated business closures will be necessary for the remainder of this public-health crisis, the questions before this Court are still of great importance, as the possibility of future pandemics still looms. *Jacobson* established a floor for when state action taken in the name of public health is justifiable, but the precise limits of the corresponding ceiling are still unclear, and further guidance from this Court is therefore necessary.

This Court should resolve the issues presented because lack of guidance regarding the scope of public-health departments' powers during emergencies has led to overreaching orders that have had devastating effects

on the rights of individuals and businesses throughout the United States. Natural persons and business entities alike are entitled to their constitutional rights, even in the midst of a pandemic. This Court should more clearly articulate the scope of those rights so that disputes between private citizens and local governments can be minimized. The COVID-19 pandemic caused lengthy court closures across the nation, leading to massive litigation backlogs on already congested dockets. This problem was then further exacerbated by innumerable lawsuits resulting from pandemic-associated closures themselves.

As the *Jacobson* Court stated:

> [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 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.

Jacobson, 197 U.S. at 31. The Court of Appeal's opinion overturned a valid finding by the trial court that the County's indefinite outdoor-dining ban was arbitrary, capricious, and not rationally related to the County's object of preventing the spread of COVID-19. In issuing this opinion, the Court of Appeal essentially eviscerated *Jacobson*'s prohibition of public-health measures that palpably invade constitutional rights.

This case is an ideal vehicle for resolving the questions here at issue, as it concerns a public health measure that decimated restaurants (businesses already hit hard by

the pandemic) and that was taken by a local government based purely on speculation. Further, this case hails from the most populous county in the United States and concerns the decision of an intermediate appellate court that was never reviewed. The decision of the California Court of Appeal for the Second Appellate District thus currently stands as the final word on the important federal constitutional questions implicated here as they concern more than ten million people. A decision by this Court providing definitive resolution of the questions presented in the instant petition would accordingly be of great value.

This Court should intervene to deter the expansive effects that the Court of Appeal's decision could have on people across the United States, not just in California's Second Appellate District. This Court's guidance is necessary to establish clear standards to guide public-health officials in exercising their expansive—but not unlimited—police powers under the high-stakes circumstances of a pandemic.

III. The Appellate Court's Decision Misapplies *Jacobson*.

The Court of Appeal erred in its application of *Jacobson* to the facts of this case.

Of critical importance to the *Jacobson* decision was the fact that vaccination had been widely accepted within the scientific community as an effective means of achieving the goal that the public-health law before the Court was trying to achieve—namely protection of a community from smallpox. *See Jacobson*, 197 U.S. at 23–24, 30 ("for nearly a century most of the members of the medical profession

have regarded vaccination . . . as a preventive of smallpox; [and], while they have recognized the possibility of injury to an individual . . . they generally have considered the risk . . . too small to be seriously weighed"). This stands in stark contrast to the scientific community's opinions regarding the effectiveness of banning outdoor dining as a means of curbing the spread of COVID-19. As the trial court recognized, there was no scientific consensus that the County's order banning outdoor dining was an effective means of combatting COVID-19. On the contrary, the CDC placed outdoor dining within its second-lowest tier of risk, and various studies available to the County indicated that outdoor dining was not linked with any significant increase in transmission of COVID-19. App 59a. Whereas the law the Court upheld in *Jacobson* was premised on principles that had, for decades, been embraced by science, the reasoning underlying the order at issue here has never had scientific acceptance at all.

Even if the County's order had been grounded in widely accepted scientific principles, however, it still would not survive scrutiny under *Jacobson* due to its absolute and indefinite nature. In *Jacobson*, the statute at issue imposed a five-dollar penalty on unvaccinated individuals, and an exception existed for children who were not suitable candidates for vaccination. *Jacobson*, 197 U.S. at 12. In this case, however, the County imposed a total ban on outdoor restaurant dining with no exceptions that was to last indefinitely.

The *Jacobson* Court explained that "no rule prescribed by a state, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States, []or infringe any right granted or secured by that instrument." *Id.* at 25. The *Jacobson* Court expressly recognized the potential for public-health measures to be so arbitrary and oppressive as to exceed even the broad bounds of the police power afforded to public-health departments. *Id.* at 38–39. The County's order was just such a measure. Wholly aside from the fact that it had no basis in science or reason whatsoever, it was so absolute and overarching that it clearly runs afoul of *Jacobson*.

As mentioned previously, the Court of Appeal glossed over the fact that the trial court in this matter permitted the County's outdoor-dining ban to stand undisturbed for the originally proposed period of three weeks. While MEC in no way concedes that a three-week ban was constitutionally permissible, such a ban was at least limited to a brief and clearly defined period of time, and the trial court therefore had a sound basis for allowing it under *Jacobson*. Not so with an indefinite ban. The County's indefinite ban fails to pass muster under *Jacobson* not only because there was no rational basis to support it, but also because, even if there had been, its completely unlimited nature placed it so far outside the bounds of reason that it violated many fundamental constitutional rights. The unlimited ban here at issue thus finds no support in *Jacobson*, and the decision of the Court of Appeal must be overturned.

IV. Heightened Scrutiny Must Be Applied to the County's Order Suspending Outdoor Restaurant Dining Because the Order Infringes Upon the First Amendment Right to Freedom of Assembly.

The right of assembly is a fundamental right guaranteed by the First Amendment to the U.S. Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. This Court has long recognized that the right to peaceably assemble is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). "It is beyond debate that freedom to engage in [assembly] *for the advancement of beliefs and ideas* is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *People v. Katrinak,* 136 Cal. App. 3d 145, 152 (Ct. App. 1982). Though not absolute, the freedom of assembly is nevertheless an enumerated fundamental right, both publicly and privately, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. *Harman v. City of Santa Cruz, California*, 261 F. Supp. 3d 1031, 1043–44 (N.D. Cal. 2017). When reviewing the right to peaceably assemble, a court must look "to [the assembly's] purpose." *De Jonge v. Oregon*, 299 U.S. 365 (1937). "Mere public intolerance or animosity cannot be the basis for abridgment of [ ] constitutional freedoms." *Coates v. City of Cincinnati,* 402 U.S. at 615.

Militarized public-health responses are now the centerpieces of the COVID-19 pandemic. On November 22, 2020, the County announced that it was completely prohibiting outdoor dining and drinking at restaurants, bars, breweries, and wineries by issuing the Restaurant Closure Order. The County promulgated its ban without providing any convincing scientific data, and, at the time, the safety of outdoor dining had been well established by numerous studies. App 56a. The County's Restaurant Closure Order was not backed by legitimate scientific reasoning, rather, it irrationally singled out an industry on an arbitrary and capricious basis pursuant to a political motive. As lower courts have repeatedly invoked *Jacobson* to justify extreme and violative impositions of authority by public-health officials in recent months, the principle that government overreaches are possible and that rights protected by the U.S. Constitution continue to exist even during a pandemic has too often been ignored. "[P]ublic interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1152 (9th Cir. 2021) (quoting *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017)).

When a government actor circumscribes the fundamental right to freedom of assembly with negligible scientific proof, an individual's basic liberty is inherently at stake. An owner of a restaurant invites the public to gather and dine, naturally encouraging patrons to exchange ideas and socialize. By imposing its indefinite outdoor-dining ban, the County not only devastated the businesses of MEC and countless others like it, but also prevented these businesses and their patrons from propagating the

idea that the ban was overreaching and unsupported by evidence.

Not only did the Court of Appeal misapply *Jacobson* and misunderstand the limits of that case, but the court also failed to consider critical constitutional questions that the County's outdoor-dining ban implicated. United States citizens have the unequivocal right to assemble peaceably, and the County infringed this right by banning outdoor dining without significant evidence that doing so would be an effective public-health measure. Though MEC argued that its First Amendment rights had been violated, the Court of Appeal flatly rejected this contention, claiming, among other things, that the County's outdoor-dining ban was narrowly tailored to limit the spread of COVID-19. *Restaurant Closure Writ*, 61 Cal. App. 5th at 496. The Court of Appeal came to this conclusion despite the fact that the trial court, after having weighed the copious evidence submitted by the parties, essentially determined that the converse was true. App. 15a–16a.

Jacobson prohibits the County from engaging in a "plain, palpable invasion of rights" secured by the Constitution. *Jacobson*, 197 U.S. at 31. *See also Jew Ho v. Williamson*, 103 F. 10, 14 (C.C.N.D. Cal. 1900) (concluding that courts may determine whether public-health regulations are reasonable and calculated to accomplish their purported purposes).

MEC rests its freedom-of-assembly argument on the fact that the County's Restaurant Closure Order prevented businessowners from voicing opposition by expressive association or assembly. The ability to eat at a restaurant is not what is in question, rather it is the right

to assemble and petition the government for a redress of grievances. The Court of Appeal did not appropriately recognize the conduct limited by the Restaurant Closure Order as First Amendment activity and therefore did not fairly weigh the purported justification for the County's Order against the corresponding invasion of MEC's constitutional rights as *Jacobson* requires.

V. Banning Outdoor Restaurant Dining, in the Absence of Any Study Specifically Demonstrating that Outdoor Restaurant Dining Contributes to the Spread of COVID-19, Is Not Narrowly Tailored to Achieve the Government's Legitimate Interest in Limiting the Spread of the Disease.

The freedom-of-assembly clause was incorporated against the states, preserving "the right of free speech, the right to teach, and the right of assembly, of course, [as] fundamental rights." *De Jonge*, 299 U.S. 365. Accordingly, government action that limits the freedom of assembly is evaluated under a strict-scrutiny analysis that is nearly identical to the framework applicable to freedom-of-speech cases. *Whitney v. California*, 274 U.S. 357, 373 (1927). When a government practice restricts fundamental rights, it is subject to strict scrutiny and can be justified only if it furthers a compelling government purpose, and even then, only if no less-restrictive alternative is available. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16–17 (1973); *Dunn v. Blumstein,* 405 U.S. 330 (1972).

The County still lacks convincing scientific data to prove the existence of a compelling government interest—or even a rational one—in restricting MEC's business from operating. At a hearing held by the Los Angeles

County Board of Supervisors prior to imposition of the Restaurant Closure Order, Supervisor Kathryn Barger introduced a motion to keep outdoor dining open. App. 52a. At the hearing on this motion, Drs. Ferrer and Davis admitted that the County's recommendation to prohibit outdoor dining had been based on a CDC national study, and that, in fact, the County had not actually been tracking data regarding what impact—if any—outdoor dining had on COVID-19 transmission in Los Angeles County.[4] App. 50a-52a. Indeed, the CDC study on which the County relied was wholly irrelevant to outdoor dining. Dr. Davis stated that this study was the "best information we have that's very specific to restaurants," expressly admitting to the Board of Supervisors on November 24, 2020 that there was no hard scientific evidence linking the recent COVID-19 surge in Los Angeles County to outdoor dining. App. 90a. The County's own data also failed to provide any support for the Restaurant Closure Order. The data tracked all non-residential settings at which three or more laboratory-confirmed COVID-19 cases had been identified. Of the 2,257 COVID-19 cases identified, only seventy originated from restaurants, and the vast majority of these restaurants did not have an outdoor-dining model comparable to MEC's. App. 35a.

The County's suggestion that public-health officials have unfettered discretion to premise their orders on irrelevant scientific studies is a matter of public concern and an explicit threat to modern constitutional jurisprudence, especially that surrounding the right to freedom of

4. The trial court's order partially granting MEC's request for a preliminary injunction details copious evidence that reveals that there was insufficient scientific data to support the Restaurant Closure Order.

assembly. Governmental action circumscribing the freedom of assembly must be, at a minimum, legitimately related to a compelling interest. Without the necessary strict-scrutiny analysis, public health officials are free to violate constitutional rights with virtual impunity. The County's Restaurant Closure Order was an arbitrary and capricious measure based on negligible data, and should have failed any tier of scrutiny. The purpose of judicial scrutiny "is to prevent future generations from lightly casting aside important traditional values . . . ." *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989). This Court should grant certiorari so that lower courts do not continue to allow public-health officials to indiscriminately deprive citizens across the United States of their constitutional rights.

Overly broad interpretations of *Jacobson* have prevented the judiciary from evaluating the expertise and rationales underlying consequential orders by public-health officials. The very concept of constitutional scrutiny is frustrated by misapplications of *Jacobson* that simultaneously encourage public-health officials to ignore the consequences of their actions and block aggrieved citizens from seeking redress for constitutional violations.

At some point, public-health officials must be held accountable for infringing constitutional rights despite a dearth of scientific data justifying their doing so. While *Jacobson* entitles local governments to some deference, "a plain, palpable invasion of rights secured by . . . fundamental law," *Jacobson*, 197 U.S. at 31, has clearly occurred where harsh restrictions affecting the livelihood of businesses have been put in place despite a lack of competent scientific evidence underlying them.

Otherwise, the modern approach to constitutional scrutiny is completely eviscerated whenever a public-health emergency arises. *See Brown v. Merlo*, 8 Cal. 3d 855, 869 (1973) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." (quoting *Milnot Co. v. Richardson*, 350 F. Supp. 221, 224 (S.D. Ill. 1972))).

Government action based on differential treatment violates the First Amendment unless it is shown that such action is the least-restrictive means of achieving a compelling government interest. When a fundamental right has been violated, government action requires a valid justification. By imposing restrictions on restaurants but selectively permitting the operation of other nonessential businesses, the County exposed a less-restrictive alternative to achieve its purported interest in combatting COVID-19. The State of California is well known to favor "protect[ing] lucrative industries while denying similar largesse to its faithful." *S. Bay United Pentecostal Church v. Newsom*, 592 U.S. __, 141 S. Ct. 716 (2021).

> In Nevada, it seems, it is better to be in entertainment than religion. Maybe that is nothing new. But the First Amendment prohibits such obvious discrimination against the exercise of religion. The world we inhabit today, with a pandemic upon us, poses unusual challenges. But there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.

Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2609 (2020) (Gorsuch, J., dissenting). The current unchecked nature of *Jacobson* enables public officials to pick and choose winners in private business based on conjecture and speculation with no regard for the efficacy of their reasoning. The ubiquity of misapplications of *Jacobson* has muddled the standard of review applicable to COVID-19-related restrictions in courts across the United States.

The Court of Appeal's decision essentially released the County from any obligation to vet public-health orders prior to issuing them. As a result, unelected government employees have been given expansive powers that are virtually nonreviewable. The fact that the County's Restaurant Closure Order prohibited restaurant dining while allowing businesses in the spheres of entertainment, retail, marijuana distribution, and other nonessential areas to continue operating without limitations proves that the Restaurant Closure Order was not the least-restrictive means of achieving the County's purported goal of slowing the spread of COVID-19. The County has argued that entrusting the judiciary to review public-health measures would frustrate its ability to make science-based decisions in the name of public health during a pandemic. However, this contention would require the courts to turn a blind eye to grievous abuses of power not grounded in science at all. Deference, though broad, has its limits. App 14a.

This case presents a prime example of a local government freely bending to fear. The CDC's social-distancing guidelines were, and still are, appropriate to limit the spread of COVID-19. It is important to note that the County relied on CDC guidelines that were irrelevant

to outdoor dining to back its Restaurant Closure Order. When scientific data is unnecessary to justify such a broad imposition of power, governments are free to violate constitutional rights without reservation. It is the role of the judiciary to intervene when the actions of government officials destroy the very livelihoods that those actions were purportedly designed to protect. A less-restrictive alternative could not be more obvious in this case considering that the County gave special treatment to countless nonessential businesses. MEC has the right to operate its lawful restaurant business subject to reasonable conditions imposed by the State of California to protect public health. Where governmental action imposes restrictions that bear no relation to reason, however, MEC's constitutional rights have been violated, and MEC is entitled to redress.

CONCLUSION

For the foregoing reasons, MEC respectfully requests that this Court grant the instant petition for a writ of certiorari.

Respectfully submitted,

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