

2nd Civil No. B309416
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FOUR

COUNTY OF LOS ANGELES DEPARTMENT OF PUBLIC
HEALTH, DR. BARBARA FERRER, in her official capacity as
Director of Public Health, County of Los Angeles,

Defendants, Respondents, and Petitioners

vs.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA, FOR
THE COUNTY OF LOS ANGELES,

Respondent,

CALIFORNIA RESTAURANT ASSOCIATION, INC.,

Plaintiff, Petitioner, and Real Party in Interest.

Writ Taken from the Superior Court for Los Angeles County, Dept. 85
Case No. 20STCP03881
The Honorable James C. Chalfant (213) 830-0785

**APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*
RESTAURANT LAW CENTER
IN SUPPORT OF PLAINTIFF,
PETITIONER, AND REAL PARTY IN
INTEREST CALIFORNIA
RESTAURANT ASSOCIATION, INC.**

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Prospective *amicus curiae* the Restaurant Law Center (the “Law Center”) respectfully submits this Application for Leave to File *Amicus Curiae* Brief in Support of Plaintiff, Petitioner, and Real Party in Interest California Restaurant Association, Inc. A copy of the proposed brief is attached hereto as Exhibit A. This application and proposed brief are timely filed in accordance with CRC 8.200(c)(1).

INTEREST OF AMICUS CURIAE

The Law Center is a public policy organization affiliated with the National Restaurant Association, the world’s largest foodservice trade association. The industry is comprised of over one million restaurant and other foodservice outlets employing over fifteen million people. Restaurants and other foodservice providers are the nation’s second largest private-sector employers. The Law Center provides courts with the industry’s perspective on legal issues significantly impacting it. Specifically, the Law Center highlights the potential industry-wide consequences of pending cases like the case at bar through regular participation in *amicus* briefs on behalf of the industry.

The Law Center represents a broad and diverse group of restaurant owners and operators in the County of Los Angeles and across the State of California more broadly. They comprise a diverse cross section of the state’s legendary restaurant industry: from large national outfits with hundreds of locations and millions in revenue, to small single-location, family-run

neighborhood restaurants and bars; from independently owned fine dining establishments to fast-casual franchises. Restaurants are vital to California's economy and culture, contribute billions of dollars in annual revenue to the its economy, and have employed hundreds of thousands in good jobs across the state. The Law Center and the members of its affiliates have a paramount interest in this case, which has wide-ranging implications for the restaurant and hospitality industry across the state.

In its proposed brief, the Law Center sets forth the real and irreparable harm that thousands of Los Angeles restauranteurs will suffer if the Court grants the County of Los Angeles's Petition for a Writ of Mandate. As *amicus curiae*, the Restaurant Law Center seeks to bring to the Court's attention the injury that will be suffered by restauranteurs, the Californians they employ, and the public writ large. In particular, the Law Center sets forth below for the benefit of the Court the critical importance of the restaurant and hospitality industry in the State of California and Los Angeles County specifically; the dire economic challenges the industry is currently facing, including as a result of the shutdown orders that have harmed their businesses; and why it is absolutely critical to the survival of the restaurant industry to allow restaurants across the state to continue to operate their businesses safely by serving guests outdoors with reasonable restrictions.

CONCLUSION

For all of the foregoing reasons, the Law Center respectfully requests that this Court to grant its application, and consider the attached *amicus curiae* brief in its deliberations on this matter.

Respectfully submitted,

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Dated: January 19, 2021

EXHIBIT A

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INTEREST OF AMICUS CURIAE¹

Amicus curiae the Restaurant Law Center (the “Law Center”) is a public policy organization affiliated with the National Restaurant Association, the world’s largest foodservice trade association. The industry is comprised of over one million restaurant and other foodservice outlets employing over fifteen million people. Restaurants and other foodservice providers are the nation’s second largest private-sector employers. The Law Center provides courts with the industry’s perspective on legal issues significantly impacting it. Specifically, the Law Center highlights the potential industry-wide consequences of pending cases like the case at bar through regular participation in *amicus* briefs on behalf of the industry.

The Law Center represents a broad and diverse group of restaurant owners and operators in the County of Los Angeles and across the State of California more broadly. They comprise a diverse cross section of the state’s legendary restaurant industry: from large national outfits with hundreds of locations and millions in revenue, to small single-location, family-run neighborhood restaurants and bars; from independently owned fine dining establishments to fast-casual franchises. Restaurants are vital to California’s

¹ Pursuant to Cal. R. 8.200(c)(3), *amicus* certifies that no party or counsel for a party in the pending appeal authored the proposed brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *Amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

economy and culture, contribute billions of dollars in annual revenue to the its economy, and have employed hundreds of thousands in good jobs across the state. The Law Center and the members of its affiliates have a paramount interest in this case, which has wide-ranging implications for the restaurant and hospitality industry across the state.

The number one priority of the restaurant industry is to provide a safe and healthy environment for guests and employees. The industry has faithfully and diligently followed applicable guidelines, and, where necessary, adapted their business models and adopted countless new measures to ensure that diners and workers remains safe. The Law Center stands ready to continue to collaborate with federal, state, and local authorities, as they have for close to a year, to address the extremely challenging circumstances of these times.

A blanket ban on outdoor dining—especially now, when so many restaurants are already struggling to survive—is unsupported by any scientific evidence, and fundamentally represents a wrong-headed approach. The Law Center therefore submits this brief to encourage the Court to deny the County’s petition, refrain from entering a peremptory writ of mandate ordering the lower court to vacate its order, and end the stay of the lower court’s ruling.

In particular, the Law Center sets forth below for the benefit of the Court the critical importance of the restaurant and hospitality industry in the

State of California and Los Angeles County specifically; the dire economic challenges the industry is currently facing, including as a result of the shutdown orders that have harmed their businesses; and why it is absolutely critical to the survival of the restaurant industry to allow restaurants across the state to continue to operate their businesses safely by serving guests outdoors with reasonable restrictions.

SUMMARY OF ARGUMENT

To complement the arguments made by Plaintiff-Petitioner, the California Restaurant Association, the Law Center writes to highlight why the Court should deny the County's petition for a writ of mandate and allow the decision of the lower court to stand. In support of its position, the Law Center sets forth below the very real and very harmful consequences that will result to its members if the writ of mandate is granted.

Put simply, California's restaurants are in a moment of complete crisis. Daily, restaurants are closing that are unlikely to ever open again. At a time when thousands of restaurant and hospitality businesses have been forced to shutter—regretfully putting hundreds of thousands of their employees out of work—every level of government should be working together to protect the industry that means so much to so many. Since March of last year, *amicus* and its members have worked with government leaders to develop and implement workable responses and restrictions to address these challenging times.

Restaurant operators and their employees are masking, sanitizing, and cleaning, and physically altering their premises. Some are testing and tracking, too. They are investing in new materials, new technologies, and new products to ensure they continue to safely serve their customers in the unique setting of indoor dining, and many have pivoted to include outdoor dining options for customers where none were offered before.

The restaurant industry has done everything that has been asked and more. Meanwhile, the industry has collectively suffered billions of dollars of loss and damage as a direct result of their physical spaces being detrimentally altered and rendered non-functional for their intended purposes.

The Law Center cannot overemphasize the importance of the outcome of this case to its members. By denying the petition for a writ of mandate, this Court can help ensure that restaurants across the state can survive and continue to safely serve customers, employ workers, and help our state through these unprecedented times.

Conversely, granting the writ, and allowing Petitioners to operate wholly without any check on their authority, will leave thousands of restaurants, as well as their employees and customers, out in the cold with no prospect for relief. The Law Center respectfully urges this Court to deny Petitioners' request.

ARGUMENT

I. The Restaurant Industry Is Vital to Both the County of Los Angeles's and California's Economy and Culture, and Faces Unprecedented Hardship

The restaurant and foodservice industry is the lifeblood of the Californian economy. Prior to the pandemic, the industry accounted for an estimated \$97 billion dollars of sales across nearly 80,000 locations in California.² In addition, in 2019, the restaurant industry was the largest private sector employer in the state, employing close to two million people—eleven percent of California's workforce.³ Over the next decade, that number is expected to grow by nine percent.⁴ Consumer spending at restaurants has a multiplier effect, too. Every dollar spent at table-service restaurants—the businesses most threatened by the ban on indoor dining—returns \$2.03 to the state's economy, not to mention the positive impact on the state's tax revenue.⁵

Indeed, a single restaurant can support the livelihood of dozens of employees, suppliers, purveyors, and related businesses like hotels. Restaurants are crucial to their communities and comprise an essential part of the fabric of this state. That is particularly true of the many small

² Nat'l Restaurant Ass'n, *California Restaurant Industry at a Glance* (2019), available at <https://restaurant.org/downloads/pdfs/state-statistics/california.pdf>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

restaurants—often family- or immigrant-owned—that make up the vast majority of the industry.⁶ As the Superior Court for the County of San Diego noted in a recent decision enjoining the County of San Diego from preventing restaurants from operating under COVID protocols, “Businesses with restaurant service ... serve the public interest.

These business establishments provide sustenance to and enliven the spirit of the community, while providing employers and employees with means to put food on the table and secure shelter, clothing, medical care, education, and, of course, peace of mind for they and their families.” *Midway Venture LLC v. County of San Diego*, Case No. 37-2020-00038194-CU-CR-CTL, Cal. Sup. Ct. (San Diego, Cent. Div.), Minute Order (Dec. 16, 2020), at 7. *Cf. LMP Servs., Inc. v. City of Chicago*, 2019 IL 123123, ¶18, *cert. denied*, 140 S. Ct. 468 (2019) (noting that local, independently-owned restaurants “bring stability to the neighborhoods in which they are located,” “pay property taxes and have a vested interest in seeing that their neighborhoods continue to grow and thrive so that their own businesses will flourish,” and “are a vibrant part of the community and bring a long-term sense of cohesiveness and identity to the area.”).

⁶ Nat’l Restaurant Ass’n, *Factbook: 2020 State of the Restaurant Industry* (Feb. 2020), available at <https://www.restaurant.org/downloads/pdfs/research/soi/2020-state-of-the-industry-factbook.pdf> (more than 9/10 restaurants have fewer than 50 employees).

The restaurant industry remains a shining example of upward mobility. Eight in ten restaurant owners say their first job in the industry was an entry-level position. Even more restaurant managers say the same. And restaurants are a source of opportunity with more minority managers and women managers than any other industry. Restaurants also provide opportunity for immigrants to the United States—not only for employment but also business ownership.⁷

Today, the industry is more at risk than ever before. The restaurant and hospitality industries have suffered catastrophic financial losses and unprecedented challenges. For instance, as of April, over eight million restaurant employees nationally—nearly two thirds of the restaurant workforce—had been laid off or furloughed.⁸ By the end of April, almost 40% of all restaurants across the country were shuttered, and the restaurant and foodservice industry lost over \$80 billion in sales.⁹ Economists predict that those numbers will only continue to rise, and that the industry will have sustained almost \$250 billion in lost revenues by year-end.¹⁰

⁷ Americas Soc’y/Council of The Americas & Fiscal Pol’y Inst., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015), available at <https://www.as-coa.org/sites/default/files/ImmigrantBusinessReport.pdf>.

⁸ Nat’l Restaurant Ass’n, *COVID-19 Update: The Restaurant Industry Impact Survey* (Apr. 20, 2020), available at <https://www.restaurant.org/downloads/pdfs/business/covid19-infographic-impact-survey.pdf>.

⁹ *Id.*

¹⁰ *Id.*

California has not been spared. After close to eight months of scrambling to make ends meet, most California restaurants are in significant debt and unable to pay their bills. Though much has been made about options such as takeout, delivery, and curbside pickup, for most restaurants, those alternatives provide only a small fraction of normal revenue and can only sustain a small fraction of normal revenues.

California's restaurants are in a moment of crisis. Conservatively, researchers estimate 20% of restaurants will close nationwide.¹¹ In California alone, estimated restaurant job losses from COVID-19 stand at 1,020,000.¹² The numbers for independent restaurants are even more dire.¹³ Even those restaurants that remain open will be forced to lay off dedicated team members whose livelihoods depend on guests dining on-site.

As the National Restaurant Association put it, "the future for restaurants across the country is a lot more uncertain because Congress has walked away without passing the relief needed to survive the winter."¹⁴

¹¹ *Id.*

¹² COVID-19 State Action Center: California, *available at* <https://restaurantsact.com/california/>

¹³ Heather Lalley, *Report: Up To 85% of Independent Restaurants Could Close Due To Pandemic*, REST. BUS. (June 11, 2020), <https://www.restaurantbusinessonline.com/financing/report-85-independent-restaurants-could-close-due-pandemic>.

¹⁴ Press Release, Nat'l Restaurant Ass'n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020), *available at* <https://restaurant.org/news/pressroom/press-releases/association-statement-on-congressional-recess-with>.

Indeed, “[v]irtually every kind of restaurant is suffering: the corner diner, the independents, the individual owners of full-service restaurant chains.”¹⁵

While the most recent reauthorization of the federal Paycheck Protection Program has provided limited relief for some in the hospitality industry, the situation remains dire for the foodservice industry nationally, and in California. Restaurants are asking for a fighting chance. The future of restaurants as we know them—and the hundreds of thousands of employees and millions of customers they support—depends on it.

II. Restaurants Have Risen to the Occasion, Adapting Their Business Models and Adopting Countless Measures to Operate Safely, Particularly Outdoors

Faced with these very challenging times, restaurants and hospitality companies have been doing their level best to respond reasonably and appropriately to executive orders and the most-up-to-date scientific evidence. Throughout, the paramount focus of the industry has been the safety of their employees, customers, and communities.

When executive shutdown orders initially issued in mid-March, restaurants adapted as best they could in the face of unprecedented circumstances and suffering millions in lost revenue as a result of the physical loss and damage the orders caused. Some restaurants created carry-out and delivery businesses where they did not have them before, despite the

¹⁵ *Id.*

fact that takeout, delivery, and curbside pickup equate to only a small fraction of normal revenue for a typical restaurant.

Others drastically expanded that service, installing extra windows or rearranging indoor spaces and furniture to create pick-up areas for customers and delivery personnel, also mounting physical barriers, partitions, and signage to direct traffic flow and keep people properly socially distanced. Still other restaurants opted to remain closed, reasonably concluding that they could not operate under their circumstances.

When permitted to resume limited capacity outdoor dining, restaurants rose to the occasion again. Many removed tables and chairs to limit capacity and allow for social distancing. Some even converted sections of parking lots or nearby streets into outdoor seating areas. Faced with unprecedented challenges, the industry's owners, operators, and employees lived up to their well-deserved reputation of creativity and flexibility in devising ways to safely serve customers and provide best-in-class service to their communities.

In addition, restaurants have made remarkable strides to ensure that the entire process is as safe as possible. This has included mandating that, among other things, all customers who dine-in and carry out always wear masks unless seated and eating. Restaurants have implemented rigorous sanitization measures with an emphasis on constant handwashing, cleaning,

and disinfection of the restaurant, as well as educating employees to stay home if they are sick and testing staff regularly.

Even more, many restaurants have made significant investments to ensure compliance with outdoor dining protocols, installing Plexiglass dividers, constructing and upgrading patios and other outdoor eating spaces, and ensuring a safe dining experience for customers and staff.¹⁶ These measures go beyond the recommendations for restaurants by the Centers for Disease Control and Prevention (CDC).¹⁷

Before the outdoor dining ban, restaurants in Los Angeles were quick to “create pop-ups and new food experiences throughout town.”¹⁸ In spite of the industry’s efforts to undertake these measures to provide safe outdoor service, the restaurant industry has been unfairly targeted for additional shutdowns. The Law Center firmly believes in science and support efforts to gather data to guide how to best respond to the continuing challenges

¹⁶ Mona Holmes, ‘*I’m Pleading with the Government: LA Restaurants Respond to New Lockdowns*, EATER LOS ANGELES (Dec. 10, 2020), <https://la.eater.com/2020/12/10/22166279/los-angeles-restaurant-owners-coronavirus-second-shutdown-california> (detailing steps Los Angeles restaurants have taken to ensure safe dining during pandemic).

¹⁷ Centers for Disease Control and Prevention, *Daily Checklist for Managers of Restaurants and Bars*, CDC (June 27, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/COVID-Restaurant-Bar-manager-checklist.pdf>.

¹⁸ WWD, *L.A. Restaurateurs and Small Businesses Stay Creative, but Struggle to Survive* (Jan. 11, 2021), available at <https://wwd.com/eye/lifestyle/l-a-restaurateurs-and-small-businesses-stay-creative-but-struggle-to-survive-1234690871/>

facing our communities. But existing data and statistics do not support banning outdoor dining. As Respondent expressly set forth in its order granting the preliminary injunction:

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.

...

In actuality, the Department's data indicates that COVID cases traced back to the County's restaurants and bars accounted for a mere 3.1 % (70 of the total 2,257) confirmed cases countywide from over 204 outbreak locations -- the vast majority of which were chain/fast-food type restaurants and not MEC's model. Of those 2,257 confirmed cases, 2,249 of were traced to staff members at workplaces and just eight cases came from non-staff members. The Restaurant Closure Order is an abuse of the Department's emergency powers, *is not grounded in science, evidence, or logic*, and should be adjudicated to be unenforceable as a matter of law.

Prelim. Inj. Ex. A. at 1, 3 (emphases added).

Through it all, each restaurant has done its best to serve customers and employees. Even if not every restaurant is able to operate outdoors due to their unique circumstances, that does not justify forcing every restaurant to close to outdoor dining without regard to their circumstances. Whatever each individual restaurant owner's reasonable decision about how to respond, one thing is clear: there is no scientific data-driven reason to impose a blanket categorical bar on outdoor dining at precisely the time that the restaurant

industry is meeting the need to provide such services in a safe manner to the benefit of its customers and restaurant industry employees who need their jobs.

III. The Superior Court Properly Exercised Its Discretion to Enter an Injunction; the Petition Should be Denied and the Stay on the Injunction Lifted

The Respondent Superior Court acted within its discretion under well-established law to enjoin Petitioners from indefinitely extending the subject Restaurant Closure Order without adequate justification. Simply put, Respondent weighed the relative hardships to Petitioners and to CRA, and found that Petitioners offered nothing to refute CRA's showing of irreparable harm in the absence of injunctive relief. Nor could they, in light of the compelling evidence CRA adduced in the lower court. *See* Return to Pet. for Writ at 65-66.

Conversely, Petitioners cannot now establish the risk of irreparable harm if their Petition is denied and injunctive relief upheld. Petitioners are not, under Respondent's Order, prohibited from adopting or extending restrictions on outdoor dining—they are merely required to adequately examine the costs and benefits of doing so, and act accordingly. Any risk of harm can be alleviated, if not eliminated entirely, by engaging in the analysis required by Respondent.

Respondent's conclusion that CRA had demonstrated the necessary likelihood of success on the merits of its claim is similarly unimpeachable.

Respondent found that Petitioners had failed to conduct any risk-benefit analysis of extending the Order, and that its actions in doing so were arbitrary, capricious, and lacking in evidentiary support. Because, as Respondent found, Petitioners were required to engage in at least some analysis of the risks and benefits prior to extending the Order, their failure to do so provided sufficient support to conclude the CRA had met its burden to show a likelihood of success on the merits. This conclusion, based on the facts presented to Respondent, is well within its discretion, and should be upheld by this Court by way of denial of the Petition.

CONCLUSION

For all of the foregoing reasons, the Law Center respectfully urges this Court to deny the Petition, decline to issue a writ of mandate, and lift the stay on the lower court's injunction.

Respectfully submitted,

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Dated: January 19, 2021

CERTIFICATE OF WORD COUNT

The text of this brief is proportionately spaced, has a typeface of 13 points or more and contains 3,023 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Respectfully submitted,

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