IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MICHELLE LUJAN GRISHAM,
Governor of New Mexico; and
KATHYLEEN KUNKEL, Secretary of the
New Mexico Department of Health,

Petitioners,

v. **S. Ct. No. S-1-SC-38396**

THE HONORABLE RAYMOND L. ROMERO,

Respondent,

and

OUTLAW MEATS, LLC,
a New Mexico Limited Liability Company,
F-2 ENTERPRISES, INC. d/b/a TEXAS CLUB
GRILL & BAR, a New Mexico Corporation,
K-BOBS OF RATON, INC., a New Mexico Corporation,
K-BOBS OF LAS VEGAS, INC., a New Mexico Corporation,
B.M.B. FINANCIAL, LLC, d/b/a TRINITY HOTEL,
a New Mexico Limited Liability Company,
RED RIVER BREWING COMPANY, LLC,
a New Mexico Limited Liability Company,
NEW MEXICO RESTAURANT ASSOCIATION,

Real Parties in Interest.

PETITIONERS' RESPONSE IN OPPOSITION TO MOTION TO SUPPLEMENT THE RECORD

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Pursuant to Rule 12-309(E) NMRA, the Governor of New Mexico, Michelle Lujan Grisham, and the New Mexico Secretary of Health, Kathyleen Kunkel, (collectively, "Petitioners") respectfully submit this response in opposition to the Motion to Supplement the Record filed by Real Parties in Interest (the "RPI") on August 20, 2020 (the "Motion to Supplement"). As grounds for their response in opposition, Petitioners state as follows.

INTRODUCTION

These proceedings present two legal questions for the Court's consideration: (1) whether the Secretary of Health possesses authority to restrict or close businesses when necessary to protect public health; and (2) whether the restrictions on business operations set out in the operative Public Health Order ("PHO") are arbitrary and capricious. Given this Court's recent ruling upholding the State's authority to enforce existing closures and restrictions, the sole issue remaining for this Court to decide is whether the temporary closure of indoor dining at restaurants and breweries imposed by the PHOs was arbitrary and capricious. This Court can (and should) resolve this question in the negative. The undisputed facts, along with the affidavits proffered in support of Petitioners' filings, demonstrate a reasonable relationship between the State's efforts to mitigate COVID-19 transmission and the challenged restrictions on restaurant operations. Nevertheless, the RPI seek to have this Court second-guess Petitioners' decision by injecting into the record unsupported

statistical calculations.[1] This eleventh-hour attempt to muddy the questions before this Court is misguided. The evidence has no bearing on the ultimate question of whether Petitioners' decision was arbitrary and capricious. Therefore, the Court should deny the RPI's Motion to Supplement.

DISCUSSION

This Court should deny the Motion to Supplement for the simple reason that it seeks to muddle the issue before this Court with irrelevant, misleading information. Petitioners filed the emergency petition for writ of superintending control in this case for the specific purpose of having this Court resolve the controlling legal issues of "(1) whether the Secretary of Health has statutory authority to restrict or close businesses when necessary for the protection of public health; and (2) whether the temporary closure of indoor dining at restaurants and breweries was arbitrary and capricious." Petition at 1. This Court has already answered the first question in the affirmative. See Writ of Superintending Control at 1-2, Lujan Grisham v. Reeb, No. S-1-SC-38336 (N.M. Sup. Ct. Aug. 4, 2020) (directing the district court in that case to resolve counts 1 and 2 of the complaint "in accordance with this Court's ruling that the New Mexico Legislature has clearly

[1] The scant analysis is provided without any of the underlying data or other supporting materials that would typically accompany such a filing. See e.g., Rule 1-026(B)(6) NMRA (addressing the scope of discovery for purposes of expert testimony).

given the Governor of New Mexico authority to issue civil administrative penalties under the Public Health Emergency Response Act [(the "PHERA")] for violations of restrictions on mass gatherings and business operations contained in emergency public health orders.").

Thus, the only question remaining is whether Petitioners' exercise of their authority under the PHERA to temporarily ban indoor dining at restaurants and breweries constitutes an arbitrary and capricious exercise of State police powers. Yet the RPI's Motion to Supplement—composed of a declaration questioning the merits of Petitioners' decision and filings in the RPI's prematurely-filed IPRA suit—does nothing to assist this Court in answering that question. As this Court has explained, "[A]gencies and individuals with important responsibilities must have considerable discretion in order to fulfill their responsibilities effectively." Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n, 2003-NMSC-005, ¶ 25, 133 N.M. 97, 61 P.3d 806 (citations omitted). Accordingly, courts will only consider an agency's actions arbitrary and capricious when they are "wilful and unreasonable, without consideration, and in disregard of the facts and circumstances." PNM Elec. Servs. v. N.M. PUC, 1998-NMSC-017, ¶ 24, 125 N.M. 302, 961 P.2d 147.

Further, courts must exercise even greater caution when tasked with invalidating regulations implemented in response to a public health crisis. See State ex rel. Hughes v. Cleveland, 1943-NMSC-029, ¶ 18, 47 N.M. 230, 141 P.2d 192 ("It

is the policy of the courts to uphold regulations intended to protect the public health, unless it is plain that they have no real relation to the object for which ostensibly they were enacted, and prima facie they are reasonable." (quoting Mitchell v. City of Roswell, 1941-NMSC-007, ¶ 13, 45 N.M. 92, 111 P.2d 41)). As the U.S. Supreme Court recognized more than a century ago in upholding a state's authority to require smallpox vaccinations:

> If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, *it can only be when that which the legislature has done comes within the rule that if 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 . . . .*

Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905) (emphasis added). Hewing to this legal maxim, the Supreme Court recently struck down a challenge to the California Governor's COVID-19-related executive orders. See S. Bay United Pentecostal Church v. Newsom (South Bay), 140 S. Ct. 1613, 1613-14 (2020). In joining the majority, Chief Justice Roberts aptly observed that the official actions taken "in areas fraught with medical and scientific uncertainties" must be given "especially broad" latitude and "should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people." Id. at 1614 (Roberts, C.J., concurring) (alterations, internal quotation marks and citation omitted).

The logic set out by the United States Supreme Court is instructive in this case and comports with this Court's prior decisional authority. The sole purpose of the temporary indoor dining ban was (and remains) to prevent the spread of contagious, airborne pathogen killing hundreds of thousands of people across the world. The decision to temporarily prohibit indoor dining at restaurants—places where people congregate for significant periods of time in close proximity without masks—is plainly related to this objective. See Legacy Church v. Kunkel, 2020 U.S. Dist. LEXIS 122542, at *225-26 (D.N.M. July 13, 2020) (unpublished) (stating that the court was unable to conclude that the PHEO's "differential treatment of restaurants, gyms, and religious gathering ha[d] no real or substantial relation to protecting public health" nor could the court conclude that the Secretary "acted in an 'arbitrary, unreasonable manner.'" (quoting Jacobson, 197 U.S. at 28)).

This Court's prior opinions echo the reasoning of Jacobson and its progeny. "It is the policy of the courts to uphold regulations intended to protect the public health, unless it is plain that they have no real relation to the object for which ostensibly they were enacted, and prima facie they are reasonable." Cleveland, 1943-NMSC-029, ¶ 18 (quoting Mitchell, 1941-NMSC-007, ¶ 13); see also, Santa Fe Cmty. Sch. v. N.M. State Bd. of Educ., 1974-NMSC-005, ¶ 7, 85 N.M. 783, 518 P.2d 272 ("Laws providing for preservation of the public peace, health and safety are essentially police measures and represent an exercise of this inherent power. It

is the broadest power possessed by governments"). Thus, the only evidence this Court need consider to arrive at this conclusion is the two affidavits attached to the petition demonstrating the State's reasoning.[2] From those affidavits, the Court can plainly see that the temporary closures of indoor dining had a "real relation" to the object of the indoor dining ban (i.e., to reduce the spread of a highly contagious, deadly virus). That the RPI have found someone willing to sign a declaration stating that Petitioners' reasoning behind their decision is flawed because the State allegedly failed to consider the differences between types of restaurants or based its decision on faulty data does not negate this fact. Cf. League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, No. 20-1581, 2020 U.S. App. LEXIS 19691, at *8 (6th Cir. June 24, 2020) ("Whether the Governor's Order is 'unsupported by evidence or empirical data' in the record does not undermine her decision, at least as a legal

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[2] Alternatively, Petitioners believe the Court may uphold the temporary closure of indoor dining at restaurants and breweries solely by taking judicial notice of the current understanding in the scientific community that SARS-CoV-2 is primarily spread through respiratory droplets—droplets which spread further when an individual is not wearing a facemask. See Rule 11-201(B)(2) NMRA (stating that a court may take judicial notice of "a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); see, e.g., Frequently Asked Questions, CDC, https://www.cdc.gov/coronavirus/2019-ncov/faq.html (last updated on Aug. 4, 2020) (stating that "[t]he virus that causes COVID-19 is thought to spread mainly from person to person, mainly through respiratory droplets produced when an infected person coughs, sneezes, or talks" and that "[m]asks provide an extra layer to help prevent the respiratory droplets from traveling in the air and onto other people").

matter. After all, we must 'accept [the Governor's] generalizations even when there is an imperfect fit between means and ends.'" (quoting FCC v. Beach Commc'ns, 508 U.S. 307, 315 (1993), and Heller v. Doe, 509 U.S. 312, 321 (1993)).

The Declaration also challenges Petitioners' decision based on what the RPI perceive as its ineffectiveness in reducing COVID-19 transmissions. See Declaration at 2 ¶ 6 (stating that "the closure of indoor dining has clearly not reduced COVID-19 cases among restaurant workers"). Yet even if this conclusion were true, which Petitioners dispute, emergency decisions should not be judged after-the-fact based on their effectiveness (or lack thereof), as such decisions are necessarily made in dynamic situations fraught with uncertainties. See South Bay, 140 S. Ct. at 1613-14. Public officials cannot be expected to be soothsayers, and hindsight will always be 20/20. Yet they must act in the face of a crisis nonetheless. Facing sudden, exponential growth in new COVID-19 cases in June and July, Petitioners made the reasonable (and difficult) decision to limit high-risk activities such as indoor dining—a choice which the judiciary should hesitate before second-guessing.[3] Cf. In re Abbott, 954 F.3d 772, 792 (5th Cir. 2020) ("[I]f the choice is between two reasonable responses to a public crisis, the judgment must be left to the governing state authorities. It is no part of the function of a court . . . to determine which one

[3] Unlike restaurants, many businesses, such as bars, amusement parks, and movie theaters, have been closed for the duration of the existing public health emergency.

of the two modes is likely to be the most effective for the protection of the public against disease." (alterations, internal quotation marks, and citation omitted)); Whitmer, 2020 U.S. App. LEXIS 19691, at *9 ("[T]he Governor's order need not be the most effective or least restrictive measure possible to attempt to stem the spread of COVID-19. Shaping the precise contours of public health measures entails difficult line-drawing. Our Constitution wisely leaves that task to officials directly accountable to the people." (citations omitted)). Accordingly, the declaration offered by the RPI is irrelevant and should be excluded.

In addition to the declaration, the RPI seek to admit into evidence filings in a separate case purporting to demonstrate that the New Mexico Department of Health (the "DOH") failed to immediately provide all responsive documents in response to an Inspection of Public Records Act (IPRA) request. See Motion to Supplement Exhibit 2; Motion to Supplement Exhibit 3. However, RPI's misleading characterization of the facts has no bearing on the issue before this Court (i.e., whether the temporary closure of indoor dining at restaurants and breweries was arbitrary and capricious). The only evidence this Court needs to consider is the affidavits attached to the Petition or judicially noticeable facts.

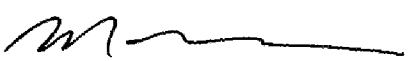
Moreover, the RPI's Motion to Supplement paints a misleading picture by intimating DOH is hiding something. See Motion to Supplement Exhibit at 2 ¶ 7 (citing the IPRA suit filings and stating that "an attempt to gain access to the state's

dataset . . . were [sic] rebuffed"). This is not true. First, as the filings demonstrate, the DOH provided numerous responsive documents to the RPI. Second, **the district court in that case dismissed the RPI's suit** because the DOH did not deny their IPRA request, nor could their request be deemed denied in light of the fact that they filed the suit less than fifteen days following the request. See Order Granting Motion to Dismiss and Also Granting Plaintiff Leave to File an Amended Complaint, New Mexico Restaurant Assoc. v. N.M. Dept. of Health, No. D-202-CV-2020-04272 (N.M. Second Jud. Dist. Ct. Aug. 14, 2020) (unpublished); see also NMSA 1978, § 14-2-11(A) (1993) (providing that a records request may be deemed denied if the inspection is not permitted within fifteen days of receipt of the request). There is no merit to RPI's suggestion that the State is somehow attempting to cloud the grounds for its decisions. Their suggestion to the contrary should be summarily rejected.

CONCLUSION

In sum, Petitioners oppose the RPI's Motion to Supplement because it seeks to inject irrelevant and misleading evidence that is not material to the salient question presented: whether Petitioners acted arbitrarily or capriciously in imposing the temporary indoor dining ban. For this reason, Petitioners respectfully request this Court deny the RPI's motion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2020, I filed the foregoing through the New Mexico Electronic Filing system, which caused all counsel of record to be served by electronic means.

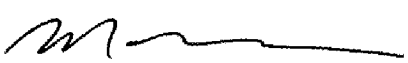
Respectfully submitted,

Matthew L. Garcia

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with type-volume, font size, and word limitations of the New Mexico Rules of Appellate Procedure, specifically Rule 12-318(F)(2)-(3) NMRA. The body of this brief employs 14-point Times New Roman font and contains 2,256 words, counted using Microsoft Office Word.

Respectfully submitted,



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