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January 5, 2020

Hon. Tani Gorre Cantil-Sakauye, Chief Justice
Hon. Carol A. Corrigan, Associate Justice
Hon. Goodwin H. Liu, Associate Justice
Hon. Mariano-Florentino Cuéllar, Associate Justice
Hon. Leondra R. Kruger, Associate Justice
Hon. Joshua P. Groban, Associate Justice
Hon. Martin J. Jenkins, Associate Justice

***Re: County of San Bernardino, et al. v. Gavin Newsom, et al.
Docket No. S266106
City of Chino Hill's Amicus Curiae Letter In Support of
Petition for Writ of Mandate***

Honorable Chief Justice and Associate Justices:

I write to you on behalf of the Mayor and City Council of the City of Chino Hills in my capacity as Chino Hills' City Attorney. The City of Chino Hills ("Chino Hills") supports the Petition for Writ of Mandate ("Petition") filed by Petitioners County of San Bernardino and Josie Gonzales (collectively, "the County"). This amicus letter, submitted under Rule 8.500, subdivision (g)(1) of the California Rules of Court, presents equitable and economic arguments in support of the continued and safe operation of restaurants and other businesses in addition to the arguments addressed in the County's Petition. Chino Hills has significant interests in the foregoing issues, and in implementing a lawful State Emergency Plan under Government Code § 8568 that regulates more narrowly and flexibly than the Regional Stay At Home Order dated December 3, 2020 and other Stay at Home Orders issued by the Governor as referenced in the Petition ("Orders").

State policies that mandate the closure of businesses without sufficient consideration or mitigation of the economic impacts have devastated our City. Several businesses in Chino Hills have already been forced to close their doors. These closures ripple throughout our City, affecting the business owners, employees, and customers. As more edge closer to closing, this means the loss of critical and important jobs in our community, the disruption of families, and an endangered American Dream.

Chino Hills' businesses have shown creativity, resilience, and passion while complying with various public health orders. Our business community has done its part to protect the safety of its workers and the public at large. A prolonged closure of businesses disregards the extraordinary efforts and earnest desire to comply that business owners have undertaken in the last nine months. Many of our restaurants and personal services businesses have spent thousands of dollars to safely operate outdoors or with modified operations, only to be told they must entirely cease operations. Our City has worked to give businesses the tools they need to stay open and operate safely. Although, the importance of protecting public health during this unprecedented pandemic remains a priority, a critical balance must be achieved.

The Order Arbitrarily and Illegally Regulates Businesses

The notion that a municipality's health officer has broad authority is well-established and long-standing. *Jacobson v. Commonwealth of Massachusetts*, ("Jacobson") (1905) 197 U.S. 11, 25. "[A] community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety. *Ibid.* However, the health officer's authority is not unbridled. Courts have the duty to evaluate an exercise of that authority to ensure actions taken have a "real and substantial relationship" to public health and safety:

“[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.” *Id.* at 31 (emphasis added).

In addition, the health officer cannot engage in a “plain, palpable invasion of rights” secured by the Constitution or act arbitrarily or oppress. *Id.* at 31, 38. *See also Jew Ho v. Williamson*, (C.D. Cal. 1900) 103 F. 10 (whether the regulation in question is a reasonable one and directed to accomplish the apparent purpose is a question for the court to determine); *Cross Culture Christian Ctr. v. Newsom*, (E.D. Cal. 2020) 445 F.Supp.3d 758, 766; *Six v. Newsom*, (C.D. Cal. 2020) 462 F.Supp.3d 1060, 1068 (upholding physical distancing measures to slow down spreading of the virus). As Justice Gorsuch recently explained, the *Jacobson* test is equivalent to rational basis test. *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) 141 S.Ct. 63, 70 (Gorsuch, J. concurring) (“Although *Jacobson* pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review to Henning *Jacobson*’s challenge to a state law that, in light of an ongoing smallpox pandemic, required individuals to take a vaccine, pay a \$5 fine, or establish that they qualified for an exemption.”)

The Due Process Clause of the Fourteenth Amendment includes a substantive component that bars arbitrary, wrongful, government action “regardless of the fairness of the procedures used to implement them.” *Zinerman v. Burch*, (1990) 494 U.S. 113, 125. The “core of the concept” of substantive due process is the protection against arbitrary government action. *Hurtado v. California*, (1884) 110 U.S. 516, 527 (1884). Indeed, “the touchstone of due process is protection of the individual against arbitrary actions of government” *Id.* When executive branch agencies act in a legislative capacity, courts evaluate whether the challenged agency action has been “arbitrary, capricious, or entirely lacking in evidentiary support.” *Davies v. Contractors’ State License Bd.* (1978) 79 Cal.App.3d 940, 946. While courts do not weigh evidence when applying this test, they must ensure that the agency has adequately considered all relevant factors and has demonstrated a rational connection between those factors and the choice made. *Carrancho v. California Air Resources Board*, (“*Carrancho*”) (2003) 111 Cal.App.4th 1255, 1265.

A federal district court in Pennsylvania held that “actions which are irrational, arbitrary or capricious do not bear a rational relationship to any

end.” *County of Butler v. Wolf* (W.D. Pa. Sept. 14, 2020) 2020 WL 5510690, at 26. After nine months, the deferential *Jacobson* standard no longer applies. See *Wolf, supra*, 2020 WL 5510690 at 26. In *Wolf*, a federal district court found constitutional violations in a governor’s COVID emergency restrictions limiting the number of people permitted to attend gatherings and determining which businesses could remain open based on whether they are “life-sustaining” in nature. Plaintiff’s challenge was rooted in claims of equal protection, due process, and First Amendment rights. The closures were temporary but had no certain end date. With respect to the open ended uncertainty, the district court recognized the harm to the that would result to businesses: “A total shutdown of a business with no end-date and with the possibility of additional, future shutdowns can cause critical damage to a business’s ability to survive, to an employee’s ability to support him/herself, and adds a government-induced cloud of uncertainty to the usual unpredictability of nature and life.” *Id.* at 26.

The Orders infringe upon substantive due process because no analysis was undertaken to assess their impact in the wake of the lengthy time restaurants and other businesses have been closed. For example, we are aware of no analysis that the State has undertaken that links outdoor dining to significant transmission of COVID-19. Further, other businesses have shouldered debilitating restrictions on their operations for nine months, have often expended resources to safely open, but then after this investment, they have been shut down without a rational basis. The State has not properly weighed the hardships against the benefits of the closures and in the widespread loss of livelihoods. Thus, the foregoing defects render the Order inconsistent with substantive due process -- a consideration of all relevant factors that demonstrates a rational connection between those factors and the challenged regulation.

The Court Should Leave Intact Other Orders Accommodating Public Agencies.

The full scope of relief sought by the County’s Petition, and which this Court may grant, is broad. The exhibits attached to the Petition consist of several Executive Orders referencing multiple statutes that affect public agencies. This Court should not invalidate any Orders designed to ensure the continued and seamless operation of local government during these unprecedented times, or that reaffirm the discretion of local governments to

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regulate in a way tailored to local conditions. For example, Section 3 of Executive Order N-25-20 has authorized local governments since March 17, 2020 to conduct public meetings by teleconference instead of in-person as otherwise required by California law. This and other similar Orders, which do not appear to fall within the scope of relief sought by the County, are expressly authorized by Government Code, §8571. Government Code, §8571 permits Section 3 of Executive Order N-25-20 to remain because it merely suspends a statute prescribing the procedure for conduct of state business, where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency. Thus, these orders should remain intact, and left unaffected by any relief this Court grants with respect to the challenged Order.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mark D. Hensley".

Mark D. Hensley
City Attorney
City of Chino Hills

cc: Honorable Mayor Brian Johsz and
Members of the City Council
Benjamin Montgomery, City Manager, City of Chino Hills

State of California)
County of Los Angeles)
)

Proof of Service by:
✓ US Postal Service
Federal Express

I, Kirstin Largent, declare that I am not a party to the action, am over 18 years of age and my business address is: 626 Wilshire Blvd., Suite 820, Los Angeles, California 90017; ca@counselfpress.com

On 1/5/2021 declarant served the within: City of Chino Hill's Amicus Curiae Letter In Support of Petition for Writ of Mandate
upon:

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350 McAllister Street, Room 1295
San Francisco, California 94102-4797

I declare under penalty of perjury that the foregoing is true and correct:

Signature: /s/ Kirstin Largent

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