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6 CITY OF LAGUNA BEACH

7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

10
11 CITY OF COSTA MESA, and
KATRINA FOLEY,

12 Plaintiffs,

13
14 vs.

15 UNITED STATES OF AMERICA, THE
16 DEPARTMENT OF HEALTH AND
17 HUMAN SERVICES, THE UNITED
STATES DEPARTMENT OF
18 DEFENSE, THE UNITED STATES
19 AIR FORCE, THE CENTERS FOR
DISEASE CONTROL AND
20 PREVENTION, THE STATE OF
21 CALIFORNIA, FAIRVIEW
DEVELOPMENTAL CENTER
22 (FAIRVIEW), THE CALIFORNIA
23 GOVERNOR’S OFFICE OF
EMERGENCY SERVICES, and THE
24 CALIFORNIA DEPARTMENT OF
25 GENERAL SERVICES,

26 Defendants.
27
28

Case No. 8:20-cv-00368-JLS-JDE

*Assigned to Hon. Josephine L. Staton
United States District Judge*

**EX PARTE APPLICATION OF CITY
OF LAGUNA BEACH FOR LEAVE
TO FILE AMICUS BRIEF IN
SUPPORT OF PLAINTIFFS’
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION;
DECLARATION OF PHILIP D.
KOHN; [PROPOSED] AMICUS
CURIAE BRIEF**

Hearing on TRO/Preliminary Injunction:

Date: March 2, 2020

Time: 2:00 p.m.

Courtroom: 10A

1 **TO THE HONORABLE COURT AND TO PLAINTIFFS AND**
2 **DEFENDANTS AND THEIR RESPECTIVE COUNSEL OF RECORD:**

3 **PLEASE TAKE NOTICE THAT** the City of Laguna Beach (“City”)
4 respectfully requests that the Court grant the City ex parte leave to file the attached
5 Amicus Curiae Brief in support of Plaintiffs’ application in this action for a
6 temporary restraining order and preliminary injunction, which is currently scheduled
7 to be heard on March 2, 2020.

8 This request is made on the ground that the Court has the inherent authority
9 and discretion to allow a non-party to participate as an amicus curiae. See *Hoptowit*
10 *v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin*
11 *v. Conner*, 515 U.S. 472 (1995); *Nat. Res. Def. Council v. Evans*, 243 F.Supp.2d
12 1046, 1047 (N.D. Cal. 2003). This authority and discretion is commonly exercised
13 to grant such participation in matters of general public interest having ramifications
14 beyond the named parties and in which amicus can be helpful to the Court. *Miller-*
15 *Wohl Co., Inc. v. Comm’r. of Labor and Industry*, 694 F.2d 203, 204 (9th Cir.
16 1982); *Sonoma Falls Dev. LLC v. Nevada Gold & Casinos, Inc.*, 272 F.Supp.2d 919,
17 925 (N.D. Cal. 2003).

18 It cannot be disputed that the matters at issue in this action transcend the
19 interests and concerns of the named parties as those matters implicate serious public
20 health, safety, and general welfare considerations on a local, regional, statewide,
21 national, and potentially international level. The City of Laguna Beach is a coastal
22 city in Orange County situated approximately 10 miles from the political boundary
23 of Costa Mesa, where the Fairview Development Center – to which persons
24 diagnosed with or exposed to the Coronavirus are proposed to be transferred and
25 housed – is located. Laguna Beach is a prominent tourist destination due to its
26 beaches, natural resources, and recreation amenities, resorts and hotels, cultural
27 facilities and activities, restaurants, and shopping opportunities, and the City attracts
28 over 6 million visitors on an annual basis.

1 The City of Laguna Beach has a vital interest in safeguarding the health,
2 safety, and welfare of its residents and visitors and the avoidance of exposure to the
3 substantial risks posed by the further transmission of the Coronavirus beyond its
4 current confines. As such, and to ensure the federal and state governments’ faithful
5 adherence to mandates, policies, standards, and protocols applicable to the proposed
6 transfer and housing of persons infected or potentially infected with the
7 Coronavirus, the City wishes to urge the Court to insist on complete and accurate
8 information in answering the questions that must be addressed and critically
9 analyzed concerning the suitability of the Fairview Development Center – which is
10 not an established medical care and treatment facility – for the proposed purpose
11 and the specific protections and precautions that will be instituted and implemented.
12 Furthermore, it is incumbent that the Court be satisfied that the federal and state
13 governments have discharged their responsibilities to provide adequate notice to all
14 of the interested and affected local jurisdictions – including the City of Laguna
15 Beach – and to consult, engage, and meaningfully discuss the proposed plan with
16 and consider input from those local jurisdictions and other stakeholders.

17 Prior to the filing of these papers, the City Attorney for the City of Laguna
18 Beach contacted and conferred via e-mail with the lead counsel for the federal
19 government defendants, the state government defendants, and the plaintiffs
20 regarding the City’s intent to file this application; and each of whom has consented
21 to the City’s filing of an amicus curiae brief. (See attached Declaration of Philip D.
22 Kohn, ¶¶ 3, 4.) The City extends its appreciation to those counsel for their prompt
23 and professional courtesy in providing their consents to the City’s request.

24 Dated: February 27, 2020

RUTAN & TUCKER, LLP
PHILIP D. KOHN

By: /s/ Philip D. Kohn

Philip D. Kohn
Attorneys for Proposed Amicus Curiae
CITY OF LAGUNA BEACH

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DECLARATION OF PHILIP D. KOHN

I, PHILIP D. KOHN, declare as follows:

1. I am an attorney licensed to practice law in the State of California and am admitted to practice in the United States District Court for the Central District of California. I have personal knowledge of the matters set forth in this Declaration and, if called as a witness, I could and would testify competently as to those matters.

2. I am the City Attorney for the City of Laguna Beach. I have been authorized by the Laguna Beach City Council to seek leave to file an amicus curiae brief in the subject legal action in support of Plaintiffs’ pending application for a temporary restraining order and preliminary injunction.

3. On February 26, 2020, at approximately 11:03 a.m., I e-mail Daniel Beck, lead counsel for the United States government defendants, Darin Wessel, lead counsel for the California government defendants, and Jennifer Keller, lead counsel for Plaintiffs, to notify them of the City of Laguna Beach’s intent to file an ex parte application seeking leave of the Court to file an amicus curiae brief in support of Plaintiffs’ request for a temporary restraining order and preliminary injunction, and to request that they consent to, or agree not to oppose, the City of Laguna Beach’s application to file an amicus curiae brief.

4. By reply e-mail messages on February 26, 2020, Mr. Beck (at approximately 11:12 a.m.), Mr. Wessel (at approximately 12:09 p.m.), and Ms. Keller (at approximately 11:14 a.m.) each responded and informed me that they consented to the City of Laguna Beach’s application to file an amicus curiae brief.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 27, 2020 at Costa Mesa, California.

/s/ Philip D. Kohn

Philip D. Kohn

[PROPOSED] AMICUS CURIAE BRIEF

1
2 The Court and the parties are familiar with the facts that led the City of Costa
3 Mesa and its Mayor to commence this action, and the City of Laguna Beach does
4 not have anything to add to the background of the matter. The City of Laguna
5 Beach is nevertheless an interested and affected entity, as discussed below, and
6 supports Plaintiffs’ request for a temporary restraining order and preliminary
7 injunction. Such relief to preserve the status quo is warranted under the
8 extraordinary circumstances presented in this case and the attendant undeniable
9 threats to the public health, safety, and general welfare of not only residents of and
10 visitors to densely populated Orange County, but residents of all of California, the
11 nation, and even beyond.

12 At issue is a highly communicable and deadly world-wide medical
13 phenomenon – not yet but soon likely to be designated as a pandemic – that is not
14 confined to and does not respect any political, geographic or physical boundaries.
15 The City of Laguna Beach does not intend to come across or be perceived as overly
16 melodramatic. On the other hand, and without dispute, we are confronting a near-
17 unparalleled challenge that at this moment remains largely unknown in its nature, its
18 dimensions and scope, its potential for spreading, and the current lack of a vaccine
19 or cure.

20 The City of Laguna Beach is a coastal city in Orange County with a
21 population of approximately 24,000 residents. It is situated approximately 10 miles
22 from the Costa Mesa border. Laguna Beach is a prominent tourist destination due to
23 its beaches, natural resources, and recreation amenities, resorts and hotels, cultural
24 facilities and activities, restaurants, and shopping opportunities. The City attracts
25 over 6 million visitors on an annual basis.

26 To the extent the Court may need to reach the question, the City of Laguna
27 Beach does not express a view at this time on the legal issue of whether the United
28 States and California governments have the ability to ultimately effectuate the

1 unilateral transfer of individuals diagnosed with or exposed to the Coronavirus to
2 the Fairview Development Center in Costa Mesa over the objections and concerns
3 of local jurisdictions.

4 Instead, what the City of Laguna Beach respectfully requests the Court
5 consider in its review and disposition of Plaintiffs' application is, in furtherance of
6 the checks and balances built into our system of governance, the reasonably faithful
7 and transparent adherence of Defendants to applicable mandates, policies, standards,
8 and protocols, including that there be an articulated reasonable basis rooted in fact
9 and devoid of arbitrariness or capriciousness that justifies and supports the actions
10 proposed to be taken. Especially owing to the importance and ramifications of
11 decisions dealing with the underlying emergency situation, there is a heightened
12 need not to sacrifice the requisite processes and procedures at the altar of
13 expediency.

14 The City of Laguna Beach urges the Court to insist on complete and accurate
15 information in answering the questions that must be addressed and critically
16 analyzed concerning the suitability of the Fairview Development Center – which is
17 not an established medical facility – for the proposed purpose and the specific
18 protections and precautions that will be instituted and implemented. Furthermore, it
19 is incumbent that the Court be satisfied that the federal and state governments have
20 discharged their responsibilities to provide adequate notice to all of the interested
21 and affected local jurisdictions – including the City of Laguna Beach – and to
22 consult, engage, and meaningfully discuss the proposed plan with and consider input
23 from those local jurisdictions and other stakeholders.

24 While a balancing of competing interests may need to be accommodated at
25 the end of the day, it must be acknowledged as a threshold matter that any missteps
26 or mistakes committed now, even if done in good faith, cannot later be corrected,
27 and the consequences can be catastrophic. In circumstances such as this, there
28 simply are no opportunities for a do-over if and when unintended but nonetheless

1 foreseeable adverse results occur.

2 For the above reasons, and those expressed by Plaintiffs and other amicus
3 curiae, the City of Laguna Beach requests that the temporary restraining order
4 remain in effect and/or the Court issue a preliminary injunction to preclude
5 Defendants, or any of them, from transporting and housing persons diagnosed with
6 or exposed to the Coronavirus to the Fairview Development Center until such time
7 as Defendants have demonstrated the suitability and adequacy of the site and
8 facilities for its proposed use, and they have met and consulted in good faith with all
9 local jurisdictions in Orange County to fully inform them and obtain input from
10 them regarding the scope and parameters of the proposed plan and the measures to
11 be established, followed, and monitored to provide necessary safeguards and
12 precautions for the management and containment of the risks associated with the
13 proposed plan.

14
15 Dated: February 27, 2020

Respectfully submitted,

RUTAN & TUCKER, LLP
PHILIP D. KOHN

16
17 By: /s/ Philip D. Kohn

Philip D. Kohn
Attorneys for Proposed Amicus Curiae
CITY OF LAGUNA BEACH

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CERTIFICATE OF SERVICE

City of Costa Mesa, et al. v. United States of America, et al.

Case No.: 8:20-CV-368-JLS-JDE

All Case Participants are registered for the USDC CM/ECF system.

**EX PARTE APPLICATION OF CITY OF LAGUNA BEACH
FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF
PLAINTIFFS' APPLICATION FOR TEMPORARY
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DECLARATION OF PHILIP D. KOHN;
[PROPOSED] AMICUS CURIAE BRIEF**

I hereby certify that on February 27, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Central District by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the USDC CM/ECF system.

Dated: February 27, 2020

RUTAN & TUCKER LLP

By: /s/ Mia R. Slobodien