

DEPARTMENT 85 LAW AND MOTION RULINGS

Case Number: 22STCP02772 **Hearing Date:** December 15, 2022 **Dept:** 85

Alliance of Los Angeles County Parents v. County of Los Angeles Department of Public Health, Muntu Davis, and Barbara Ferrer, 22STCP02772

Tentative decision on (1) motion to strike; sustained with leave to amend; (2) demurrer: sustained

Respondents County of Los Angeles Department of Public Health, Muntu Davis (“Davis”), and Barbara Ferrer (“Ferrer”) (collectively, “LACDPH” or “Department”), demurs to the first, second, and fourth causes of action in the First Amended Petition (“FAP”) filed by Petitioner Alliance of Los Angeles County Parents (“Parents”) and also moves to strike the FAP for failure to verify it.

The court has read and considered the moving papers, oppositions, and replies, [\[1\]](#) and renders the following tentative decision.

A. Statement of the Case

1. FAP

Petitioner Parents filed the Petition against Respondents on July 26, 2022. The operative pleading is the FAP filed on September 30, 2022, alleging (1) traditional mandamus to correct abuse of discretion under Health and Safety Code (“H&S Code”) sections 120175 and 101040; (2) violation of the Equal Protection Clause of the California Constitution; (3) violation of right to free speech under the California Constitution; (4) deprivation of substantive due process under the California Constitution; and (5) declaratory judgment. The FAP alleges in pertinent part as follows.

The Department measure at issue requires students to cover their faces at school for ten days after someone in the class tests positive for COVID-19 (hereinafter, “COVID”). FAP, ¶¶ 10-11. The frequency at which this occurs for some students has left them wearing masks since the fall semester began; this is a *de facto* mask mandate. FAP, ¶11.

Schoolchildren in Los Angeles County (“County”) are subject to some of the most restrictive COVID-19 protection mandates in the country. FAP, ¶26. LACDPH has issued hundreds of health orders through its authority under H&S Code sections 101040, 101085, and 120175. FAP, ¶27. Yet, it has never conducted a harm/benefit analysis to determine whether the harms associated with forcibly masking children outweigh any purported benefit. FAP, ¶29.

Winter is likely to bring a new wave of COVID cases with or without like masking. FAP, ¶14. LACDPH cites to the fact that the County is in the Center for Disease control’s (“CDC”) “High” tier of community risk, which requires ten or more COVID hospitalizations per 100,000 people over a seven-day

period. FAP, ¶¶ 30, 33. The County's tier is inflated because a lot of hospitalizations are for people with unrelated problems who happen to test positive for COVID. FAP, ¶¶ 34-37.

Studies have shown that mask mandates have a statistically insignificant impact on the spread of COVID at schools. FAP, ¶¶ 40-44. Random controlled trial studies have not demonstrated any statistically significant reduction in COVID transmission resulting from masking children. FAP, ¶¶ 45-59. LACDPH, the CDC, and other states rely on a study by Ferrer's live-in daughter that observed that students in County schools tested positive for COVID-19 at a lower rate than other students, concluding that the County's measures were responsible for this difference. FAP, ¶¶ 60-64. Ferrer, her daughter, and other authors of the study never disclosed the conflict of interest between Ferrer and her daughter. FAP, ¶¶ 62, 65.

Children have always been at significantly lower risk of infection than adults. FAP, ¶¶ 66-69. Long-COVID is also not a risk, as studies have shown that any symptoms children experience after infection are similar to non-COVID infections. FAP, ¶70.

Masking children has caused negative social, emotional, and psychological impacts. FAP, ¶¶ 71-72. Experts have maintained that cloth masks are ineffective, and more advanced masks and respirators are a poor fit for children and have numerous side effects. FAP, ¶¶ 73-82. The use of masks also hinders the development of speech, communication, and language skills because they block facial gestures and other non-verbal channels of communication. FAP, ¶83. Children with neurodevelopmental difficulties face an inordinately disproportionate negative impact. FAP, ¶¶ 84-88. The affected skills have a limited developmental window that these students cannot "make up" once it closes. FAP, ¶89.

Speech and language delays are the most common childhood disability. FAP, ¶92. They have a harder time communicating with masks on, they cannot see what a speech therapist is trying to get them to say or any encouragement the therapist gives, and they struggle to make friends. FAP, ¶¶ 91, 93-95.

Masks also impair the ability of teachers and caregivers to connect with students and monitor their well-being. FAP, ¶¶ 97-98. Educators are witnessing rapid deterioration of the mental wellbeing of children, who often hear that they are the vectors of disease with the power to hurt and kill their loved ones. FAP, ¶¶ 99-101.

Some children who wear masks have also experienced severe headaches and migraines, developed severe facial rashes, developed speech issues, and found it hard to breathe. FAP, ¶¶ 102-05, 107, 110-11. Some parents opt to keep younger children home to avoid the negative effects of masking, but these children then lose critical years of education and development. FAP, ¶¶108-09.

LACDPH abused its discretion under the H&S Code when it enacted the Mandate (1) without utilizing accurate hospitalization data to calculate community risk levels, (2) without accounting for false positives when counting cases, (3) without distinguishing between deaths "caused by" COVID versus deaths with incidental COVID, (4) without using any unbiased random controlled studies showing a statistically significant decrease in COVID transmission due to masking, (5) without acknowledging or weighing any harms to children caused by forced masking, and (6) while failing entirely to acknowledge or consider evidence of low hospitalization, mild severity, and low mortality associated with COVID. FAP, ¶117. This action is arbitrary and beyond the bounds of reason, lacks any evidentiary support, bears no reasonable relation to the public welfare, and is so palpably unreasonable and arbitrary as to be an abuse of discretion as a matter of law. FAP, ¶118.

To establish an equal protection violation based on the discriminatory application of a facially non-discriminatory law in a case that does not involve a suspect class or fundamental right, a plaintiff must prove that (1) the plaintiff was treated differently from persons similarly situated; (2) the unequal treatment was intentional; and (3) the unequal treatment was not rationally related to a legitimate governmental purpose. FAP, ¶126. The Mandate affects children only because they go to school and must spend 6-8 hours per day in masks. FAP, ¶127. There is no rational basis for this because adults are more vulnerable. FAP, ¶131.

After Parents filed this Petition, LACDPH began blocking all public comment on its social media accounts to prevent “harassment” and “bullying.” FAP, ¶¶ 139-40. On August 21, 2022, it announced that those accounts are now for informational purposes only and open to comment only during live “town hall” events. FAP, ¶¶ 141-42. Only those tagged in the posts may comment, which is not a viewpoint neutral restriction. FAP, ¶¶ 143, 148.

Before August 2022, those social media pages were a designated public forum. FAP, ¶144. The new restrictions on such a forum do not serve a significant governmental interest, and the LACDPH has not opened ample alternative channels for communication. FAP, ¶¶ 144-45. When Parents tried to remedy this with a Twitter account that reposted LACDPH material and allowed for public comment, Twitter suspended it on LACDPH’s request. FAP, ¶147.

The Mandate violates substantive due process because it is clearly arbitrary and unreasonable and has no substantial relation to the public health, safety, morals, or general welfare. FAP, ¶152.

Parents seeks (1) a writ of mandate prohibiting LACDPH from implementing or enforcing all arbitrary and capricious COVID health orders for masking children; (2) a temporary stay of enforcement of the Mandate pending judgment in this case; (3) declaratory judgment that COVID health orders treating lower-risk children far more harshly than adults denies children in the County equal protection of the law under the California Constitution; (4) declaratory judgment that blocking public comment on LACDPH’s social media pages violates Parents members’ constitutional right to free speech; (5) an injunction mandating the reopening of LACDPH posts for public comment; (6) declaratory judgment that LACDPH’s COVID health orders deprive Parents members of substantive due process; (7) an injunction prohibiting implementation and enforcement of COVID health orders that deny substantive due process; (8) injunctive relief directing LACDPH to not implement or enforce COVID health orders against children until it uses accurate hospitalization data to calculate community risk levels, accounts for false positives, distinguishes between COVID caused deaths and COVID deaths incidental to other causes, uses unbiased random controlled studies showing a statistically significant decrease in COVID transmission due to masking, balances benefits of masking against harms, and considers evidence of low hospitalization and mortality and mild severity of COVID; (9) damages according to proof; and (10) attorney’s fees and costs. FAP Prayer for Relief, ¶¶ 1-15.

2. Course of Proceedings

On August 23, 2022, LACDPH removed this case to federal court. On August 31, 2022, the federal district court remanded the case to state court.

2. Demurrer

Demurrers are permitted in administrative mandate proceedings. CCP §§1108, 1109. A demurrer tests the legal sufficiency of the pleading alone and will be sustained where the pleading is defective on its face.

Where pleadings are defective, a party may raise the defect by way of a demurrer or motion to strike or by motion for judgment on the pleadings. CCP §430.30(a); Coyne v. Krempeles, (1950) 36 Cal.2d 257. The party against whom a complaint or cross-complaint has been filed may object by demurrer or answer to the pleading. CCP §430.10. A demurrer is timely filed within the 30-day period after service of the complaint. CCP § 430.40; Skrbina v. Fleming Companies, (1996) 45 Cal.App.4th 1353, 1364.

A demurrer may be asserted on any one or more of the following grounds: (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading; (b) The person who filed the pleading does not have legal capacity to sue; (c) There is another action pending between the same parties on the same cause of action; (d) There is a defect or misjoinder of parties; (e) The pleading does not state facts sufficient to constitute a cause of action; (f) The pleading is uncertain (“uncertain” includes ambiguous and unintelligible); (g) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct; (h) No certificate was filed as required by CCP §411.35 or (i) by §411.36. CCP §430.10. Accordingly, a demurrer tests the sufficiency of a pleading, and the grounds for a

demurrer must appear on the face of the pleading or from judicially noticeable matters. CCP §430.30(a); Blank v. Kirwan, (1985) 39 Cal.3d 311, 318. The face of the pleading includes attachments and incorporations by reference (Frantz v. Blackwell, (1987) 189 Cal.App.3d 91, 94); it does not include inadmissible hearsay. Day v. Sharp, (1975) 50 Cal.App.3d 904, 914.

The sole issue on demurrer for failure to state a cause of action is whether the facts pleaded, if true, would entitle the plaintiff to relief. Garcetti v. Superior Court, (1996) 49 Cal.App.4th 1533, 1547; Limandri v. Judkins, (1997) 52 Cal.App.4th 326, 339. The question of plaintiff's ability to prove the allegations of the complaint or the possible difficulty in making such proof does not concern the reviewing court. Quelimane Co. v. Stewart Title Guaranty Co., (1998) 19 Cal.4th 26, 47. The ultimate facts alleged in the complaint must be deemed true, as well as all facts that may be implied or inferred from those expressly alleged. Marshall v. Gibson, Dunn & Crutcher, (1995) 37 Cal.App.4th 1397, 1403. Nevertheless, this rule does not apply to allegations expressing mere conclusions of law, or allegations contradicted by the exhibits to the complaint or by matters of which judicial notice may be taken. Vance v. Villa Park Mobilehome Estates, (1995) 36 Cal.App.4th 698, 709.

For all demurrers filed after January 1, 2016, the demurring party must meet and confer in person or by telephone with the party who filed the pleading for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. CCP §430.31(a). As part of the meet and confer process, the demurring party must identify all of the specific causes of action that it believes are subject to demurrer and provide legal support for the claimed deficiencies. CCP §430.31(a)(1). The party who filed the pleading must in turn provide legal support for its position that the pleading is legally sufficient or, in the alternative, how the complaint, cross-complaint, or answer could be amended to cure any legal insufficiency. Id. The demurring party is responsible for filing and serving a declaration that the meet and confer requirement has been met. CCP §430.31(a)(3).

If a demurrer is sustained, the court may grant leave to amend the pleading upon any terms as may be just and shall fix the time within which the amendment or amended pleading shall be filed. CCP §472a(c). However, in response to a demurrer and prior to the case being at issue, a complaint or cross-complaint shall not be amended more than three times, absent an offer to the trial court as to such additional facts to be pleaded that there is a reasonable possibility the defect can be cured to state a cause of action. CCP §430.41(e)(1).

C. Statement of Facts^[2]

As of October 5, 2022, the CDC maintains that wearing a well-fitting mask or respirator consistently and correctly reduces the risk of spreading the COVID-19 virus. RJN Ex. A, pp. 6, 9. In areas with High COVID Community Levels, universal indoor masking in schools and early care and education ("ECE") programs and the community at large is recommended. RJN Ex. A, p. 9. Schools might need to require masking in settings such as classrooms or during activities to protect students with immunocompromising conditions or other conditions that increase their risk for getting very sick with COVID in accordance with applicable federal, state, or local laws and policies. RJN Ex. A, p. 9.

Students or staff who come to school or an ECE program with symptoms or develop symptoms while at school or an ECE program should be asked to wear a well-fitting mask or respirator while in the building and be sent home and encouraged to get tested if testing is unavailable at school. RJN Ex. A, p. 10. Schools and ECEs should ensure that people with COVID-19 isolate away from others and do not attend school until they have completed isolation. RJN Ex. A, p. 10. Once isolation has ended, people should wear a well-fitting mask or respirator around others through day 10. RJN Ex. A, p. 10.

D. Analysis

Respondent LACDPH demurs to the first, second, and fourth causes of action in the FAP and moves to strike the entire FAP for improper verification.

1. Meet and Confer

On October 24, 2022, the parties met and conferred for both motions. Alter Dem. Decl., ¶2; Alter Strike Decl., ¶2. The parties were unable to reach an agreement on the issues. Alter Dem. Decl., ¶2; Alter Strike Decl., ¶2.

2. The Motion to Strike

a. Applicable Law

Any party, within the time allowed to respond to a pleading, may serve and file a notice of motion to strike the whole or any part thereof. CCP §435(b)(1). CCP section 436 permits the court to strike out any irrelevant, false, or improper matter, as well as any part of any pleading not in conformity with an order of the court. Irrelevant matters are defined as those allegations that are not essential to the statement of a claim or that are neither pertinent nor supported by an otherwise sufficient claim. CCP §431.10(b).

The notice of motion to strike shall be given within the time allowed to plead, and if a demurrer is interposed, concurrently therewith, and shall be noticed for hearing and heard at the same time as the demurrer. CRC 3.1322(b). The notice of motion to strike a portion of a pleading shall quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count or defense. CRC 3.1322(a).

b. Analysis

A mandamus petition must be properly verified. CCP §§ 1069, 1086. When a document to be filed electronically provides for a signature under penalty of perjury of any person, the document is deemed to have been signed by that person if filed electronically provided that either of two conditions are met. CRC 2.257(b). For the first condition, the declarant must sign the document using an electronic signature and declare under penalty of perjury under the laws of the state of California that the information submitted is true and correct. CRC 2.257(b)(1). If the declarant is not the electronic filer, the electronic signature must be unique to the declarant, capable of verification, under the sole control of the declarant, and linked to data in such a manner that if the data are changed, the electronic signature is invalidated. CRC 2.257(b)(1).

LACDPH moves to strike the FAP because the signature of verifying party Margaret Orenstein consists only of “/s/.” The FAP was filed by Parents’ counsel, not Margaret Orenstein, and does not meet the requirements of uniqueness, control, or data linkage and is not a valid verification. Mot. at 4.

Parents attach a copy of the FAP with a signature executed via DocuSign and a declaration that counsel possesses the original verification signature. Opp. at 2. In reply, LACDPH asks the court to strike the existing FAP and order that the FAP with a verification signature be filed in its place. Reply at 2. The unverified FAP is stricken and the verified FAP is ordered substituted in its place.

3. The Demurrer

The Department demurs to the first, second, and fourth causes of action. As the Department argues, the FAP challenges a Department policy (the Mandate) requiring persons exposed to COVID and who are in the County to wear a mask while indoors for a period of ten days after the exposure. FAP, ¶10. This requirement is a *de facto* mask mandate for school children. FAP, ¶¶ 10-11. Parents allege that its members’ children have been harmed by previous mask mandates in which the Department required masking in schools and youth sports activities. FAP, ¶28. Dem. at 5.

a. First Cause of Action - H&S Code Sections 120175 and 101040

The FAP’s first cause of action alleges that LACDPH acted arbitrarily and capriciously in enacting the Mandate (1) without utilizing accurate hospitalization data to calculate community risk levels, (2) without accounting for false positives when counting cases, (3) without distinguishing between deaths caused by COVID versus deaths incidental to COVID, (4) without using any unbiased random controlled studies showing a statistically significant decrease in COVID transmission due to masking, (5) without acknowledging or weighing any harms to children caused by forced masking, and (6) while failing entirely to acknowledge or consider evidence of low hospitalization, mild severity, and low mortality associated with COVID. FAP, ¶¶ 117-18.

The first cause of action challenges the Mandate under Health & Safety Code sections 120175 and 101040. FAP, ¶¶ 10. The court reviews the Mandate as a quasi-legislative act related to public health and safety under the abuse of discretion standard. An agency decision is an abuse of discretion only if it is “arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair.” Kahn v. Los Angeles City Employees’ Retirement System, (2010) 187 Cal.App.4th 98, 106. In applying this deferential test, a court “must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.” Western States Petroleum Assn v. Superior Court, (1995) 9 Cal.4th 559, 577. Mandamus will not lie to compel the exercise of a public agency’s discretion in a particular manner. American Federation of State, County and Municipal Employees v. Metropolitan Water District of Southern California, (2005) 126 Cal.App.4th 247, 261. It is available to compel an agency to exercise discretion where it has not done so (Los Angeles County Employees Assn. v. County of Los Angeles, (1973) 33 Cal.App.3d 1, 8), and to correct an abuse of discretion actually exercised. Manjares v. Newton, (1966) 64 Cal.2d 365, 370-71. In making this determination, the court may not substitute its judgment for that of the agency, whose decision must be upheld if reasonable minds may disagree as to its wisdom. Id. at 371. A writ will lie where the agency’s discretion can be exercised only in one way. Hurtado v. Superior Court, (1974) 11 Cal.3d 574, 579; County of Los Angeles Dep’t of Public Health v. Superior Court, (“Outdoor Restaurant”) (2021) 61 Cal. App. 5th 478, 495.

As described by LADPH, Parents challenge the Mandate because (1) DPH used the wrong method for calculating COVID-related hospitalizations and deaths, (2) the studies considered by LADPH were biased, (3) LADPH failed to consider certain evidence before issuing the Mandate, and LACDPH’s data was overinclusive. Dem. at 7.

LADPH asserts that each of these reasons is insufficient because it concedes that LADPH looked at the relevant data and the fact that Parents disagree with LACDPH’s interpretation of the data cannot establish that the Mandate is “entirely lacking in evidentiary support.” Outdoor Restaurant, *supra*, 61 Cal.App.5th at 493.

LADPH is incorrect. On demurrer, the facts alleged in the Petition must be deemed to be true. Marshall v. Gibson, Dunn & Crutcher, (1995) 37 Cal.App.4th 1397, 1403. If LADPH merely looked at the data and made a reasoned judgment based on it, Parents cannot second guess that judgment. This is particularly true “in an area fraught with medical and scientific uncertainties.” Outdoor Restaurant, *supra*, 61 Cal.App.5th at 495. But Parents can contend that LADPH used the wrong methodology. To a lesser extent, they can contend that a principal study relied upon is biased. The court agrees with LADPH, however, that a mere failure to consider certain evidence will not justify an attack on the Mandate because the court cannot reweigh the evidence. See Outdoor Restaurant, *supra*, 61 Cal.App.5th at 490.

Parents also are correct that, while the standard of review for LADPH’s orders is extreme deference for matters such as the Mandate (Outdoor Restaurant, *supra*, 61 Cal.App.5th at 489), this deference is not wholly unfettered. There is a temporal component to LADPH’s authority to issue orders and orders which may be upheld one year into the pandemic may not necessarily be upheld almost three years into it. Opp. at 5.

LADPH argues that Parents’ contention that the Department has not conducted any “harm/benefit analysis” to determine whether the harms associated with forcibly masking children outweigh any purported benefit” does not render its orders arbitrary and capricious. Dem. at 8. Outdoor Restaurant states that a risk-benefit analysis, while valuable, is not required “when swift government action must be taken”. 61 Cal. App. 5th at 493. The court will assume for present purposes that holding still applies and that the Department need not conduct a risk-benefit analysis for its orders, even where it would be valuable to do so.

Finally, LADPH argues that the CDC recommends masking to prevent the spread of COVID in K-12 schools. RJN Ex. A. Dem. at 8. The CDC’s recommendation was judicially noticed for the fact of its existence, not to show that it is true and correct. LADPH cannot bootstrap from the recommendation of another agency as its reason to impose the Mandate. Some agency must consider the appropriate studies before the required masking can have a rational basis. As Parents argue, “an arbitrary and irrational act by one agency (CDC) does not justify an irrational and arbitrary act by another government agency.” Opp. at 7.

b. Second Cause of Action - Equal Protection Clause

The second cause of action alleges that the Mandate violates the Equal Protection Clause of the California Constitution because the Mandate disproportionately impacts children. FAP, ¶¶ 124-36.

In analyzing the constitutionality of laws challenged under the equal protection clauses of the United States and California Constitutions, courts employ a two-tier approach depending upon the interest affected or the classification involved. Dunn v. Blumstein, (1972) 405 U.S. 330, 335; Sail'er Inn, Inc. v. Kirby, (“Sail'er Inn”) (1971) 5 Cal.3d 1, 15-16. If a legislative measure adversely impinges upon a “fundamental right” or involves a “suspect classification,” it will be subjected to a “strict scrutiny” test under which “the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.” Sail'er Inn, supra, 5 Cal.3d at 16-17. In all other cases, the less stringent “rational basis” test applies. D'Amico v. Board of Medical Examiners, (1974) 11 Cal.3d 1, 16-17. Under the latter standard, legislation is invested with a presumption of constitutionality and distinctions drawn must merely “bear some rational relationship to a conceivable legitimate state purpose.” Id. The burden of demonstrating the invalidity of a classification under the rational relationship standard is on the party challenging the classification. Id. at 17.

Age is not a suspect classification (Hicks v. Superior Court, (1995) 36 Cal.App.4th 1649, 1657) and the FAP does not allege that the Mandate infringes upon a fundamental right to attend school. FAP, ¶124-27. Accordingly, a rational basis review applies to the second cause of action. To establish an equal protection violation based on the discriminatory application of a facially nondiscriminatory law in a case that does not involve a suspect class or fundamental right, a plaintiff must prove that (1) the plaintiff was treated differently from persons similarly situated; (2) the unequal treatment was intentional; and (3) the unequal treatment was not rationally related to a legitimate governmental purpose. FAP, ¶126.

The FAP alleges that the Mandate affects children greater than adults because they go to school and must spend six to eight hours per day in masks. FAP, ¶127. Yet, adults are more vulnerable to COVID than children and the Mandate consequently lacks a rational basis. FAP, ¶131.

LACDPH asserts that the Mandate fails for the same reason as the first cause of action: the Mandate is rationally related to a legitimate government interest. Dem. at 9.

Parents responds that no citizen could ever challenge government action as arbitrary, capricious, or harmful if the Department were correct. Opp. at 8.

The demurrer must be overruled for the same reasons as the first cause of action. In reply, LACDPH relies on Chan v. Judicial Council of California (2011), 199 Cal. App. 4th 194, 204 as holding that, under a rational basis equal protection analysis, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. Reply at 7. This citation may affect the analysis of the equal protection claim, but the court declines to deviate from its ruling for the first cause of action based on a case cited for the first time in reply without significant discussion of its import. See Badie v. Bank of America (1998) 67 Cal.App.4th 779, 784, 85; Solomont v. Polk Development Co., (1966) 245 Cal.App.2d 488 (point made which lacks supporting authority or argument may be deemed to be without foundation and rejected). Regency Outdoor Advertising v. Carolina Lances, Inc., (1995) 31 Cal.App.4th 1323, 1333 (New issues raised for the first time in a reply brief are not properly presented to a trial court and may be disregarded).

c. Fourth Cause of Action – Substantive Due Process

The fourth cause of action alleges that the Mandate deprives children of substantive due process rights under the Constitution because it is arbitrary and unreasonable and has no substantial relation to the public health, safety, morals or general welfare. FAP, ¶¶151-53.

Substantive due process guards against arbitrary government conduct. Las Lomas Land Co. LLC v. City of Los Angeles, (2009) 177 Cal.App.4th 837, 855. Where a substantive due process claim does not allege infringement of a fundamental right, the rational basis standard applies. Perkey v. Department of Motor Vehicles (1986) 42 Cal.3d 185, 189. The Restaurant Case held that a statutory excess of power assertion and

constitutional substantive due process claims call for the same analysis. The core issue is whether the action is rationally related to a legitimate state interest, limiting the spread of COVID. 61 Cal. App. 5th at 491. The parties agree that the rational basis test applies to the substantive due process claim. FAP, ¶¶ 151-52; Dem. at 6-8; Opp. at 6-7.

The demurrer is overruled for the same reasons as the first and fourth causes of action.

E. Conclusion

The motion to strike is granted and Parents is ordered to file FAP attached as an exhibit to its opposition. The demurrer is overruled because the court must accept the FAP's facts as true and there is a sufficient basis in those allegations to conclude that LADPH has abused its discretion. As the case law makes clear, however, the court must give serious deference to the Department's decision and Parents faces a difficult battle to overturn the Mandate.

[1] Parents fails to lodge a courtesy copy of either opposition, and the Department failed to lodge a courtesy copy of either reply, in violation of the Presiding Judge's First Amended General Order Re: Mandatory Electronic Filing. Both counsel are admonished to provide courtesy copies for all future filings.

[2] In support of its demurrer, LACDPH requests judicial notice of the CDC's webpage entitled Operational Guidance for K-12 Schools and Early Care and Education Programs to Support Safe In-Person Learning, updated October 5, 2022 (RJN Ex. A). Parents object that the facts therein are reasonably subject to dispute under Evid. Code section 452(h). Obj. at 2. Judicial notice of the document is proper to demonstrate that the CDC has made the recommendations therein and not for the truth of the grounds on which the recommendation is made. The request is granted. Evid. Code §452(c).
