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 WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF OF *AMICUS CURIAE* THE RESTAURANT LAW CENTER IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

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.[1] 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, across the State of California more broadly, and around the country. Its members comprise a diverse cross section of the nation's 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.

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[1] Pursuant to S. Ct. R. 37.6, counsel for *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no party other than *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to S. Ct. R. 37.2(a), counsel for *amicus curiae* certifies that counsel of record for all parties received timely notice of the intent to file this brief and have consented to its filing.

Restaurants are vital to the American economy and culture, contribute billions of dollars in annual revenue to the economy, and have created and employed individuals in millions of jobs around the country. The Law Center and its members have a paramount interest in this case, which has wide-ranging implications for the restaurant and hospitality industry not only in California, but across the country.

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 remain safe. The Law Center stands ready to continue to collaborate with federal, state, and local authorities, as they have for the last year and a half, to address the extremely challenging circumstances of these times.

As recognized by the Superior Court of Los Angeles (the "Superior Court" or "lower court") in this case, the County of Los Angeles's blanket ban on outdoor dining (the subject "Restaurant Closure Order")—at a time when so many restaurants were already struggling to survive—was unsupported by any scientific evidence, and fundamentally represented a wrong-headed approach. The Court of Appeal's decision to overrule the lower court, and reinstate the ban based on nothing more than *post-hoc* speculation, was in error, and should be vacated.

The Law Center therefore submits this brief to encourage the Court to accept the Petition for

Certiorari (the "Petition"), and to make clear that even in the context of a pandemic, agencies may not regulate in a manner that is arbitrary and capricious, or lacking in any evidentiary basis. In particular, the Law Center sets forth below for the benefit of the Court the critical importance of the restaurant and hospitality industry not just in the State of California but across the nation; the dire economic challenges the industry is currently facing, including those that have come as a result of shutdown orders, capacity restrictions, and other COVID-19 required protocols 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.

The Law Center cannot overemphasize the importance of the outcome of this case to its members. By accepting the Petition and vacating the ruling of the Court of Appeal, this Court can help ensure that restaurants across the state and nation can survive and continue to safely serve customers, employ workers, and help these businesses survive through these unprecedented times. Conversely, if left to stand, the decision of the Court of Appeal will allow regulators in California and around the country to operate without any meaningful check on their administrative authority, and 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 grant the Petition.

SUMMARY OF ARGUMENT

The Law Center writes to highlight why the Court should grant the petition, reverse the flawed decision of the Court of Appeal, and reinstate the decision of the Superior Court in Petitioner's favor. 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 decision of the Court of Appeal is allowed to stand. More specifically, the restaurant and food service industry has faced and continues to face unprecedented devastation in the wake of the ongoing pandemic, which sadly now shows few signs of abating. If state regulators are left wholly limitless in their authority to regulate during this public health crisis, the industry faces significant hardship, not only from the uncertainty of the legal landscape, but also the efforts that regulators unbound by even minimal standards of administrative procedures and due process are almost certain to take in its wake. Moreover, the Court of Appeal's decision was demonstrably wrong, conflating the appropriate standard of review, and allowing arbitrary and capricious actions based on no qualitative evidence to stand upon the barest scintilla of judicial review. This threatens not only the Law Center's members (who have been disproportionately subjected to limitation throughout the course of the pandemic), but almost any business or individual left subject to the caprice of administrative regulators, who will be left with no meaningful legal recourse. These facts alone justify reversal of the Court of Appeal and judgment in favor of Petitioner.

ARGUMENT

I. The Restaurant Industry Is Vital to the Economy and Culture of the County of Los Angeles, the State of California, and the Nation Writ Large, and Faces Unprecedented Hardship; the Possibility of Arbitrary Regulation That Will Result if the Court of Appeal's Decision Stands Will Further Cripple the Industry

Put simply, America's restaurants for the last eighteen months have been operating in a state of daily and complete crisis. Every day, 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. In line with evolving guidance, state laws, and local ordinances, many are requiring COVID-19 vaccination, mandatory testing, and extensive contact tracking of workers and customers. They have invested and continue to invest 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, where the season and the weather have been conducive, as in Los Angeles, 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. At the same time, 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 State of California, at issue in this case, represents a microcosm of the foodservice industry writ large nationally. 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] Prior to the pandemic, over the next decade, that number was 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 outdoor 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,

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[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.*

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 restaurants—often family- or immigrant-owned—that make up most of the industry.[6] As the Superior Court for the County of San Diego noted late last year in a 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.").

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[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 since the onset of the pandemic more than eighteen months ago. For instance, as of April 2020, 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 2020, almost 40% of all restaurants across the country were shuttered, and the restaurant and foodservice industry lost over $80 billion in sales.[9] As economists predicted, those numbers only continued to rise, and the industry is

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[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.*

estimated to have sustained almost $250 billion in lost revenues since March 2020.[10]

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 revenues.

California's restaurants continue to be in daily 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 have remained open in some capacity have been forced to lay off dedicated team members whose livelihoods depend on guests dining on-site.

In early spring and summer of this year we began to think that the worst of the pandemic had passed. The increased availability and effectiveness of COVID-19 vaccines led the Centers for Disease Control and Prevention (CDC) to relax its guidance on

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[10] *Id.*

[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.

masking and social distancing for individuals. Capacity limits on restaurants and other businesses were lifted or relaxed, and life for many people (as well as business for restaurants) began to start to look like something resembling the pre-pandemic normal.

Sadly, however, only months later, we are seeing progress lost. The COVID-19 "Delta variant" has proven to be more virulent and transmissible than previously thought, even for vaccinated individuals. The CDC has reversed course on its guidance, now recommending masking for all individuals when indoors; and states and localities have begun to reinstate pandemic restrictions which had previously been lifted, including mandatory masking and occupancy limits. It is against the backdrop of this uncertain future that the need for clarity with respect to the metes and bounds of a regulator's authority during a global pandemic is more critical than ever. Put more simply, as the COVID-19 pandemic continues, if the Court of Appeal's decision is allowed to stand, restaurants will face the very real possibility of arbitrary closures or limitations imposed (or re-imposed) upon them, with no meaningful opportunity for substantive judicial review.

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 were initially issued in mid-March of last year, restaurants adapted as best they could in the face of unprecedented circumstances and suffered 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, even though takeout, delivery, and curbside pickup equate to only a small fraction of normal revenue for a typical restaurant.

Some restaurants 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 safe. 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 also 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.[14] These measures go beyond the recommendations for restaurants by the CDC.[15]

Before the outdoor dining ban, restaurants in Los Angeles were quick to "create pop-ups and new food experiences throughout town."[16] In spite of the industry's efforts to undertake these measures to

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[14] 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).

[15] 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.

[16] 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/

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 facing our communities. But at the time the Court of Appeal vacated the injunction entered by the lower court, existing data and statistics did not support banning outdoor dining (nor, notably, do they do so now). As the Superior Court 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.
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> . . .
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> 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.

Pet. App. C at 111a, 39a (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 Court of Appeals Erred in Its Failure to Require the County of Los Angeles to Show that the Restaurant Closure Order Was Not Arbitrary and Capricious

"[E]ven in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) ("*Roman Catholic Diocese*"). Yet this is precisely what the Court of Appeal did in allowing the County of Los Angeles to promulgate its outdoor dining ban absent even the most cursory review of any relevant evidence or data, deferring blindly to the agency's speculative

and non-evidenced based conclusions, and placing the County's actions beyond any justiciable limit on its regulatory authority. This was, simply put, a bridge too far for the Court of Appeal to go, and one which this Court should make sure it cannot cross. *See South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) (mem.) ("*South Bay*") (Roberts, C.J., concurring: "Deference, though broad has its limits.").

This Court made clear in *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Auto Insurance Company* that the standard for reviewing the lawfulness of an agency's regulation is the well-established "arbitrary and capricious standard." 463 U.S. 29, 43 (1983) ("*State Farm*"). Indeed, the "core of the concept" of substantive due process is the protection against arbitrary government action. *Hurtado v. California*, 110 U.S. 516, 527 (1884). California state law is in accord. Where, as here, executive branch agencies act in a legislative capacity to regulate, courts must determine whether a challenged action is "arbitrary, capricious, or entirely lacking in evidentiary support." *Davis v. Contractors' State License Bd.*, 79 Cal. App. 3d 940, 946 (1978). Under the long-standing principles of *State Farm*, an agency's action is arbitrary and capricious where, *inter alia*, it "entire fail[s] to consider an important aspect of the problem." 463 U.S. at 43.

The Court of Appeal's decision vacating the lower court's stay ignored this requirement, and instead applied the more deferential "rational basis" standard (and even that in the most summary of fashions), thus insulating the County's action from

any meaningful review. The court erred in doing so, conflating the standards under "rational basis test" applicable to Equal Protection claims with those of the "arbitrary and capricious test" properly applied in assessing substantive due process claims, concluding that the Restaurant Closure Order was lawful even if based merely on "rational speculation." *See* Pet. App. C. at 107a. In this way, the Court of Appeal misread the holding of *Jacobson*, *Roman Catholic Diocese*, and *South Bay* to conclude that where fundamental rights are not at issue, a court need not "examine the relevant data and articulate a satisfactory explanation for its action" or "consider an important aspect of the problem," as required by *State Farm*. 463 U.S. at 43. Applying this standard, the Court of Appeal erroneously held that the Restaurant Closure Order was lawful, even where the undisputed evidence showed that the County had not based its imposition of the Order on any qualitative scientific evidence and did not engage in even a rudimentary analysis of its costs and benefits. This Court should grant *certiorari* to make clear that even in the context of a public health crisis, a government agency acting in such an untethered fashion violates substantive due process irrespective of whether "fundamental liberties" are at stake.

The Superior Court acted well within its discretion under well-established law to enjoin the County from indefinitely extending the subject Restaurant Closure Order without adequate justification. As it explained, in cases alleging the deprivation of substantive due process, a reviewing court "must ensure that the agency has adequately considered all relevant factors," before arriving at a decision, and cannot allow an administrative agency

to engage in "arbitrary, wrongful government action." Pet. App. C at 108a (citations omitted). Moreover, the lower court weighed the relative hardship to the County as well as to the Petitioner and found that the County offered insufficient evidence to refute Petitioner's showing of irreparable harm in the absent of injunctive relief, or that the public interest weighed heavily in favor of enjoining the Restaurant Closure Order. Nor realistically could the County do so, in light of the compelling evidence Petitioner adduced in the lower court. *See* Pet. App. C at 53A-82A. As the Superior Court observed, "By failing to weigh the benefits of an outdoor dining restriction against its costs, the County acted arbitrarily and its decision lacks a rational relationship to a legitimate end." Pet. App. C at 155a.

This Court should grant the Petition and reaffirm that even in the context of a grave public health crisis, where matters of substantive due process are concerned an agency cannot take action that is arbitrary and capricious or fails to consider all "important aspect[s] of a problem." *State Farm,* 463 U.S. at 43. The Court should make clear that *Jacobson, Roman Catholic Diocese,* and *South Bay* do not abrogate this fundamental tenet of the *State Farm* analysis. The Court should likewise clear that, while an administrative agency is due a certain amount of deference in a court's review of its actions, deference is not without limit and cannot pass muster under the arbitrary and capricious standard where its action is taken without *any* evidentiary basis, and with no meaningful review of the costs, risks, and benefits weighing in favor and against such an action.

CONCLUSION

The Court of Appeal's decision leaves virtually no meaningful relief where an administrative agency acts to regulate in an arbitrary and capricious manner and is inconsistent with this Court's unequivocal precedent as to the appropriate standard of substantive due process review of such actions. As such, it leaves restaurants (and, drawn to its logical conclusion, all businesses, and indeed, all citizens) subject to the whim of administrative agencies unshackled from any notion of due process or substantive judicial review.

For all of the foregoing reasons, the Law Center respectfully urges this Court to grant the Petition, reverse the decision of the Court of Appeal, and direct that court to enter judgment in Petitioner's favor.

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