Fisher Phillips

fisherphillips.com

Sacramento
621 Capitol Mall
Suite 1400
Sacramento, CA 95814

(916) 210-0400 Tel
(916) 210-0401 Fax

Writer's Direct Dial:
(916) 210-0404

Writer's E-mail:
aparker@fisherphillips.com

July 22, 2022

The Honorable Chief Justice Tani G. Cantil-Sakauye
The Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Letter of Amicus Curiae of Restaurant Law Center in Support of Petition for Review
***640 Tenth, LP et al. v. Newsom, et al.*, No. S275182**

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Supreme Court of California:

Pursuant to California Rules of Court, Rule 8.500(g), Restaurant Law Center ("RLC") respectfully submits this letter in support of the Petition for Review filed on June 22, 2022 by Plaintiffs/Appellants 640 Tenth LP, et al. RLC urges the Court to grant review of the Court of Appeal's decision on May 13, 2022 because of the substantial impact on small businesses statewide suffered to date and the future risk to the industry should agency actions remain unchecked.

I. INTEREST OF RLC

RLC is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing nearly 16 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the second largest private sector employers in the United States.

The restaurant industry is also the most diverse industry in the nation, with 47% of the industry's employees being minorities, compared to 36% across

the rest of the economy. Further, 40% of restaurant businesses are primarily owned by minorities, compared to 29% of business across the rest of the United States economy. In California pre-pandemic, restaurant and foodservice jobs provided approximately 11% of total employment in the state. Moreover, 60% of California restaurants are owned by people of color, while 50% of California restaurants are owned or partly owned by women.

Supporting these businesses is RLC's primary purpose. Through amicus participation, RLC provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry. The issues raised by and impact of the *640 Tenth* case directly affect them and threaten to irrevocably injure them. RLC's amicus briefs have been cited favorably by state and federal courts.

II. THE COURT OF APPEAL'S DECISION THWARTS THE APA'S PURPOSE

To RLC, the gravamen of the Petition for Review is that the *640 Tenth* decision prescribes the exact conduct that the Legislature intended the California Administrative Procedure Act ("APA") to alleviate. That is, to burden California citizens, and particularly small businesses, with "unprecedented growth" in regulations that "discourage[] innovation, research, and development of improved means of achieving desirable social goals." (*See* Gov. Code § 11340.) By removing the "basic minimal procedural requirements" under the APA for adopting, amending, or repealing regulations, the *640 Tenth* decision effectively permits agencies to continue to act with unbridled power to adopt regulations that work against the protections the APA was enacted to provide. (*See* Gov. Code § 11346.) Rather than reiterate the conflicts with the APA aptly raised by the Petition, the development (or lack thereof) in the restaurant industry since May 5, 2020 clearly demonstrates the need for this Court's review.

To begin with, a few basic statistics set the stage. In 2019, California restaurants and foodservices provided approximately 1,830,000 jobs across 76,201 eating and drinking place locations statewide, which totaled estimated sales of $97.0 billion. Put simply, every dollar spent in the table service segment contributed $2.03 to the state economy and in the limited-service segment, $1.75 to the state economy. (*See* https://www.senate.ca.gov/sites/senate.ca.gov/files/california_restaurant_stati

sticspdf.pdf.) Those numbers were expected to only grow, with the industry projected to provide nearly 20% of the total employment in the state by 2029. (*Ibid*.)

Instead, the pandemic and regulations flowing therefrom requiring closure of, and later capacity limits for, indoor businesses and sectors hit the restaurant industry the hardest. By 2021, California led the nation in the number of restaurant closures with nearly 40,000 total closures and had one of the highest rates of permanent restaurant closures. (*See* https://www.yelpeconomicaverage.com/business-closures-update-sep-2020.html.) Moreover, in one year, California restaurants laid off or furloughed an estimated 900,000 to one million restaurant workers. (*See* https://www.calrest.org/news/thousands-california-restaurants-close-permanently.) In addition to the thousands of closures, one survey found that due to the capacity limits imposed by agency regulations, 30% of restaurants reported they would have to either permanently close or downsize by closing some locations. (*Ibid*.) Even when regulations changed from complete indoor dining closures to allowing certain indoor capacity limits in food establishments, that same survey found that only 41% of restaurants said that a 50% capacity limit would have allowed their establishments to continue operating. (*Ibid*.) Where the effects on the restaurant and foodservice industry since 2020 are so widespread and detrimental, compliance with the APA is patently pivotal in promulgating, interpreting, and enforcing the regulations that directly impact them.

III. CALIFORNIA RESTAURANTS ARE IRREVOCABLY INJURED ABSENT AGENCY PROCEDURAL PROTECTIONS

Without the "performance standards" required by the APA, California businesses and the restaurant industry specifically face an urgent and existential threat to their ability to comply with agency regulations. Those standards, which provide an objective along with criteria to achieve that objective, specifically serve to foster "innovation, research, and development of improved means to achieve societal goals" in California's businesses. The societal goal at issue in *640 Tenth*, and the alleged purpose behind Governor Newsom's proclamation in Executive Order N-60-20 that the APA did not apply, was establishing procedures to reopen businesses "at a pace designed to protect public health and safety" in light of the COVID-19 pandemic. Yet,

during a time of national and statewide emergency is precisely when the protections provided by the procedural requirements of the APA were and are most vital. The *640 Tenth* decision gave this point shockingly short shrift.

Indeed, where other regulations (even if promulgated by distinct agencies) during the same statewide emergency were promulgated in full compliance with the APA, there appears to be no rational basis to preclude the application of the APA in Executive Order N-60-20. In fact, the damage to California businesses by not utilizing the APA for actions taken under Executive Order N-60-20 is extensive, as explained above. By contrast, the benefits of complying with the APA are clearly evident. Take for example, the state Department of Industrial Relations, Division of Industrial Safety ("CalOSHA") Emergency Temporary Standards ("ETS") dealing with the safe operation of all businesses during the pandemic. (Cal. Code Regs., tit. 8, § 3205). Consistent with the requirements of the APA, CalOSHA first published regulations on November 30, 2020, containing a statement of emergency with 71 citations, including Centers for Disease Control and Prevention ("CDC") publications and peer-reviewed studies upon which employers could rely to adopt written COVID-19 prevention plans in their workplaces. (Cal. Code Regs., §§ 8205, et seq.)

Following the initial implementation of the ETS, CalOSHA continued to revise its standards, considering guidance issued by other agencies on various issues affecting workplaces, including masking, testing, and vaccination. (*See* https://www.dir.ca.gov/dosh/coronavirus/ETS.html.) Importantly, at each stage of revisions to the ETS and consistent with the APA, businesses were permitted to comment on any proposed changes prior to their implementation. In fact, prior to the adoption of nearly every subsequent set of revisions since November 2020, the proposed amended ETS was withdrawn specifically to flesh out issues raised by businesses.

For example, prior to the adoption of the revised ETS on June 17, 2021, CalOSHA's Standards Board voted to withdraw the proposed amended ETS in order to further review mask guidance presented by the California Department of Public Health ("CDPH"). Subsequently, the Board heard public comment by business groups who pressed for changes relating to the proposed requirements for employers to provide N95 respirators to unvaccinated workers and for clarity on their responsibilities regarding "documenting" the vaccination status of employees. (*See* https://www.fisherphillips.com/news-

insights/caloshas-revised-workplace-covid-19-rules.html.) This opportunity for comment and input from businesses was present at each stage of CalOSHA's revised ETS from the first through the third revisions.

By following the APA's requirements for public comment, businesses provided practical input on the effects and feasibility of the proposed standards that directly affected them. Moreover, in abiding by the APA, businesses could prepare for those standards prior to their implementation. Such preparation was necessary to ensure compliance. For instance, with respect to respirators, businesses needed to prepare by determining where they could order the proper type of respirator to ensure compliance with the ETS requirements. Absent proper preparation, businesses would have faced an uphill battle to locate proper equipment that was already difficult to come by due to product shortages, manufacturing and distribution issues, and other market complications caused by the pandemic. Requirements for respirators are one of many examples where businesses required advance preparation to ensure compliance with the ETS and preserve the health and safety of their workers and customers.

In stark contrast, in the two months following Executive Order N-60-20, the CDPH issued guidance requiring the closure of certain businesses with indoor spaces presenting an "increased risk of transmission." (Executive Order N-60-20.) This guidance was not based on any scientific evidence and the agency did not solicit public comment nor provide standards by which any specific objective could be achieved. Moreover, businesses were not advised of the guidance prior to its issuance. One month later, the CDPH then categorized certain sectors or businesses into tiers, purportedly based on "public health information and research" but without citation to it. (Order of Statewide Public Health Officer Order, Aug. 28, 2020; Employer Playbook, July 28, 2020.) Once again, businesses were subject to strict regulations without notice or the ability to comment or prepare.

By stating the APA did not apply to the Health Department's actions under N-60-20, in comparison to the APA compliant CalOSHA ETS, California businesses were at the whim of agencies to impose regulations without notice, comment, or preparation, as well as inconsistent enforcement based on those arbitrary regulations. Notably, despite that Executive Order N-60-20 was rescinded on June 11, 2021 by Executive Order N-07-21, none of the enforcement citations issued pursuant to the prior order against businesses

have been rescinded. In practical effect, Executive Order N-60-20 provided the Health Department with broad and sweeping authority to take any action it deemed necessary to protect the public health without any rational basis, transparency with or input from the businesses it applied to, and any means of recourse by businesses absent legal action.

IV. THIS COURT'S REVIEW IS NECESSARY TO PROTECT CALIFORNIA'S RESTAURANT INDUSTRY.

The crux of the issue is plain. Even though Governor Newsom relied on the statewide emergency as the basis for not applying the APA to criteria and procedures established by the California Department of Public Health, other regulations of equal importance in preserving the public health and safety in the face of a global pandemic were promulgated in full compliance with the APA. The Governor should not allow part of his administration to ignore the APA for the stated reason that it is an emergency when another part of his administration affirmatively demonstrates that the APA can and should be complied with. Such an inconsistent application of the APA, the specific purpose of which is to ensure proper checks and balances between the administrative, executive, and legislative branches of state government to protect California businesses, cannot stand.

This Court's review of the opinion below is necessary to protect California's restaurant industry through the duration of the COVID-19 pandemic and all future emergencies.

Respectfully submitted,

Fisher & Phillips LLP
Alden J. Parker
Erin J. Price
Counsel for Amicus Curiae RLC

Restaurant Law Center
Angelo I. Amador
Counsel for Amicus Curiae RLC

PROOF OF SERVICE

I, the undersigned, am at least 18 years old and not a party to this action. I am employed in the County of Sacramento with the law offices of Fisher & Phillips LLP and its business address is 621 Capitol Mall, Suite 1400, Sacramento, California 95814.

On July 22, 2022, I served the foregoing document(s) **Letter of Amicus Curiae of Restaurant Law Center in Support of Petition for Review**, on the person(s) listed below as follows:

Bruno William Katz Wilson, Elser, Moskowitz, Edelman & Dicker LLP 401 West A Street, Suite 1900 San Diego, CA 92101	Plaintiff and Appellant *640 Tenth, LP, O'Frank, LLC, Hansen Rammel Braun Corporation, Golden Egg Venture, Inc., Fit Athletic Club-San Diego, LLC and Crossfit East Village Corporation*
Matthew Sean Harrison Prometheus Civic Law PC 120 Vantis, Suite 300 Aliso Viejo, CA 92656	Plaintiff and Appellant *640 Tenth, LP, O'Frank, LLC, Hansen Rammel Braun Corporation, Golden Egg Venture, Inc., Fit Athletic Club-San Diego, LLC and Crossfit East Village Corporation*
Alan D. Romero Office of the Attorney General 1300 I Street Sacramento, CA 95814	Defendant and Respondent *Gavin Newsom, Rob Bonta and Tomas J. Aragon*
Joshua Michael Heinlein Office of County Counsel 1600 Pacific Highway, Room 355 San Diego, CA 92101	Defendant and Respondent *County of San Diego and Wilma J. Wooten*
Jeffrey Patrick Michalowski Paul Plevin Sullivan & Connaughton 101 West Broadway Ninth Floor San Diego, CA 92101	Defendant and Respondent *County of San Diego and Wilma J. Wooten*

☒ **[by MAIL]** - I enclosed the document in a sealed envelope or package addressed to the person(s) whose address(es) are listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in Sacramento, California, in a sealed envelope with postage fully prepaid.

☒ **[by ELECTRONIC SERVICE]** - I electronically served the document to the person(s) listed above via TrueFiling.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 22, 2022, at Sacramento, California.

Vicki Rathke
Print Name

By: 
Signature