LUKE WAKE, No. 264647
E-Mail: lwake@pacificlegal.org
DANIEL M. ORTNER, No. 329866
E-Mail: dortner@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorneys for Plaintiffs
Ghost Golf, Inc., et al.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO

GHOST GOLF, INC., DARYN COLEMAN, SOL Y LUNA MEXICAN CUISINE, and NIEVES RUBIO,

Plaintiffs,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, XAVIER BECERRA, in his official capacity as Attorney General of California, SANDRA SHEWRY, in her official capacity as Acting Director of the California Department of Public Health, ERICA S. PAN, in her official capacity as Acting State Public Health Officer,

Defendants.

Case No. 20CECG03170

MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTIVE RELIEF

Date: December 15, 2020
Time: 3:30 p.m.
Location: Department 501
Judge: The. Hon. D. Tyler Tharpe

Date Action filed: Oct. 26, 2020
Trial Date:

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INTRODUCTION

We are in the midst of a global pandemic, which presents difficult public policy challenges for the State of California and unprecedented trials for many businesses and families struggling from the economic fall-out. But while the Legislature has enacted numerous bills since COVID-19 began, the Legislature has yet to weigh and consider competing public health and economic concerns on the weighty question of whether and when businesses should be required to close, or otherwise restricted in their activities. Instead, the Executive Branch has taken it upon itself to resolve these fundamental policy issues.

Since March 19, 2020 Governor Newsom has invoked the Emergency Services Act (ESA) in unprecedented ways and claimed the unilateral authority to issue orders prohibiting or restricting private conduct in whatever manner he deems necessary to address the pandemic. After more than seven months, Governor Newsom continues to make fundamental policy decisions for the state without any procedural, substantive or temporal limitations on his use of emergency powers. But one-man rule is antithetical the separation of powers enshrined in the California Constitution, especially where—as here—the Governor claims an unfettered power to continue to make rules regulating every aspect of civil society by "emergency order" on an indefinite and on-going basis.

On August 28, 2020, Governor Newsom announced that he would not be lifting emergency restrictions on business anytime in the foreseeable future. Instead, he doubled-down on restrictions that he has had in place since July 1, 2020, and added additional complexities to his hand-crafted and ever-evolving regulatory regime. His new "Blueprint for a Safer Economy" assigns different colors to California counties and corresponding restrictions for all sectors of the California economy, based on data collected from the California Department of Public Health. This color-coded regime is precisely the sort of highly detailed regulatory scheme we might expect from the California Legislature because our constitutional system vests the Legislature with

the responsibility of weighing competing public health, social, and economic considerations in deciding public policy. The Governor, by contrast, violates the California Constitution when making law—*i.e.*, deciding fundamental policy for the State.

The Legislature might still choose to enact a statute imposing industry closure rules and various other restrictions on business operations. But at bare minimum, the Legislature would be required to set guidelines that would control when and how the Executive Branch could shut down businesses. Such legislation would have to include safeguards to ensure that Executive Branch officials remain accountable to the Legislature and to the public. Moreover, the Legislature would have to proceed in an open and deliberative legislative process, which would give constituents opportunity to raise concerns about what such a regime would mean for their businesses, for their employees, and for their livelihoods.

Daryn Coleman, owner of Ghost Golf, Inc., in Fresno, never had the opportunity to voice his concerns. His business has been shut down under the Governor's continuing orders for all but four days since March 19, 2020. As a result, Ghost Golf faces the prospect of permanent closure and bankruptcy if it is not permitted to reopen soon. Likewise, Sol y Luna in Bakersfield, faces serious financial hardship and the prospect of closure and bankruptcy if the Governor's restrictions on indoor operations continue much longer. But its owner, Nieves Rubio, has no recourse in raising concerns with her elected legislators because it is the Governor who has made the rules here. Accordingly, Ghost Golf and Sol y Luna, along with their owners, now seek immediate relief before this Court because they will suffer irreparable harm if the Governor is allowed to continue enforcing his Blueprint regime much longer.

Plaintiffs recognize the seriousness of COVID-19 and take the safety of their customers and staff seriously. If permitted to reopen, Ghost Golf would ensure social distancing and would maintain extensive protocols to safeguard its patrons. Likewise, Sol y Luna would continue to abide by CDC guidance and best industry practices to

ensure safety. Plaintiffs seek only an injunction to prevent the continued enforcement of unlawful restrictions that threaten to sink their businesses.

STATEMENT OF FACTS

Governor Newsom and CDPH's Continuing Restrictions on Business

In response to the novel coronavirus, Governor Newsom declared a state of emergency in California on March 4, 2020. Complaint Exhibit 1. He then issued a general stay-at-home order on March 19, 2020, which indefinitely prohibited "non-essential businesses" from operating. E.O. N-33-20; Complaint Exhibit 2. All non-essential businesses remained closed until May 4, 2020, when Governor Newsom issued E.O. N-60-20, which allowed the State to begin reopening non-essential businesses in phases. Complaint Exhibit 3. The May 4th Order also delegated authority to the California Public Health Officer "to take any action she deems necessary to protect public health in the face of the threat posed by COVID-19." *Id.*

On July 1, 2020, Governor Newsom back-tracked on reopening because of rising COVID-19 cases in parts of the State. He ordered many businesses, including dine-in restaurants and family entertainment centers, to cease indoor operations in counties that were on the "State's County Monitoring List," which then included Fresno and Kern Counties. Complaint Exhibit 4. On July 13, 2020, Governor Newsom required closure of indoor operations for dine-in restaurants and family entertainment centers statewide, and imposed restrictions on indoor operations for various other business in the counties that were on the State's County Monitoring List. E.O. N-60-20; Complaint Exhibit 5.

On August 28, 2020, Governor Newsom and the California Department of Public Health (CDPH) announced that they were replacing the County Monitoring List with the "Blueprint for a Safer Economy." The Blueprint assigns each county a color (purple, red, orange, or yellow) depending on its assessed risk level for COVID-19 transmission and imposes corresponding restrictions for different industry

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sectors.[1] Complaint Exhibit 6. The color-coding for each county is updated every other Tuesday, which means that affected businesses have no certainty as to what rules will govern for more than two weeks at a time.

Under the Blueprint regime indoor family entertainment centers must remain closed indefinitely so long as a county is classified as either "purple" or "red." They may operate at only 25% capacity in counties classified as "orange." But even under the most lenient color-coding ("yellow"), family entertainment centers are limited to operating at just 50% capacity—notwithstanding whatever health and safety measures the owner might have in place.

Likewise, the Blueprint regime prohibits indoor operations for restaurants in "purple counties" and imposes restrictions on indoor operations in the other tiers. For example, in "red counties" restaurants are limited to operating at 25% capacity and they may not, under any condition, seat more than 100 people. In "orange counties" restaurants are prohibited from operating at more than 50% capacity and they may not, under any condition, seat more than 200 people. And even in "yellow counties" restaurants remain restricted to 50% capacity.

Notably there is no "green" category under the Blueprint regime. That is by design. In the Governor's words: "We don't put a green because we don't believe that there is a green light . . . [to] go back to the way things were . . . ." Complaint Exhibit 9. Instead, the Governor made clear his intention of continuing to govern under this Blueprint regime indefinitely "until there is a vaccine . . . ." *Id.*

Ghost Golf Faces Permanent Closure Under the Blueprint Regime

Daryn Coleman owns and operates Ghost Golf, Inc., a unique indoor miniature golf venue themed like a haunted house. Coleman Declaration ¶ 6. Ghost Golf has been shut down entirely since March 19, 2020, except for four days at the end of June

[1] The assessments are based on the 7-day average of both positivity percentages and average rates per 100,000 people. Complaint Exhibit 6. Also, CDPH now considers transmission rates in disadvantaged communities as an equity factor that may make it more difficult for a county to move into a less restrictive color-coding category. *Id.*

when it was briefly allowed to reopen. ¶¶ 12-15. Ghost Golf spent more money in preparing to reopen than it made in profits during those four days. ¶ 16. Under the Blueprint regime, Ghost Golf is prohibited from opening its doors until CDPH moves Fresno County into the "orange" category or possibly even the "yellow" category.[2]

Because Ghost Golf has been closed for so long, it is now facing the very real possibility of a permanent closure and or bankruptcy and the loss of Coleman's life savings. ¶¶ 37-38. Without incoming revenue, Ghost Golf has struggled to pay its continuing overhead expenses and has been unable to pay even reduced rent, which means the debt on its commercial lease has ballooned. ¶¶ 26-28. With mounting debts and no hope on the horizon under the Blueprint regime, Ghost Golf faces a bleak future. It has already missed out on the Halloween holiday, its peak season for the year. Coleman Declaration ¶¶ 32-33. If not permitted to reopen and begin bringing in revenue during the upcoming holiday season—Thanksgiving and Christmas—the odds of permanent closure grow higher still. Coleman Declaration ¶ 33. If the Blueprint regime requires continued closure into the spring of 2021, it is difficult to see how Ghost Golf could ever hope to recover. Coleman Declaration ¶ 35.

Sol y Luna Faces Permanent Closure Under the Blueprint Regime

Nieves Rubio opened Sol y Luna, a Mexican Restaurant in Bakersfield, California, in 2015. Rubio Declaration ¶ 2-3. On March 19, 2020, Sol y Luna was shut down by the Governor's orders. ¶ 4. The restaurant was allowed to reopen June 1, 2020, and did so after making significant investments to keep its patrons safe. ¶¶ 8, 11-14. However, it was forced to close indoor dining again under the Governor's directive on July 1, 2020. ¶ 9. Sol y Luna was then restricted to operating on its patio, which has proven unprofitable. ¶¶ 9, 22.

Under the Blueprint regime, Sol y Luna was only recently allowed to begin operating at 25% capacity indoors because Kern County was reclassified from "purple"

[2] The Blueprint regime only allows indoor family entertainment centers to open in the "orange" category for "naturally distanced activities." It is unclear from existing CDPH guidance whether indoor golf counts as a "naturally distanced" activity.

to "red" in October; however, CDPH may (at any point) reclassify Kern County again—moving it back into the purple category. Rubio Declaration ¶ 20. As such, Sol y Luna may be restricted to patio seating during the winter months. But Sol y Luna cannot be profitable even operating indoors if limited to 25% capacity. ¶¶ 18-19.

Each month since March, Sol y Luna has spent more money on overhead and payroll than it has taken in. Rubio Declaration ¶ 25. Sol y Luna cannot continue much longer unless something changes. In November Sol y Luna anticipates that it will burn through the remainder of its forgivable Paycheck Protection Program loans. ¶ 23. At that point it will be forced to begin drawing from its Economic Injury Disaster Loan (EIDL), which must be paid back with interest. ¶ 24. Sol y Luna projects that it will run out of EIDL money in January if it remains subject to restrictions under the Blueprint regime. ¶ 25. At that point Sol y Luna faces the prospect of permanent closure unless it can find some way to be profitable with continuing restrictions, which is unlikely given the restaurant's experience over the past seven months. Rubio Declaration ¶ 25.

LEGAL BACKGROUND

Separation of Powers Under the California Constitution

The California Constitution imposes a strict separation of powers in Article III, Section 3, which provides that: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." The Constitution vests all legislative powers in the California Legislature. Cal. Const. art. IV. The Governor is vested with only "executive power." Cal. Const. art. V. Therefore, the Governor has no inherent rulemaking authority, even during an emergency. *Prof'l Engineers in California Gov't v. Schwarzenegger*, 50 Cal. 4th 989, 1015 (2010) (holding that the Governor lacked inherent power to respond to a fiscal emergency); *Brown v. Chiang*, 198 Cal. App. 4th 1203, 1214 (2011) (collecting cases standing for this proposition).

The Governor's Emergency Powers

Under the California Emergency Services Act, a Governor may declare a State of Emergency upon declaring that conditions exist presenting "extreme peril to the safety of persons and property within the state . . . ." Cal. Gov't Code § 8558. A Governor's State of Emergency Declaration may continue so long as conditions threatening public health or private property exist. The Act imposes no time limit on the duration of an Emergency Declaration. Cal. Gov't Code § 8626. Upon issuing an Emergency Declaration, the Governor may exercise the following powers:

- **Direct State Personnel and Resources.** The Governor may make use of all state personnel, equipment, and facilities in responding to an emergency. Cal. Gov't Code § 8628. *See also* Cal. Gov't Code § 8628.5.
- **Suspend Law.** The Governor may suspend "regulatory statute[s]" and regulations where "strict compliance . . . would in any way prevent, hinder, or delay the mitigation of the effects of the emergency." Cal. Gov't Code § 8571. *See also* Cal. Gov't Code § 8627.5.
- **Complete Authority Over Agencies and Police Power.** The Governor has "complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California . . . ." Cal. Gov't Code § 8627.
- **Issue Pertinent Orders.** Consistent with the foregoing powers, the Governor may "promulgate, issue, and enforce such orders and regulations as he deems necessary." *Id*. *See also* Cal. Gov't Code § 8567. These orders have force of law, and a violation is a misdemeanor. Cal. Gov't Code § 8665.

The Department of Public Health's Powers

The Health and Safety Code confers authority for CDPH to take the following actions in response to the spread of disease in the State of California:

- **Quarantine, Isolate, Inspect, and Disinfect.** The Department may "quarantine, isolate, inspect, and disinfect persons . . . [and] places . . . [if] the

action is necessary to protect or preserve the public health." Cal. Health & Safety Code § 120145. *See also* Cal. Health & Safety Code § 120130(d). "[Q]uarantine" means "to keep persons, when suspected of having contracted or been exposed to an infectious disease, out of a community, or to confine them to a given place therein, and to prevent intercourse between them and the people generally of such community." *Ex parte Culver*, 187 Cal. 437, 442 (1921).

- **Related Quarantine and Isolation Authority.** The Department may adopt regulations concerning isolation or quarantine procedures. Cal. Health & Safety Code § 120130(c). And the Department may establish "places for quarantine or isolation." Cal. Health & Safety Code § 120135.
- **Destroy Infected Animals or Property.** The Department may destroy property if it cannot be disinfected. Cal. Health & Safety Code § 120150.
- **Other Necessary Actions.** The Department may "take measures as are necessary to ascertain the nature of the disease and prevent its spread" such as taking control of "the body of any living person, or the corpse of any deceased person." Cal. Health & Safety Code § 120140.

SUMMARY OF THE ARGUMENT

Plaintiffs are entitled to a preliminary injunction to prevent imminent and irreparable closure of their businesses. Plaintiffs are likely to prevail on the merits because even during an emergency, the Governor and CDPH must abide by the Constitution and cannot go beyond the powers given to them by the Legislature. Because the Constitution vests all of the State's legislative powers in the Legislature, the Governor and state agencies under his control are forbidden from making law. Defendants violated this fundamental precept in pronouncing and enforcing the Blueprint regime.

The Governor and CDPH justify continuing industry restrictions under the Blueprint on the view that the ESA authorizes the Governor, and his subordinates, to issue emergency orders in whatever manner—and on whatever subject—the Governor

deems necessary during a declared emergency. Specifically, the Governor relies on Cal. Gov't Code § 8627, which provides the Governor complete control over state agencies and says that the Governor has been delegated "all police power vested in the state." But the Legislature cannot delegate to the executive branch "all police powers" without violating California's non-delegation doctrine. Such a broad delegation lacks definitive standards and sufficient safeguards to prevent abuse. Accordingly, to avoid a serious constitutional problem, Cal. Gov't Code § 8627 must be construed narrowly to deny the Governor the power to make laws governing industry actors—especially where imposed on an indefinite and ongoing basis.

Likewise, the Blueprint regime cannot be justified as an exercise of CDPH's conferred authority under the Public Health Code. CDPH's statutory authority is limited chiefly to issuing and enforcing quarantine orders where there is individualized suspicion that a person or place has been infected or contaminated. CDPH lacks any authority to impose general business restrictions.

If an injunction is not granted, Plaintiffs will continue to suffer significant financial loss and face the imminent risk of permanent closure. Plaintiffs have implemented extensive safety precautions and an injunction will allow them to remain in business and safely serve the public.

ARGUMENT

I. STANDARD OF REVIEW

A preliminary injunction should be granted immediately to prevent irreparable harm to Ghost Golf and Sol y Luna. In deciding whether to grant a preliminary injunction, this Court must consider two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits of the case at trial, and (2) the harm to be suffered by the plaintiff if the injunction does not issue as compared to the harm to be suffered by the defendant if it does. *IT Corp. v. County of Imperial*, 35 Cal. 3d 63, 70 (1983). *See also Take Me Home Rescue v. Luri,* 208 Cal. App. 4th 1342, 1350-53 (2012).

In addition, there must be an "inadequacy of legal remedies" to justify granting an injunction. *Triple A Mach. Shop, Inc. v. California*, 213 Cal. App. 3d 131, 138 (1989).

II. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

A. The Emergency Services Act Does Not Authorize the Governor to Dictate Generally Applicable Rules Restricting Business

The Governor relies on Cal. Gov't Code § 8627. That provision states that the Governor may exercise "complete authority over all agencies of the state government and has the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California . . . ." On first blush the authority to wield "all police power" sounds exceedingly broad. Indeed, under the Governor's interpretation he may wield this power in whatever manner he deems appropriate in combatting COVID-19, which would allow him to regulate nearly every aspect of civil society during this ongoing pandemic. However, as discussed in greater detail below, this open-ended reading of the ESA would infringe upon the separation of powers and violate the California Constitution. Accordingly, as a matter of constitutional avoidance, this Court must adopt a limiting construction if at all possible. *People v. Garcia*, 2 Cal. 5th 792, 804 (2017).

Read in context, Section 8627 confers to the Governor emergency powers as may be necessary to exercise "complete authority over all agencies of the state government" by directing state agencies to exercise police powers already *properly vested* in the executive branch.[3] The key language is the limitation that the police power must already be "vested in the state by the Constitution and laws of the State of California . . ." Cal. Gov't Code § 8627. In other words, the text authorizes the Governor himself to exercise all of the police powers that are placed within the proper sphere of the executive branch. *See Farmers Inc. Exch. v. California*, 175 Cal. App. 3d

[3] There are no textual indicia that the "all police power" language was intended to confer a disjunctive power; rather it should be read as consistent with the conferred authority over state agencies.

494, 500-01 (1985) (affirming that a Governor may direct state personnel and resources in responding to an emergency, under Cal. Gov't Code § 8627—at least where the State's emergency actions are "taken pursuant to statutory authority"). Simply put, if any component of the executive branch is empowered to take an action (including independent agencies), the Governor can take that action as the head of a unified executive branch.[4]

This construction appropriately harmonizes the various provisions of the ESA. Each piece works together to ensure that the Governor may consolidate the State's resources in a unified response.[5] *See* Cal. Gov't Code §§ 8628; 8628.5; 8665; 8567. For instance, this interpretation would enable the Governor to take action to shut down a particular business where there is individualized reason to believe that the business is violating lawfully established health and safety standards, even if ordinarily some other agency or officer would be responsible for taking this action. Likewise, if an agency retains discretion to promulgate regulation under an organic statute, the Governor might direct that agency to exercise its vested discretion to issue temporary emergency regulations. But under this construction the Governor would not have an independent, roving and unfettered power to impose generally applicable rules governing business activity; this is important because otherwise Section 8627 would present a serious constitutional problem.

The Governor's expansive reading of Section 8627 also violates the rule against surplusage because it renders other provisions of the ESA redundant. "Wherever reasonable, interpretations which produce internal harmony, avoid redundancy, and accord significance to each word and phrase are preferred." *Pac. Legal Found. v. Unemployment Ins. Appeals Bd.*, 29 Cal. 3d 101, 114 (1981). But surely a governor is

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[4] In ordinary times independent agencies are not under the direct authority of the Governor. For example, the California Department of Alcoholic Beverage Control is an independent agency. *See* ABC Act. Cal. Dept. of Alcoholic Beverage Control, https://www.abc.ca.gov/law-and-policy/abc-act/.

[5] This is consistent with the related power to suspend regulatory statutes that inhibit the state's response to an emergency. Cal. Gov't Code § 8571.

exercising a portion of the State's police power when he suspends a regulation or exercises "complete control over state agencies." *See Ex parte Junqua*, 10 Cal. App. 602, 604 (1909) (explaining that the police power is the authority to "make and enforce . . . all such police, sanitary, and other regulations as may be deemed necessary for the health, comfort, and happiness of its inhabitants"). If Section 8627 is as broad as the Governor suggests, every other provision of the ESA is superfluous.[6] Accordingly, this canon of construction strongly supports a narrowing construction of Section 8627.

Finally, the ESA's statutory purpose and history also support a narrow construction of Section 8627. Article 1 of the Emergency Services Act explains that the underlying goal of the Emergency Services Act was "that all emergency services functions of this state be coordinated as far as possible." Cal. Gov't Code § 8627. Nothing in this section, nor in the legislative debate surrounding the enactment of the ESA, would suggest that the ESA enacted a sweeping change to grant the Governor expansive power to order continuing business closures for the duration of an indefinite emergency.

B. An Expansive Reading of Section 8627 Violates the Non-Delegation Doctrine

If Section 8627 truly confers all the State's police powers, then the statute improperly vests the Governor with powers *coextensive* with the Legislature's lawmaking power. *See Hewitt v. State Board of Medical Examiners*, 148 Cal. 590 (1906) (holding unconstitutional a statutory provision that conferred unfettered discretion on a licensing regime); *In re Peppers*, 189 Cal. 682 (1922) (same). *See also Am. Distilling Co. v. State Bd. of Equalization,* 55 Cal. App. 2d 799 (1942) (rejecting an interpretation that would violate the non-delegation doctrine). By definition, the

[6] Even within Section 8627, it would be superfluous for the Legislature to say that it was giving complete control over state agencies if the Legislature was also delegating all of its police powers.

"police power" is the power of the Legislature to make law as may be necessary, in its judgment, to promote public "health, peace, comfort, and welfare," *Ex parte Junqua*, 10 Cal. App. 602, 604 (1909). *See State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners*, 40 Cal. 2d 436, 440, 254 P.2d 29, 31 (1953) (affirming the police power is the power to legislate to protect "public health, safety, morals and general welfare"). Or in other words, the police power is "the power of sovereignty or power to govern the inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare." *Cotta v. City & Cty. of San Francisco*, 157 Cal. App. 4th 1550, 1557 (2007). *See also Sligh v. Kirkwood*, 237 U.S. 52, 58–59 (1915) ("The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. …The police power, in its broadest sense, includes all legislation and almost every function of civil government."). As such, a conferral of "all police power" necessarily violates California's non-delegation doctrine. *See Kugler v. Yocum*, 69 Cal. 2d 371, 375 (1968).

The California Supreme Court holds that an enactment violates the non-delegation doctrine if the Legislature has failed to either: (a) resolve fundamental policy issues, or (b) provide an "adequate yardstick for the guidance of the administrative body empowered to execute the law[.]" *Gerawan Farming, Inc.*, 3 Cal. 5th at 1146-47. *See also Kugler*, 69 Cal. 2d at 384. What is more, the Supreme Court of California has said that "legislative guidance by way of policy and primary standards is not enough if the Legislature fails to establish an effective mechanism to assure the proper implementation of its policies." *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 168-69 (1976).

i. If Section 8627 Truly Grants All the Police Power of the State to the Governor, Then It Allows Him to Set Fundamental Policy

If the Legislature truly conveyed all of its police powers in Section 8627, then it failed to resolve fundamental policy issues. Under this broad construction, the Legislature has completely abdicated its role by leaving fundamental policy questions

to the executive branch. *See Clean Air Constituency v. California State Air Res. Bd.*, 11 Cal. 3d 801, 817 (1974) (emphasizing that the Legislature is "the most representative organ of government [and that it] should settle insofar as possible controverted issues of policy" and it "must determine crucial issues whenever it has the time, information and competence to deal with them"). Chief among those unresolved fundamental policy issues is the question that has haunted California businesses since Governor Newsom issued his order on March 19, 2020, requiring closure of non-essential businesses: Whether, and under what circumstances, may the State close or impose other significant restrictions on the operation of businesses?

In the Governor's view he has complete discretion to decide whether and when businesses should be closed, reopened, partially reopened, or otherwise restricted in their operations. Under this view, the Governor may choose to issue orders bringing any given industry to the brink of collapse or to impose no business restrictions at all. Such "unfettered discretion" is the hallmark of a non-delegation violation. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 536 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 406 (1935). *See also People's Fed. Sav. & Loan Ass'n v. State Franchise Tax Bd.*, 110 Cal. App. 2d 696, 700 (1952) (invalidating a statute which gave the State Franchise Tax Board "uncontrolled power" to set rates).

There can be no doubt that the Legislature wanted to protect public health during an emergency. But it also wanted to ensure that society could continue to function, and that Californians could continue to provide for their families in the event of a prolonged emergency. Yet the Legislature did not resolve these difficult policy questions with Section 8627. If the Governor's construction is correct, then the Legislature quite simply punted, leaving it to the executive branch to weigh competing, and vitally important, public health and economic concerns.

ii. If Section 8627 Truly Grants All the Police Power of the State to the Governor, Then It Does Not Provide Adequate Guidance

The Governor's construction of Section 8627 would also violate the non-

delegation doctrine because the statutory text fails to provide an "adequate yardstick for the guidance" of how the Governor should carry out the Legislature's goals. *Gerawan Farming, Inc.*, 3 Cal. 5th at 1146-47. In the context of a global pandemic that shows no sign of abating, a conferral of all the State's police powers amounts to an open-ended delegation of power that would allow the Governor to make rules—at his sole discretion—regulating virtually every aspect of economic and personal affairs for the indefinite future. *See California State Auto Ass'n Inter-Ins. Bureau v. Downey*, 96 Cal. App. 2d 876, 900-01 (1950) (affirming that the Legislature "cannot delegate unlimited powers to an administrative officer [or body]"). *See also Gaylord v. City of Pasadena*, 175 Cal. 433, 437 (1917) (affirming that delegated power cannot give "too great a play to the discretion of the [vested official])."

And, in fact, Governor Newsom has used this power liberally since March. Not only has the Governor shut down and restricted business operations, but he has interpreted his authority to allow him to dictate every aspect of life under the pandemic such as setting rules for how families can go trick or treating for Halloween[7] or gather together for their Thanksgiving dinner. For example, CDPH lists "mandatory requirements" for "all gatherings," including such restrictions as a prohibition on gatherings of more than two hours, even for outdoor events where the participants are wearing face-coverings.[8] And the Governor has exercised his assumed emergency powers to impose various economic policies that are somewhat more tenuously connected to cited public health goals. *E.g.*, E.O. N-62-20 (May 6, 2020) (temporarily altering statutory presumptions for workers compensation claims); E.O. N-37-20 (May 31, 2020) (temporarily prohibiting evictions); E.O. N-67-20 (June 3,

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[7] CDPH, Guidance for Safer Halloween and Día de los Muertos Celebrations during COVID-19 (Oct. 13, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-for-Safer-Halloween-and-Dia-de-los-Muertos-Celebrations-during-COVID-19.aspx.

[8] CDPH, Guidance for Private Gatherings (Oct. 9, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CDPH-Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings-10-09.aspx.

2020) (modifying statutory election procedures).

The ESA's lack of discernable standards guiding the exercise of vested discretion is all the more problematic given the extraordinary scope of the ESA. As the "scope" of a law increases, "the standards must be correspondingly more precise." *Synar v. United States*, 626 F. Supp. 1374, 1386 (D.D.C. 1986). Because the Governor's power under the ESA is "immense, encompassing all [California] enterprise," it is vital that the Governor's exercise of that authority be constrained by meaningful standards. *Michigan v. U.S. Environmental Protection Agency,* 213 F.3d 663, 680 (D.C. Cir. 2000). *See also Alaska v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1143, 1144-45 (Alaska 1987) (stressing courts should apply a sliding-scale analysis: "When the scope [of conferred power] increases to immense proportions . . . the standards must be correspondingly more precise.").

The Michigan Supreme Court recently ruled that its state's Emergency Powers of the Governor Act (EPGA) violated the non-delegation doctrine on substantially similar grounds. The Court concluded that the non-delegation problem was particularly severe in light of the emergency act's "expansiveness, its infinite duration, and its inadequate standards." *In re Certified Questions From United States Dist. Court , W. Dist. of Michigan, S. Div.*, No. 161492, 2020 WL 5877599, at *18 (Mich. Oct. 2, 2020). This vast grant of power impermissibly allowed the Governor the "power to reorder social life and to limit, if not altogether displace, the livelihoods of residents across the state and throughout wide-ranging industries." *Id.* at *15. And it bears emphasis that Michigan's EPGA conferred significantly narrower powers than the California ESA. The Michigan Legislature had conferred only the power to "promulgate reasonable orders" as may be "necessary to protect life and property or to bring the emergency situation with the affected area under control[.]" *Id.* at *16. The Michigan Supreme Court found this violated separation of powers because the statute gave away "a substantial part of the entire police power of the state." *Id.* (noting that this provision failed to place adequate limits on the governor's power

because "life" and "property" could "be threatened by a virtually unlimited array of conduct, circumstances, and serendipitous occurrences."). Under Governor Newsom's construction, Section 8627 does not merely vest a "substantial part" of the Legislature's police powers, it unconditionally surrenders the entirety of the police power to the Governor. And it confers these core legislative powers without any substantive, procedural, or temporal limitations.

The supposed conferral of "all police powers" stands in stark contrast to even the most expansive delegations of authority that the California Supreme Court has considered and upheld. For instance, in *Kugler*, 69 Cal. 2d at 375, the California Supreme Court upheld a law that allowed a city manager to determine salaries of firemen, but which declared that the rates had to be no less than the average received by firemen in the City of Los Angeles. The court explained that the Legislature had resolved the "fundamental issue" in deciding that that the wages should be on parity with those in Los Angeles. While the city manager was responsible for "the subsequent filling in of the facts in application and execution of the policy," *Id.* at 377, the Legislature had made the critical policy decision and provided a "yardstick" against which to determine whether public officials had (or had not) conformed to the Legislature's standard. *See American Distilling Co.*, 55 Cal. App. 2d at 805 (emphasizing that the Legislature "must provide an adequate yardstick for the guidance of the executive or administrative body or officer empowered to execute the law.").

More recently in *Gerawan Farming, Inc. v. Agric. Labor Relations Bd.*, 3 Cal. 5th 1118, 1146 (2017), the California Supreme Court upheld a statute that created a mandatory mediation and conciliation (MMC) process for agricultural labor disputes. Once this process was invoked, the mediator was entitled to resolve disputed terms concerning "wages, hours, or other conditions of employment." *Id.* But as the California Supreme Court explained, the Legislature had made the "fundamental policy determination that the MMC process was necessary" as well as "a variety of

subsidiary policy decisions concerning the necessary procedures, the factors channeling the mediator's discretion, the preconditions for invoking the MMC process, and the extent of review by the Board and the courts." *Id.* Moreover, the scope of the mediator's authority was limited to disputes concerning the parties' "economic relations" and did "not confer unrestricted authority to make fundamental policy determinations' that must be left to the legislature." In addition, the Legislature had provided "direction for . . . implementation" by providing a list of factors for the mediator to consider. *Id.* at 1101. *See also Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 168 (1976) (upholding a city initiative which gave a rent control board authority to review and grant landlord or tenants' petition for rent adjustment after considering a list of nonexclusive but mandatory factors).

Unlike in *Kugler*, *Gerawan*, or *Birkenfeld,* the Legislature has made no "fundamental policy" determinations about whether or under what circumstances the State should require closure or other restrictions for businesses. And unlike in these cases, the Legislature has failed to provide any standard, metric, or factors guiding the Governor's exercise of discretion. For instance, the Legislature could have required the Governor to consider an enumerated list of factors as in *Gerawan* or *Birkenfeld*. Or the Legislature could have imposed safeguards by requiring the Governor to make certain findings before closing or restricting business operations, or could have guided the exercise of discretion by incorporating substantive limitations on the exercise of these otherwise broad emergency powers. Instead, the Governor has been given free rein to implement whatever policies he feels are needed to respond to an emergency. But if the non-delegation doctrine means anything at all, it is that the Legislature cannot authorize such an open-ended grant of authority to the executive branch. *See In re Certified Questions From United States Dist. Court, W. Dist. Of Michigan, S. Div.,* 2020 WL 5877599, at *18 n.21 (concluding that if the non-delegation doctrine is not applicable here, "it is difficult to imagine when if ever" it would apply, and that the doctrine would be "entirely obsolete").

iii. Section 8627 Lacks Requisite Safeguards Under the Governor's Open-Ended Construction

A broad reading of the ESA would also violate the non-delegation doctrine because there are no effective mechanisms in Section 8627 to ensure the Governor remains accountable in exercising his delegated authority, and/or to guard against arbitrary decisions. For instance, the Legislature could have provided safeguards against arbitrary decisions by requiring the Governor to comply with basic procedural requirements to ensure transparency and opportunity for public input when implementing new forward-looking rules months into an ongoing emergency. But there are no such safeguards here.

One obvious safeguard that the Legislature failed to include in the ESA was a mechanism to ensure temporal limitations on the Governor's unbridled emergency powers. This could have been done easily. Many states have imposed temporal limitations on emergency powers.[9] At least eight states (as well as the District of Columbia and the Virgin Islands) have gone a step further and require the legislature to affirmatively ratify any extension of the emergency declaration.[10] For example, in Michigan a Governor's emergency declaration lasts for only 28 days unless the Governor requests and the legislature approves a request for an extension. M.C.L. § 30.403. But that is not the case in California where the Governor's emergency declaration could extend indefinitely without any additional action by either the Governor or the Legislature.[11] *See In re Certified Questions From United States Dist.*

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[9] *See, e.g.*, Colo. Rev. Stat. § 24-33.5-704 (emergency declaration lasts for 30 days); 35 Pa. Stat. and Cons. Stat. Ann. § 7301 (emergency declaration last for 90 days).

[10] *See* Alaska Stat. Ann. § 26.23.020; Kan. Stat. Ann. § 48-924; Minn. Stat. Ann. § 12.31; S.C. Code Ann. § 25-1-440 (a)(2); Utah Code Ann. § 53-2a-206; Wash. Rev. Code Ann. § 43.06.220; Wis. Stat. Ann. § 323.10; D.C. Stat. § 7-2306; 23 V.I.C. § 1005.

[11] The ESA does encourage the Governor to terminate the emergency declaration when such a declaration is no longer necessary. However, the law provides no guidance to determine when an emergency is terminated and leaves the decision almost solely in the Governor's discretion. And California courts have refused to second guess the Governor's determination absent a blatant abuse of discretion. *Nat'l Tax-Limitation Comm. v. Schwarzenegger*, 8 Cal. Rptr. 3d 4, 13 (2003). This suggestion therefore provides no meaningful limit on the Governor's conduct.

Court, W. Dist. Of Michigan, S. Div., No. 161492, 2020 WL 5877599, at *16 (emphasizing that because Michigan's EPGA) "authorizes indefinite exercises of emergency powers for perhaps months—or even years," its broad scope was even more suspect).[12] *See also United States v. Emerson*, 846 F.2d 541, 545 (9th Cir. 1988) (explaining that the temporary nature of an emergency created "safeguards that protect against an abuse of discretion"); *Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally*, 337 F. Supp. 737, 754 (D.D.C. 1971) ("It is also material, though not dispositive, to note the limited time frame established by Congress for the stabilization authority delegated to the President."); *Usibelli Coal Mine, Inc. v. State Dep't of Nat. Res.*, 921 P.2d 1134, 1143 (Alaska 1996) (upholding a conferral of authority to fix and adjust coal lease royalty rates because there were "a number of safeguards," including temporal limitations). And Governor Newsom's implementation of his Blueprint shows that the danger of a governor prolonging an emergency declaration--for months, or years on end--is very real; the lack of a "green" tier signals that the Governor plans to exercise his emergency authority to continue to restrict business activity for as long as COVID-19 is a concern at all.

Another related option that the Legislature could have taken with the ESA would be to limit the Governor's exercise of "police powers" to truly exigent times where it is impossible for the Legislature to convene or to act quickly enough when immediate action is necessary in response to an imminent and previously unforeseen threat to public health or safety. For example, in March the country was still grappling with the incipient COVID-19 pandemic as it unexpectedly swept across the country. At that time, when the pandemic appeared to threaten our healthcare system and where immediate legislative action may have been impractical, the Governor might have been able to justify a broader exercise of emergency powers under Section 8627. But by September, when the Governor pronounced his new Blueprint regime, we were

[12] While Michigan's Emergency Management Act imposed a 28-day limitation on emergency powers, the EPGA was held to permit continued exercise of emergency powers for an on-going emergency.

more than six months into the pandemic. By then the situation had largely stabilized and the Legislature had met and passed laws on a wide variety of topics.[13] Yet the Governor never sought the Legislature's input in determining which businesses could stay open or what criteria should be used to evaluate that decision. And even after creating the Blueprint regime, the Governor continues to alter his plan and introduce new and novel elements such as the intra-county equity requirement without involving the Legislature.

The longer the COVID-19 pandemic goes on, the less justifiable a broad delegation of all police power becomes. *Cf. Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2605 (2020) (Alito, J., dissenting from denial of application for injunctive relief) ("As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights."). Recently Judge Stickman of the United States District Court for the Western District of Pennsylvania expressed this point powerfully when granting a preliminary injunction against several of Pennsylvania Governor Tom Wolf's COVID-19 related emergency orders. He explained that while "[c]ourts are generally willing to give temporary deference to temporary measures aimed at remedying a fleeting crisis," the "ongoing and open-ended" nature of COVID-19 restrictions justified more extensive judicial scrutiny in order to prevent "one-person rule" or "government by fiat." *Cty. of Butler v. Wolf*, No. 2:20-CV-677, 2020 WL 5510690, at *8-*10 (W.D. Pa. Sept. 14, 2020). The same is true with Governor Newsom's Blueprint. It is a measure that is "ongoing and open-ended" rather than a response to a "fleeting crisis." Accordingly, far more robust safeguards are needed to prevent "one-person rule" or "government by fiat" than are currently contained in the Emergency Services Act—at least under the Governor's open-ended interpretation.

[13] Here Are the 2020 Bills Gov. Newsom Rejected or Signed into California Law, Cal Matters (Oct. 1, 2020), https://laist.com/2020/10/01/here_are_the_2020_bills_gov_newsom_rejected_or_signed_into_california_law.php.

The ESA does allow the Legislature to terminate an emergency declaration by a concurrent resolution. But this is a wholly inadequate check on the Governor's authority. For one thing, unlike the emergency powers laws in several other states or territories, the ESA does not prevent the Governor from immediately issuing a renewed emergency declaration even if the legislature terminated an emergency by concurrent resolution.[14] Moreover, the power to terminate an emergency is an extremely blunt instrument. If the Legislature sees a need for the continued use of some of the Governor's powers, it cannot to disapprove of specific actions that the Governor has taken short of enacting a completely new law—which the Governor might well veto. This makes it extremely unlikely that the Legislature will actually utilize this mechanism so long as there is an ongoing emergency.

In addition, the Legislature's theoretical ability to suspend an emergency resolution does not adequately secure individual liberty, which is the primary purpose of the separation of powers. *People v. Nash*, 52 Cal. App. 5th 1041, 1073 (2020), *review filed* (Sept. 10, 2020) (explaining that the "primary purpose of the separation of powers is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government"). The power to legislate was given to the branch of government most accountable to the people precisely because accountability is intended to make the legislative branch less willing to trample on the rights of Californians. *See Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., concurring) (explaining that the separation of powers ensures accountability and makes it more difficult for government to trample on individual rights). Moreover, lawmaking is an open and transparent process that requires a law to go through two chambers of the Legislature and involves public debate, deliberation, and compromise. The non-delegation doctrine prevents the Legislature from empowering the Governor

[14] *Cf.* La. Stat. Ann. § 29:724 (allowing the legislature to establish a period during which no further emergency declarations may be issued); N.H. Rev. Stat. Ann. § 4:45 (governor lacks authority to renew unless there are different circumstances); 10 Guam Code Ann. § 19405 (stating that "termination . . . shall override any renewal by [the Governor]").

to enact into law anything he wishes in times of emergency subject only to the Legislature's anemic power to disapprove after the fact, even if the Legislature wants to give the Governor that power. *See New York v. United States*, 505 U.S. 144, 182 (1992) ("The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment.").

C. CDPH Lacks Statutory Authority to Issue Generally Applicable Rules Restricting Business Activity

Just as the Governor lacks the authority under the ESA to issue long-term business closure orders, none of the powers granted to the CDPH in the Health and Safety Code would authorize it to shutdown whole segments of businesses throughout the state or a county. In particular, the power to "quarantine" or "isolate" a place of business as may be necessary to "protect or preserve the public health," Cal. Health & Safety Code §§ 120145, 120130, does not apply because this power does not extend to shutting down a business when there is no reasonable ground to believe that anyone on the premises "is afflicted with contagious or infectious diseases." *Ex parte Dillon*, 44 Cal. App. 239, 243 (1919). *See also Ex parte Arata*, 52 Cal. App. 380, 383 (1921) (providing that there must be some specific suspicion that one has "contracted or been exposed to an infectious disease" and granting habeas relief where health authorities failed to "furnish tangible ground for the belief that the person was afflicted as claimed").

Lacking any specific grant of power, CDPH might turn to Section 120140, which provides the Department may "take measures as are necessary to ascertain the nature of the disease and prevent its spread." But the Court must reject an expansive interpretation of this provision for several reasons.

First, under the canon of *eiusdem generis*, general statutory language should be given a limiting construction, consistent with the examples of conferred power expressly listed in the statutory text. *Ex parte Cannon*, 167 Cal. 142, 145 (1914) ("In

such cases the particular words are inserted for the purpose of describing certain species and the general words to include other species of the same genus. The rule is founded upon the reason that, if the general words were intended to prevail in their full and unrestricted sense, the special words would not be employed by the lawmakers at all."). Here, the Legislature provided very specific examples of what sorts of "measures" it was authorizing under Section 120140—in saying CDPH could take control of the "body of any living person, or the corpse of any deceased person." The general authorization to take "necessary" measures must be construed only as authorizing actions of the same kind or class. Thus, this provision may be construed as allowing CDPH some latitude in dealing with cases where individuals or a premises has been infected or likely exposed. But it should not be construed as an open-ended authority to make any public health rule the Department might think appropriate.

Second, it is a core principle of statutory interpretation that specific statutory language controls the general. *See Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 71 Cal. App. 4th 1518, 1524 (1999) ("[I]t is well-established that a specific provision prevails over a general one relating to the same subject."). As already discussed, the power to quarantine and isolate requires reasonable suspicion that an individual or locale is infected with a disease. As such, CDPH cannot rely on the far more generalized language in Section 120140 to claim the broader power to completely shut down a locale without those same constrains or limitations.

Third, just as with Section 8627 of the ESA, a narrow interpretation of Public Health Code Section 120140 is necessary to avoid surplusages. If Section 120140 is interpreted expansively enough to include business shutdowns, then it also would include and make superfluous every other power granted to CDPH. For instance, the power to "inspect" and "disinfect" property would almost certainly be considered a measure to "ascertain the nature of the disease and prevent its spread." *See* Cal. Health & Safety Code § 120145.

Finally, an expansive interpretation of Section 120140 should be rejected under the canon of constitutional avoidance because it would otherwise violate the non-delegation doctrine. Just as the Legislature is precluded from conferring "all police powers" on the Governor, it is also precluded from conferring the open-ended authority for an agency to "take measures as are necessary" to prevent the spread of disease.

II. THE BALANCE OF THE EQUITIES FAVORS AN INJUNCTION

A. The Plaintiffs Have No Adequate Legal Remedy

The Plaintiffs have no adequate legal remedy that would compensate for being unable to reopen. They do not seek monetary relief in this case, but rather purely equitable remedies for the interference with their civil rights under California law and the California Constitution. Nothing other than reopening will end the injuries caused by the continuing violations of their statutory and constitutional rights. In short, the Plaintiffs seek the right to pursue their livelihood free from Defendants' unlawful interference. That is a right that this Court must protect, as other courts have similarly protected it and other constitutional rights even during the COVID-19 pandemic.[15] Furthermore, monetary compensation is unavailable as the Defendants are immune from damages, ESA § 8655, and therefore "unable to respond in damages." *Friedman v. Friedman*, 20 Cal. App. 4th 876, 890 (1993), *as modified on denial of reh'g* (Dec. 27, 1993).

B. The Plaintiffs Will Suffer Irreparable Harm

The Plaintiffs will suffer irreparable harm if the Defendants are not enjoined

[15] Courts across the United States have granted temporary restraining orders enjoining state officials acting unconstitutionally in response to COVID-19, *see Rock House Fitness v. Acton*, Case No. 20CV000631, Order Granting Preliminary Injunction (Court of Common Pleas, Lake County, Ohio) (issued May 20, 2020) (granting a preliminary injunction on behalf of a gym forced to shut down due to COVID-19). *See also Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020); *Cty. of Butler v. Wolf, No. 2:20-CV-677, 2020 WL 5510690, at *8-*10 (W.D. Pa. Sept. 14, 2020); Elkhorn Baptist Church v. Brown*, No. 20CV17482, 2020 WL 2532528, at *4 (Or. Cir. May 18, 2020); *Bailey v. Pritzker*, No. 5-20-0148, 2020 WL 2116566, at *1 (Ill. App. Ct. May 1, 2020); *First Baptist Church v. Kelly*, 455 F. Supp. 3d 1078, 1091-92 (D. Kan. 2020); *On Fire Christian Center, Inc. v. Fischer*, 453 F.Supp.3d 901, 909-10 (W.D. Ky. 2020). Other Courts have declared COVID-based regulations unconstitutional in their entirety, *see Wisconsin Legislature v. Palm*, 942 N.W.2d 900, ¶ 58 (Wis. 2020).

from enforcing the Blueprint. Their harm is irreparable because if relief is not granted they will likely be forced to go out of business. Coleman Decl. ¶¶ 29-30, 34-38; Rubio Decl. ¶¶ 18-26. The insolvency of one of the parties "is a classic type of irreparable harm." *California Retail Portfolio Fund GMBH & Co. KG v. Hopkins Real Estate Grp.*, 193 Cal. App. 4th 849, 857 (2011); *Davenport v. Blue Cross of California*, 52 Cal. App. 4th 435, 451 (1997) ("evidence that licensor would suffer economic insolvency without payment of royalties from publisher established irreparable harm necessary for preliminary injunction") (citing *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1995)). *See also Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985) ("The threat of being driven out of business is sufficient to establish irreparable harm."); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (holding that "a substantial loss of business and perhaps even bankruptcy" constitutes irreparable harm). Moreover, the Plaintiffs are placed in an impossible situation—if they choose to operate in-doors in violation of Defendant's orders they risk fines and perhaps even jail time, but if they comply their businesses are threatened with financial ruin. This type of "Hobson's choice" constitutes irreparable harm. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380-81 (1992).

C. An Injunction Would Remedy a Serious Harm and Would Be Narrowly Tailored to Minimize Any Harm to the Public

The harm of not being able to reopen Ghost Golf and Sol y Luna is profound. In addition to the financial toll, the continued shutdown infringes on the Plaintiff's liberty by violating the separation of powers, which is primarily designed to protect individual liberty. As a result, curtailing the Governor's unlawful exercise of executive authority is decisively in the public interest. Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

In stark contrast, there is little risk of harm to the State if Ghost Golf is allowed to reopen while exercising social-distancing protocols and if Sol y Luna is permitted

to operate indoors consistent with CDC guidelines and best industry practices. The Governor has already determined that businesses employing nearly identical safety precautions such as hair salons, nail salons, and dentists offices can safely reopen. As detailed in their declarations, the Plaintiffs plan to employ extensive precautions such as requiring customers to wear masks, utilizing contactless payment options, and taking other measures to keep customers safe. Coleman Decl. ¶¶ 18-20; Rubio Decl. ¶¶ 11-14. There is therefore no compelling reason that they should not be allowed to open immediately.

CONCLUSION

For the above reasons, the Court should grant the Plaintiffs' request for entry of a preliminary injunction without delay.

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Respectfully submitted,

By 
LUKE WAKE

LUKE WAKE, No. 264647
E-Mail: lwake@pacificlegal.org
DANIEL M. ORTNER, No. 329866
E-Mail: dortner@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Attorneys for Plaintiffs
Ghost Golf, Inc., et al.