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8 DEPARTMENT OF PUBLIC HEALTH,
MUNTU DAVIS, M.D., and BARBARA
9 FERRER, PhD

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

12 ALLIANCE OF LOS ANGELES
13 COUNTY PARENTS, an unincorporated
14 association,

15 Petitioner and Plaintiff,

16 v.
17 COUNTY OF LOS ANGELES
DEPARTMENT OF PUBLIC HEALTH;
18 MUNTU DAVIS, in his official capacity
as Health Officer for the County of Los
19 Angeles; BARBARA FERRER, in her
official capacity as Director of the County
20 of Los Angeles Department of Public
Health; and DOES 1 through 25, inclusive,
21 Respondents and Defendants.
22

Case No. 22STCP02772
Assigned for All Purposes to:
Hon. James C. Chalfant, Dept. 85

**DEFENDANTS COUNTY OF LOS
ANGELES DEPARTMENT OF
PUBLIC HEALTH'S, MUNTU DAVIS,
M.D.'S, AND BARBARA FERRER,
PHD'S REPLY IN SUPPORT OF
DEMURRER TO PLAINTIFF'S FIRST
AMENDED PETITION**

Hearing Date: December 15, 2022
Time: 9:30 a.m.
Dep't: 85

Complaint Filed: July 26, 2022
Trial Date: Not Set

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Cases

Chan v. the Judicial Council of Cal.
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I.

INTRODUCTION

Defendants Los Angeles County Department of Public Health’s, Muntu Davis, M.D.’s, and Barbara Ferrer, PhD’s (collectively “LACDPH”) demurrer to the *First Amended Petition* (“*FAP*”) filed by Plaintiff Alliance of Los Angeles County Parents (“**Plaintiff**”) should be sustained. Plaintiff concedes LACDPH’s primary arguments in the Opposition—specifically, that rational basis review applies to Plaintiff’s First, Second, and Fourth Causes of Action, and that Plaintiff only challenges the evidence relied upon by LACDPH in deciding to enact the policies challenged by those causes of action.

To state a claim under rational basis review, Plaintiff must allege that the challenged policies are entirely lacking in support. Put another way, Plaintiff must allege facts sufficient to negate every conceivable rational basis for the LACDPH policies. Because the *FAP* only alleges that Plaintiff would have interpreted the data differently, or does not consider the data upon which LACDPH relied to be reliable, Plaintiff fails to show that the challenged policies are entirely lacking in evidentiary support, or have no conceivable rational basis. Moreover, Plaintiff cannot plead that there is no rational basis because the *FAP* concedes the existence of a rational basis for the challenged policies as outlined in detail below. Accordingly, the Demurrer should be sustained without leave to amend as to Plaintiff’s First, Second, and Fourth Causes of Action.

II.

LACDPH’s DEMURRER SHOULD BE SUSTAINED

A. Plaintiff Concedes LACDPH’s Primary Arguments.

LACDPH argued in its moving papers that this Court “cannot reweigh the evidence or substitute its own judgment” for LACDPH’s on matters of public health [Demurrer, at 6:26-27] or mandate the risk-benefit analysis for which Plaintiff appears to advocate [*id.*, at 8:4-11], and that LACDPH’s policies should be upheld unless they are “arbitrary, capricious, or entirely lacking in evidentiary support” [*id.*, at 6:24-27]. Plaintiff attempts to characterize these arguments as a claim by LACDPH “that this Court cannot question

1 [LACDPH’s] health orders.” [Oppo., at 5:4-5.] But even Plaintiff knows that this is not
2 actually what LACDPH argues.

3 The Court of Appeal’s recent decision in *County of Los Angeles Department of*
4 *Public Health v. Superior Court of Los Angeles County* (2021) 61 Cal. App. 5th 478
5 (“*CRA Opinion*”), leaves Plaintiff with little room to maneuver. Plaintiff has no choice
6 but to concede that “it is improper for a court to substitute its own judgment for that of a
7 government agency, and that ordering the County Department of Public Health to engage
8 in a risk/benefit analysis of its” COVID-19 policy “was inconsistent with the court’s
9 appropriate role.” [Oppo., at 5:3-4.] Likewise, “the Court’s review begins and ends with a
10 determination of whether the agency’s action has been arbitrary, capricious, or entirely
11 lacking in evidentiary support” and it “cannot second-guess public health officials’ actions
12” [*Id.* at 5:14-16, 5:22-23.]

13 Against this backdrop, Plaintiff’s only argument is that facts now are different than
14 the facts were when the *CRA Opinion* was decided. [Oppo., at 5:24-6:2.] But even taking
15 as true Plaintiff’s claim that the facts now are different, the legal standards set forth in the
16 *CRA Opinion* are not. The Court still may not substitute its judgment for the County’s nor
17 may it second-guess LACDPH’s interpretation of public health data. That is exactly what
18 Plaintiffs ask this Court to do.

19 **B. The First, Second, And Fourth Causes Of Action Fail To State A Claim Under**
20 **Rational Basis Review.**

21 As the Demurrer explains, Plaintiff’s First, Second, and Fourth causes of action are
22 ultimately subject to the rational basis standard. [Demurrer, at 6:19-7:14, 8:26-9:26.]
23 Plaintiff contends that LACDPH does not argue “that Petitioner has failed to state facts
24 sufficient to constitute a cause of action. Instead, [LACDPH] argue[s] that Petitioner is
25 wrong and that Respondents’ acted rationally.” [Oppo., at 6:5-7.] Plaintiff again
26 misconstrues LACDPH’s argument.

27 LACDPH does not present evidence to conflict Plaintiff’s allegations that it acted
28 irrationally. On the contrary, LACDPH argues that Plaintiff’s allegations—that LACDPH

1 purportedly incorrectly calculated hospitalizations and deaths, used biased studies, failed to
2 consider certain evidence, used unreliable data, and failed to acknowledge that the
3 pandemic has receded [*id.* at 6:10-18]—are exactly the type of claims that, under the *CRA*
4 *Opinion*, cannot invalidate a policy under rational basis review. As stated in the Demurrer,
5 Plaintiff’s allegations acknowledge that LACDPH considered at least *some data* and *some*
6 *studies* to support its policies. But to state a claim under the rational basis standard,
7 Plaintiffs must negate “every conceivable basis which might support [the law].” *Facundo-*
8 *Guerrero v. Workers’ Comp. Appeals Bd.* (2008) 163 Cal.App.4th 640. Given the
9 concessions inherent in the *FAP*, Plaintiff as a matter of law cannot show that LACDPH’s
10 decisions are “entirely lacking in evidentiary support” as required to state a claim under
11 rational basis review. [Demurrer, at 7:15-8:3.]

12 *Jacobson v. Commonwealth of Massachusetts* (1905) 197 U.S. 11, 31, 38 says
13 nothing different, and certainly does not invite the Court to second-guess LACDPH.
14 [Oppo., at 6:26-7:5.] Although *Jacobson* was decided before the current rational basis
15 framework was articulated, it applies a standard equivalent to, or even more deferential
16 than, rational basis review. *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) 141 S.
17 Ct. 63, 70 (2020) (“Although *Jacobson* pre-dated the modern tiers of scrutiny, this Court
18 essentially applied rational basis review.”); *CRA Opinion*, 61 Cal. App. 5th at 489 n.4
19 (“We note some courts appear to interpret the *Jacobson* test as more deferential than the
20 rational basis standard.”).

21 Nor is Plaintiff’s criticism of LACDPH’s reliance on CDC recommendations well-
22 taken. Plaintiff argues that LACDPH cannot argue that its reliance on CDC guidance is
23 rational as a matter of law because Plaintiff speculates that the CDC’s guidance could itself
24 be irrational, and the Court cannot take judicial notice of the CDC’s recommendations for
25 their truth. [Oppo., at 7:6-12.] But LACDPH does not seek judicial notice of the CDC’s
26 recommendations for their truth—*i.e.*, that masking is beneficial—but rather for the fact
27 that the CDC has recommended masks. This is a non-hearsay purpose. *See, e.g., People v.*
28 *Rodriguez* (1966) 243 Cal. App. 2d 522, 526 (“The contents of such statements are

1 admissible to prove what was said rather than the truth of what was said and, for this
2 reason, testimony relating such is direct and not hearsay.”); *People v. Freeman* (1971) 20
3 Cal. App. 3d 488, 492 (“It was not hearsay, because not offered to prove the statement’s
4 truth or falsity but as evidence of the fact that the statement was made.”). Moreover,
5 whether the CDC’s recommendation is correct is irrelevant. Under rational basis review,
6 ““a legislative choice is not subject to courtroom factfinding and may be based on rational
7 speculation *unsupported by evidence or empirical data.*”” *Chan v. the Judicial Council of*
8 *Cal.* (2011) 199 Cal. App. 4th 194, 204 (emphasis in original). If speculation is sufficient,
9 certainly reliance on the nation’s highest public health authority is sufficient.

10 **III.**

11 **CONCLUSION**

12 For all of the foregoing reasons, LACDPH respectfully requests that the demurrer to
13 Plaintiffs’ *FAC* be sustained, without leave to amend.

14 Dated: December 8, 2022 SHEPPARD MULLIN RICHTER & HAMPTON LLP

15
16 By



KENT R. RAYGOR

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