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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

No. F082357

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

Petitioners,

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,

Respondents.

On Appeal from the Superior Court of Fresno County
(Case No. 20CECG03170, Honorable D. Tyler Tharpe, Judge)

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

State of California, Court of Appeal, Fifth Appellate District

Court of Appeal Case Number: **F082357**
Superior Court Case Number: **20CECG03170**

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APPELLANT/PETITIONER: **Ghost Golf, Inc., et al.**
RESPONDENT/REAL PARTY IN INTEREST: **Gavin Newsom, et al.**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [**X**] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*):

Petitioners Ghost Golf, Inc., et al.

2.a. [**X**] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of Interest (*Explain*):
(1)	
(2)	
(3)	
(4)	

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

/s/ Luke A. Wake Date: **Mar. 8, 2021.**

LUKE A. WAKE

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INTRODUCTION

For nearly a year Governor Newsom has been *making law* in California. At the very outset of the pandemic, the Governor shut down all non-essential businesses and he has continued to micromanage the California economy in conjunction with the California Department of Public Health (CDPH), creating a myriad of rules restricting business operations and picking winners and losers at every step. The Governor and CDPH have repeatedly changed the rules without legislative involvement—including their pronouncement of a complex system of business regulation on August 28, 2020, which the Governor intends to continue enforcing indefinitely.

The so-called "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 CDPH. This 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 fundamental state policy. Instead, the Governor and CDPH have improperly exercised lawmaking powers in weighing competing health and economic considerations, and in making judgements about the social value of different businesses in the process.

But under the California Constitution, it is the Legislature's exclusive prerogative to make law. One-man rule is antithetical to the separation of powers enshrined in the California Constitution. Nonetheless the Governor and CDPH continue to assert unfettered power to make rules regulating every aspect of civil society by "emergency order" on an indefinite and ongoing basis.

Meanwhile small business owners like Daryn Coleman and Nieves Rubio are suffering immensely under these draconian rules. Their respective businesses are near financial ruin and facing the prospect of permanent closure and bankruptcy under the Blueprint regime. They are in dire need of injunctive relief.

While most other businesses have been permitted to allow customers indoors with masks and appropriate social distancing practices, Ghost Golf has been denied the opportunity to reopen on the same terms. This indoor mini-golf facility has been shut down completely under the Governor's continuing orders for all but four days since March 19, 2020. With continuing overhead expenses and no incoming revenue, Ghost Golf is in an impossible situation.

Likewise, Sol y Luna, a Mexican restaurant in Bakersfield, has found it impossible to operate profitably under the Blueprint. Month by month Sol y Luna is losing money. Itsurvived through 2020 only because it relied on Economic Injury Disaster Assistance and Paycheck Protection Program

Loans. But now that those funds have run dry, Sol y Luna is in a bind because there is no hope that the Governor will lift these extraordinary restrictions anytime soon.

Despite their request for desperately needed injunctive relief in November, the Superior Court waited until the very end of January to issue a perfunctory decision denying a preliminary injunction for these two businesses. Without any substantive analysis the Superior Court erroneously concluded that Ghost Golf and Sol y Luna were unlikely to prevail on the merits. And notwithstanding the fact that Plaintiffs face imminent and irreparable harm, the Superior Court concluded that the balance of hardships weighed against granting injunctive relief without considering the narrow scope of injunctive relief requested or Plaintiffs' sworn declarations regarding the health and safety protocols they would maintain to protect the public if injunctive relief were granted. The decision of the Superior Court should be reversed in the interest of justice.

FACTUAL AND PROCEDURAL BACKGROUND

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. JA 30–34. 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; JA 36-37. 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. JA 39–41. 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." JA 41.

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. JA 43- 47. 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; JA 49-54.

On August 28, 2020, Governor Newsom and 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 sectors. JA 56–63. The color-coding for each county is updated weekly, which means that affected businesses have no certainty as to what rules will

govern for more than a week at a time because a county may be moved from one color tier to the next at any point. Naturally, this presents difficulties for businesses both in terms of managing employee expectations in making informed decisions about how much inventory to order on a week by week basis.

Under the Blueprint regime, indoor family entertainment centers must remain closed indefinitely so long as a county is classified as either "purple" or "red."[1] 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.[2] 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

[1] Industry Guidance to Reduce Risk, Official California State Government Website, https://covid19.ca.gov/industry-guidance/.
[2] Industry Guidance to Reduce Risk, Official California State Government Website, https://covid19.ca.gov/industry-guidance/.

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 from a press conference on August 28, 2020: "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 . . . .".[3] Instead, the Governor made clear his intention of continuing to govern under this Blueprint regime indefinitely "until there is a [fully distributed] vaccine . . . .".[4]

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. JA 114, ¶ 6. Ghost Golf has been shut down entirely since March 19, 2020, except for four days at the end of June when it was briefly allowed to reopen. JA 114–15, ¶¶ 12–15. Ghost Golf spent more money in preparing to reopen than it made in profits during those four days. JA 115, ¶ 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—even though

[3] The relevant portion of the press conference begins at the 14:00 mark. California Governor Gavin Newsom, California Wildfire and COVID-19 Update: August 28, 2020, https://www.youtube.com/watch?v=pqxQZGmQevg&t=8s.
[4] *Id.*

most other indoor businesses are permitted to reopen with social distancing protocol and masks.[5]

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. JA 117, ¶¶ 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. JA 116, ¶¶ 26–28. With mounting debts and no hope on the horizon under the Blueprint regime, Ghost Golf faces a bleak future. If the Blueprint regime requires continued closure through the second quarter of 2021, it is difficult to see how Ghost Golf could ever hope to recover. Coleman Declaration JA 117, ¶ 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. JA 120, ¶ 2–3. On March 19, 2020, Sol y Luna was shut down by the Governor's orders. JA 120, ¶ 4. The restaurant was allowed to reopen June 1, 2020, and did so after making significant investments to keep its patrons safe. JA 120–21, ¶¶ 8, 11–14. However, it was forced to close indoor dining again under the Governor's directive on July 1, 2020. JA 120,

[5] The Blueprint regime only allows indoor family entertainment centers to open in the "orange" category for "naturally distanced activities." Industry Guidance to Reduce Risk, Official California State Government Website, https://covid19.ca.gov/industry-guidance/.

¶ 9. Sol y Luna was then restricted to operating on its patio, which has proven unprofitable. JA 120–21, ¶¶ 9, 22.

Under the Blueprint regime, Sol y Luna was briefly allowed to begin operating at 25% capacity indoors when Kern County was reclassified from "purple" to "red" in October. JA 121, ¶ 20. However, Kern County was reclassified by the Governor and CDPH into the purple tier on November 17, 2020. As such, Sol y Luna has been limited to patio seating during the winter months, a completely unprofitable endeavor.[6] And in any event Sol y Luna cannot be profitable even operating indoors if limited to 25% capacity. JA 121, ¶¶ 18, 21.

Each month since March, Sol y Luna has spent more money on overhead and payroll than it has taken in. JA 122 ¶ 25. Sol y Luna cannot continue much longer unless something changes. Sol y Luna has burned through its forgivable Paycheck Protection Program loans and also its Economic Injury Disaster Loan (EIDL), which must be paid back with interest. Sol y Luna faces the prospect of permanent closure unless it can find some way to be profitable with these continuing restrictions, which is unlikely given the restaurant's experience in 2020. JA 122, ¶ 25.

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[6] Kern County was subject to a regional stay at home order from December 6, 2020, to January 26, 2021, which meant that Sol y Luna was not allowed to operate even outdoors. *See Wake Declaration in Support of Calendar Preference* ¶ 8; Blueprint for a Safer Economy, https://covid19.ca.gov/safer-economy/ (the interactive map lists the current tier assignments, and also when each county was placed on and exited the regional stay at home order).

Superior Court's Denial of Preliminary Injunction

Appellants filed their complaint in Fresno County Superior Court on October 26, 2020. JA 007. On November 5, Appellants filed their motion for preliminary injunction and on that same date filed an ex parte motion for an expedited hearing date. JA 77-78. A hearing was held on December 16, 2020. JA 270. On January 29, 2020, Judge D. Tyler Tharpe issued an opinion that held—without any analysis or explanation—that Plaintiffs were not likely to prevail on the merits and that the balance of equities did not favor an injunction. JA 271-275. This timely appeal followed shortly after Judge Tharpe's decision. JA 276.

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 § 628.5.
- **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 contagious disease:

- **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).
- **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

The Fresno Superior Court erred in concluding that Plaintiffs were not entitled to a preliminary injunction to prevent imminent and irreparable permanent 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 Emergency Services Act 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 power" 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 Health and Safety Code. Without question the State has adequate tools at its disposal to address disease, including the power to quarantine and isolate individuals who are reasonably suspected to be contagious or to have come in contact with someone who is infected. The power to quarantine and isolate may restrict movement to and from a specific building or even a neighborhood where there is probable cause, based on concrete facts, to believe that such premises or locality has been exposed to a contagious disease. But the power to quarantine and isolate has never been understood as a general police power to regulate business in the name of protecting public health.

CDPH also claims it has an open-ended authority to take whatever measures it deems "necessary" to control the spread of contagious disease under Health and Safety Code § 120140. But if this is true then the Legislature has conferred a general police power on the Department to do literally anything the Legislature might do in responding to contagious disease. Accordingly, CDPH's statutory authority must either be narrowly construed to deny the Department a general police power to make health and safety laws or the Health and Safety Code must be said to violate the non-delegation doctrine.

If an injunction is not granted, Plaintiffs will suffer ruinous financial loss. There is no question that they face the imminent risk of permanent closure and therefore irreparable harm. Accordingly, if this Court agrees that Plaintiffs are likely to prevail on the merits, it should direct the Superior Court to issue an injunction because the balance of hardships weigh in favor granting immediate but narrowly tailored relief that would allow these two businesses to remain open while safely serving the public.

ARGUMENT

I. STANDARD OF REVIEW

The decision whether to grant a preliminary injunction turns on 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).

An appeal of a denial of a preliminary injunction is ordinarily reviewed for an abuse of discretion. *Sahlolbei v. Providence Healthcare, Inc.*, 112 Cal. App. 4th 1137, 1145 (2003). But when the issue on appeal primarily concerns the party's likelihood of prevailing on the merits, "de novo review as to that factor is proper" since that issue is a matter of law. *Id.* at 1145-46. *See also Garamendi v. Exec. Life Ins. Co.*, 17 Cal. App. 4th 504, 512, 21 (1993). In this case, the Superior Court erroneously concluded as a matter of law that plaintiffs were not likely to prevail on the merits of either their statutory or their non-delegation claims. Accordingly, de novo review is appropriate for this issue of law.

Likewise, review is de novo where the appellant contends that the superior court erred as a matter of law in stating the governing standard for assessing the balance of equities. *See Pinto Lake MHP LLC v. Cty. of Santa Cruz*, 56 Cal. App. 5th 1006, 1015 (2020) (affirming that courts apply de novo review for conclusions of law). Where the superior court has applied an errant standard, its decision is deemed an abuse of discretion *per se*. *See Carter v. Pultre Home Corp.*, 52 Cal. App. 5th 571, 579 (2020) ("An action

that transgresses the bounds of the applicable legal principles is outside the scope of the trial court's discretion and, therefore, is deemed an abuse of discretion."); *Kramer v. Traditional Escrow, Inc.*, 56 Cal. App. 5th 13, 27 (2020) ("[I]ncorrect legal assumptions is not an exercise of informed discretion and is subject to reversal."). In this case Plaintiffs contend that the Superior Court failed to apply the correct legal standard in assessing the relative harm between the Plaintiffs and Defendants because the Court assumed that the State's interest in enforcing the Blueprint regime outweighed Plaintiffs' interests, notwithstanding the fact Plaintiffs were asking for injunctive relief only with regard to their respective businesses and only consistent with their sworn declarations of the various health and safety precautions they would maintain.

Finally, the Superior Court's application of the facts to the law is subject to arbitrary and capricious review. *See Haraguchi v. Superior Court*, 43 Cal. 4th 706, 711-12 (2008). Under this standard a superior court decision is subject to reversal if the decision falls outside the permissible range of options "given the established evidence." *Carter v. Pulte Home Corp.*, 52 Cal. App. 5th 571, 579 (2020).

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. But nothing in this section, nor in the legislative debate surrounding the enactment of the ESA, would suggest that the ESA granted the Governor an expansive power to order continuing business closures during an ongoing emergency. Understood in context, this provision is not nearly as expansive as the Governor contends. The proper construction achieves a vital purpose consistent with the overall goals of the ESA in giving the Governor unified control over the entire executive branch to ensure proper coordination in responding to emergencies—not an open-ended power to make law.

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* 2020 ABC Act, Cal. Dep't of Alcoholic Beverage Control, https://www.abc.ca.gov/law-and-policy/abc-act/. Thus, to ensure a unified state response to fires, flood, epidemics, and other emergencies, Section 8627 confers on 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. *See* Cal. Gov't

Code § 8627 (explaining that the underlying goal of the ESA was "that all emergency services functions of this state be coordinated as far as possible").

The Governor emphasizes the conferral of all police powers. But 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 Ins. Exch. v. California*, 175 Cal. App. 3d 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.

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.[7] *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

[7] 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.

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 gap-filling authority to promulgate regulation under an organic statute, the Governor might direct that agency to exercise its vested discretion to issue temporary emergency regulations. By contrast, the Governor's expansive reading of Section 8627 causes disharmony because it would render various provisions of the ESA redundant—in violation of the canon against surplusage.

"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). For one, a governor is certainly exercising a portion of the State's police power when he suspends a regulation. And if Section 8627 is as broad as the Governor suggests, every other provision of the ESA is superfluous because the conferral of all police powers would in itself authorize the Governor to do anything he might think appropriate. 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 without reservation because the greater power to bind private actors must necessarily entail the lesser power to bind the machinery of state government. Accordingly, this canon of construction strongly supports a narrowing construction of Section 8627.

But the Governor contends that Section 8627 confers an independent, roving and unfettered power to impose generally applicable rules governing business activity. This construction would do far more than ensure a unified state level response to emergencies. It would amount to a blank check to control nearly every aspect of civil society during this ongoing pandemic. This Court must reject the Governor's open-ended construction because it would infringe upon the separation of powers and violate the California Constitution. *See People v. Garcia*, 2 Cal. 5th 792, 804 (2017) (affirming the canon of constitutional avoidance); *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

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

A conferral of all police power to the Governor would violate the non-delegation doctrine. 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 v. Yokam*, 69 Cal. 2d 371, 384 (Cal. 1968). 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 [*i.e.*,

safeguards] to assure the proper implementation of its policies." *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 168-69 (1976).

i. The Police Power Is the Legislature's Power to Make Law and Cannot Be Delegated to the Governor

If Section 8627 truly confers all the State's police power, then the statute improperly vests the Governor with all of the Legislature's lawmaking powers for the duration of the COVID-19 pandemic. It is difficult to imagine a more expansive delegation of power. By definition, the "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 (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.").[8]

The sovereign's police power prerogative to make rules of general applicability is inherently legislative. This has been settled in Anglo-American law since the 17th century when Parliament established supremacy over the Crown and rejected the King's claim of a royal prerogative to make binding law without parliament. *See* Philip Hamburger, *Is Administrative Law Unlawful?* 33-60 (U. Chi. Press 2015). *See also* John Locke, *Two Treatises of Government* 408-09 (Laslett ed. 1963) (stressing that the power to make law can rest only in a legislative body). Americans inherited this fundamental precept of English constitutional law and the power to make law was properly vested in those legislative bodies representing the collective will of the People within each respective state. *See Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) (confirming the states retained a plenary power to

[8] Even scholars who have argued for a narrower view of the police power agree that the police power is the very broad and open-ended power of the sovereign to both make and enforce law. Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 572 (Boston, Little, Brown & Co. 1866) ("The police of a State . . . embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights[.]"); Randy Barnett, *The Proper Scope of the Police Power*, 79 Notre Dame L. Rev. 429 (2004) (arguing that properly conceived the Ninth and Fourteenth Amendments impose meaningful limits on the police power, while observing that other scholars view the police power as a "blank check to legislatures" to make law).

legislate). As such, a conferral on the executive of "all police power" necessarily violates California's non-delegation doctrine. *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 In re Certified Questions From United States Dist. Court, W. Dist. of Michigan, S. Div., No. 161492*, No. 161492, 2020 WL 5877599, at *18 (Mich. Oct. 2, 2020) (concluding that a Michigan statute conferring a substantial part of the State's police power violated the non-delegation doctrine).

ii. 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 all 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").

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[9] 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.[10] 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

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[9] CDPH, Holidays and COVID-19 (Feb. 24, 2021), https://covid19.ca.gov/holidays/.

[10] CDPH, Guidance for Private Gatherings (Nov. 13, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings-November-2020.aspx.

(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, 2020) (modifying statutory election procedures).

Chief among the fundamental policy issues that the Legislature has failed to resolve is whether, and under what circumstances, the State may 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—at least under the Governor's interpretation—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. The non-delegation doctrine forbids precisely this kind of legislative punt.

iii. 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. 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, 1143-45 (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 ruled last summer 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.*, 2020 WL 5877599, at *18. 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 the wages should be on parity with those in Los Angeles and the city manager was merely responsible for "the subsequent filling in of the facts in application and execution of the policy," *Id*. at 377.

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 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 1148. *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).

If the Governor's reading of Section 8627 is correct, then 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, Section 8627 does not provide any standard, metric, or factors guiding the Governor's exercise of discretion. 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").

iv. 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 even if this Court were to assume that the Legislature has decided a general policy and provided an intelligible principle because California's non-delegation doctrine also requires sufficient safeguards or accountability mechanisms to minimize the risk of arbitrary decisions, economic favoritism, or other abuses of power. Under the Governor's construction, there are no effective mechanisms in Section 8627 to ensure the Governor remains accountable in exercising his delegated authority or to guard against arbitrary decisions. For instance, it would have been possible for the Legislature to provide 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. The Kentucky Legislature recently did this by amending its state emergency power law to require most pandemic-

related rules to go through the ordinary rulemaking process.[11] 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.[12] At least nine 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.[13] 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.[14] *See In re Certified Questions From United*

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[11] Kentucky SB 1 (2021), https://legiscan.com/KY/text/SB1/id/2271955/Kentucky-2021-SB1-Chaptered.pdf.

[12] *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 lasts for 90 days).

[13] *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; KRS § 39A.090i.

[14] 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 should be 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.*

States Dist. 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).[15] *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

Schwarzenegger, 8 Cal. Rptr. 3d 4, 13 (2003). Therefore, this suggestion provides no meaningful limit on the Governor's conduct.

[15] 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 ongoing emergency.

continue to restrict business activity for as long as COVID-19 is a concern at all.

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."). Whereas last March we were dealing with an unexpected crisis that was sweeping the country too quickly for the legislative bodies to convene and act, there has now been more than enough time for a legislative response. The Legislature has met and passed laws on a wide variety of topics over the past year.[16] And yet the Governor continues to rely on his emergency authority to govern the state's economy without involving the Legislature. This cannot be.

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

[16] *See* New Law Reports, California Legislative Information, https://leginfo.legislature.ca.gov/faces/newLawTemplate.xhtml.

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.

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 management statutes 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.[17] 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 act to disapprove of specific actions that

[17] *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]").

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, especially since anyone who dares to pushback against the executive's actions is tarred as being callous towards human life.[18]

v. This Court Must Enforce the Non-Delegation Doctrine Because the Legislature Faces a Natural Incentive to Delegate on Difficult Issues Which Undermines Democratic Accountability

If the separtion of powers is viewed solely through the lens of institutional power, then the willing shift of power from the legislature to the executive may seem relatively harmless. But the main purpose of the separation of powers is securing individual liberty. *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

[18] When the Kentucky Legislature passed a law mandating greater legislative oversight of executive orders during an emergency, the governor claimed that the law would put the "health and the lives of the people of Kentucky" in danger. Bruce Schreiner, *Top Lawmakers Signal Intend to Override Beshear Vetoes*, Associated Press (Feb. 1, 2021), https://apnews.com/article/legislature-robert-stivers-coronavirus-pandemic-kentucky-covid-19-pandemic-04f50a6d5866b797b6352410dd9f4816. The Governor of North Carolina made similar accusations when he vetoed a similar law. Daniel Finnegan, Governor Vetoes Five Bills Dealing with Pandemic, Keeping Gyms and Event Venues Closed, Triad Business Journal (Jul. 3, 2020), https://www.bizjournals.com/triad/news/2020/07/03/governor-vetoes-five-bills-dealing-with-pandemic.html.

fundamental powers of government"). And with an eye towards protecting individual liberty, the legislature's broad delegation of emergency power is particularly dangerous.

An unchecked grant of emergency authority inverts the ordinary relationship between the government and its citizens by subverting representative government and therein undermining the consent of the governed. *See I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government[.]"). Rather than requiring deliberation, debate, and consensus before liberties can be curtailed, unchecked action becomes the default position subject only to the Legislature's anemic power to disapprove after the fact.

The Founders understood that without meaningful accountability the power to legislate could result in oppression or tyranny. 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 citizens. *See Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., concurring) ("And by directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability

would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow."). Lawmakers are required to vote on whether to pass a law, which leaves behind a voting record that allows for members of the public to accurately understand who supported a particular policy and who did not. *Id.* 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. This process results in the airing of different perspective and avoids the danger of groupthink. *See* Stuart Streichler, *Mad About Yoo, or Why Worry About the Next Unconstitutional War?*, 24 J.L. & Pol. 93, 125 (2008) ("In comparison with the select handful of advisers who have the most influence with the president, the number of elected legislators and their diverse ideologies, constituencies, and perspectives make them less susceptible to groupthink.").

The executive rulemaking process is by contrast quite different, especially during a pandemic. Rules are proposed and advanced by unknown or largely unaccountable government officials without opportunity for public input. There is no voting record that would allow voters to accurately reward or punish government officials based on their decisions. *See* Peter H. Aranson, Ernest Gellhorn, & Glen O. Robinson, *Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 58 (1982) (arguing that agencies "experience electoral accountability only indirectly, however, and therefore

can bear widespread discontent better than most congressmen"). And because those enacting emergency rules and orders tend to be appointed by the Governor, as is the case with the Director of the California Department of Public Health,[19] they are especially susceptible to groupthink. *See* Paul R. Pillar, *The Danger of Groupthink*, Brookings Institute (Feb. 26, 2013) (noting that the "[t]he executive branch of the U.S. government is more vulnerable [to groupthink] than many other advanced democracies").[20]

In the context of a pandemic it is not hard to see why it is tempting for lawmakers to give broad delegations of authority. *See* David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation (1993). A broad delegation allows lawmakers to legislate in poetry and to leave the prose of actual governance to the executive. Since the lawmakers are not required to make—or even guide—any of the hard decisions such as which businesses get to open and which must remain closed, there is no way to hold a lawmaker accountable for these outcomes. Lawmakers get to enact popular bills such as aid packages to small businesses without taking any responsibility for the initial decision to shut them down. *See Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting)

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[19] Office of Governor Gavin Newsom, Governor Announced Appointments (Dec. 7, 2020), https://www.gov.ca.gov/2020/12/07/governor-newsom-announces-appointments-12-7-20/.

[20] Available at https://www.brookings.edu/opinions/the-danger-of-group think/.

("Legislators might seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue.").

In these circumstances it is crucial that the judiciary step into the void and prevent executive overreach in the first place rather than assume that the legislative branch will be both incentivized and capable of taking back this newly delegated power. *See Chadha*, 462 U.S. at 951 ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."); *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting) ("The framers knew, too, that the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing by Congress; often enough, legislators will face rational incentives to pass problems to the executive branch."). It is for the judiciary to declare that the Legislature simply cannot give the Governor the power to enact into law anything he wishes in times of emergency even if it would like to give him 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."). *See also Clinton v. City of New York*, 524 U.S. 417, 449-50 (1998) (Kennedy, J., concurring) (arguing that

"[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers" even if the branches are just trying to "reallocate their own authority"). A pandemic cannot be allowed to result in the degradation of constitutional checks and balances that keep Californians free from oppressive and arbitrary government actions.

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. The Department argues that the Blueprint can be justified under its conferred 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. But the Blueprint is not a "quarantine" or "isolation" in any conventional understanding of those terms. Instead, it is a comprehensive system of business regulation.

Therefore, if CDPH has statutory authority to impose a Blueprint regime, it must be justified under 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 Section 120140 under the canons of statutory construction, including the avoidance canon. Otherwise, Section 120140 violates the non-

delegation doctrine for the same reason as does the ESA's conferral of "all police powers" to the Governor.

i. The Blueprint Regime Is Not an Exercise of the Quarantine or Isolation Power

CDPH claims that its Blueprint is an exercise of its quarantine or isolation power. That is not the case. A general scheme of business closure is not a quarantine and isolation regime.

The Health and Safety Code does not provide a definition of the terms "quarantine" or "isolation." This speaks to the fact that the Legislature was embracing a well-established conventional understanding of those terms—accepting those terms as understood in historical context and as used in case law at the time. *People v. Scott*, 58 Cal. 4th 1415, 1424(2014) ("It is a settled principle of statutory construction that the Legislature is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. Courts may assume, under such circumstances, that the Legislature intended to maintain a consistent body of rules and to adopt the meaning of statutory terms already construed."). The Blueprint is not consistent with the historic understanding of quarantine and isolation in four respects.

First of all, quarantine is properly understood as a restriction on the movement of individuals who are reasonably suspected to have come in contact with a contagious disease—as with a quarantine of passengers on a

ship coming from an infected area. *See Ex parte Culver*, 187 Cal. 437, 442 (1921) ("Quarantine as a verb 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*.") (emphasis added; citation omitted)). Similarly, an isolation order requires an individual who is confirmed to have an infectious disease to isolate from the rest of society for a defined time.[21] In the same vein, the quarantine or isolation of a place must be understood as cordoning off a place when there is reason to believe contagious disease may be present. *See Jew Ho v. Williamson*, 103 F. 10, 22 (N.D. Cal. Cir. Ct. 1900) ("[W]hen a vessel in a harbor, a car on a railroad, or a house on land, is found occupied by persons afflicted with such a disease, the vessel, the car, or the house, as the case may be, is cut off from all communication with the inhabitants of adjoining houses or contiguous territory, that the spread of the disease may be arrested at once and confined to the least possible territory.").

[21] The term "strict isolation" is understood as special confinement measures as may be necessary in extreme cases—as when an infected individual must be confined by force, or where extreme measures are required to assure absolute containment of an individual. Cal. Health & Safety Code § 120235 For example, individuals confirmed to have Ebola were subject to strict isolation in a special ward in 2017. *See* Catherine J. Damme, *Controlling Genetic Disease Through Law*, 15 U.C. Davis L. Rev. 801, 812 (1982) ("Isolation and removal measures are usually applied to people infected with active cases of tuberculosis, and most states operate special segregated facilities to treat the disease.").

But that is not what the Blueprint does. For example, in the red tier restaurants like Sol y Luna would be permitted to seat customers indoors for up to 25 percent capacity. It would be improper to say that this business is under quarantine or isolation orders because in fact the Blueprint allows people to freely enter and leave the premises. Even in the purple tier Sol y Luna can have kitchen staff and waiters inside, and even customers for the purpose of using restrooms. Clearly Sol y Luna is not *cordoned-off* to prevent possible exposure to a confirmed or suspected COVID-19 case. Relatedly, many of the measures imposed by the Blueprint, like social distancing requirements and seating capacity restrictions, cannot be considered quarantine and isolation by any stretch of the imagination.

Second, longstanding judicial precedent states that the State must have probable cause to believe an individual may be infectious to restrict their movement under either the quarantine or isolation power. *See Jew Ho*, 103 F. at 22. *See also 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"). Cal. Health & Safety Code § 120145 must be read against these background principles as authorizing quarantine and isolation only of people or places where there is probable cause to believe that infectious disease is

currently present based on a confirmed case. But the State has pointed to no evidence of a confirmed case at either Ghost Golf or Sol y Luna.

Third, quarantine and isolation measures can remain in place only so long as there continues to be probable cause to believe the disease remains present. *See Application of Halko*, 246 Cal. App. 2d 553, 558 (Ct. App. 1966) (explaining that "orders for quarantine may issue so long as any person continues to be infected"). The COVID-19 virus has a known infectious life of several weeks. But Ghost Golf's facilities have been forced to remain vacant for nearly a year. Therefore, Ghost Golf's forced shutdown cannot be considered a quarantine or isolation because there is no disease present at this time. Similarly, in the Blueprint's yellow tier, businesses could remain restricted even though there are very few (or even no) cases in a given county. As such, the Blueprint cannot be upheld as an exercise of the quarantine or isolation power.

Fourth, quarantine and isolation orders do not give public health officials the discretionary authority to make social value judgments. For instance, one section of the Health and Safety Code explicitly states: "No quarantine shall be raised until every exposed room, together with all personal property in the room, has been adequately treated, or, if necessary, destroyed, under the direction of the health officer; and until all persons having been under strict isolation are considered noninfectious." Cal. Health & Safety Code § 120235. There is no discretion to exempt individuals or

places from quarantine based on an assessment that certain people or places are more important or "essential" than others. The quarantine and isolation power confers authority only as is necessary to temporarily cordon-off businesses when there have been suspected outbreaks—which would require the Department to objectively apply the same restrictions on any business where there is a suspected case, as opposed to picking and choosing what businesses must shut down.

But this is exactly what the Blueprint does in permitting Home Depot, Costco, Target, Wal-Mart, CVS, hair salons, nail salons and even marijuana dispensaries to open indoors while categorically prohibiting Ghost Golf from allowing a single patron inside—even with masks and other appropriate social distancing protocol. Furthermore, favored businesses that are deemed "essential" such as the film industry are given special carve outs and exemptions based not primarily or solely on risk but based on subjective value judgments about the worth of an industry. Picking winners and losers not based on risk but based on policy judgments is not consistent with the power to quarantine and isolation.

ii. Section 120140 Does Not Authorize General Business Regulation

For the foregoing reasons CDPH can only possibly justify imposing the Blueprint's restriction on Ghost Golf and Sol y Luna under Section 120140 of the Health and Safety Code, which confers authority on the

Department to "take measures as are necessary to ascertain the nature of the disease and prevent its spread." But this should not be construed as an open-ended conferral of authority to pronounce and enforce any health and safety regulation that the Department might think beneficial in addressing contagious disease. For one, the statute does not imply that the CDPH has unfettered prerogative to decide what constitutes an appropriate public health response. But rather the term "necessary" must be construed as authorizing the Department only to take measures that are strictly required to curb the spread of COVID-19—*i.e.*, objective restrictions where critically needed, as opposed to subjective valuations of the relative social value of different business models during a pandemic.[22] And the canons of construction support this interpretation.

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,

[22] Merriam Webster, https://www.merriam-webster.com/dictionary/necessary (defining "necessary" as "absolutely needed").

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 Health and Safety 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. As discussed below, CDPH's construction would vest the Department with unfettered discretion.

iii. The Health and Safety Code Violates the Non-Delegation Doctrine If It Authorizes the Blueprint Regime

If it really is true that CDPH has authority to craft and enforce a complex system of business restraints in whatever manner the Department deems "necessary," then the Health and Safety Code violates the non-delegation doctrine for the same reasons as does the ESA's conferral of "all police power."[23] Just as the Legislature is precluded from conferring "all

[23] In the Superior Court, Defendants argued that Plaintiffs waived this claim, but that is not true. After discussing the non-delegation doctrine at length in addressing the problem with the ESA's conferral of "all police power," Plaintiffs thought it unnecessary to rehash that same discussion again as applied to Section 120140—especially because they had already sought a page length extension. But Plaintiffs clearly invoked the same line of cases in arguing that the Defendants' construction would violate the non-delegation doctrine. Plaintiffs intended to elaborate further on Section 120140's non-delegation problem in a reply brief; however, Plaintiffs were denied the opportunity to file a reply and were only permitted to respond at oral argument. In any event, Defendants were on notice that Plaintiffs were invoking the non-delegation doctrine and they responded at length in their opposition brief below. The non-delegation argument is raised explicitly in Count IV of Plaintiffs' Complaint. JA 26-27.

police powers" on the Governor without any substantive, procedural or temporal restraint, it is also precluded from conferring the open-ended authority to CDPH to do anything the Department might think "necessary" in responding to contagious disease. *See Clean Air Constituency*, 11 Cal. 3d at 817; *Downey*, 96 Cal. App. 2d at 900-01. Such an open-ended grant of authority would leave CDPH without any necessary guidance and it would allow unelected officials to weigh the difficult health and economic considerations at hand and decide fundamental policy for the State such as which businesses qualify as "essential" and are allowed to open and which are not and must stay closed. *People's Fed. Sav. & Loan Ass'n*, 110 Cal. App. 2d at 700; *Kugler*, 69 Cal. 2d at 384.

Similarly, there are no meaningful safeguards here limiting or constraining the exercise of these broad powers, nor is there a temporal limitation. *Birkenfeld*, 17 Cal. 3d at 168-69. For that matter Health and Safety Code Section 120140 lacks even the weak safeguards contained in the ESA, because CDPH is permitted to act even without an emergency declaration from the Governor, which means that there is no way for the Legislature to terminate CDPH's authority short of passing a new law. So CDPH could exercise its apparent discretion to impose a Blueprint-like regime even in response to the seasonal flu or even on a permanent basis—reasonably anticipating resurgence of flu variants each winter.

III. THE BALANCE OF THE EQUITIES FAVORS AN INJUNCTION

A. The Plaintiffs Have No Adequate Legal Remedy

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 even during the COVID-19 pandemic.[24] Furthermore, monetary compensation is unavailable as the Defendants are immune from damages, Cal. Gov't Code § 8655, and therefore "unable to

[24] 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).

respond in damages." *Friedman v. Friedman*, 20 Cal. App. 4th 876, 890 (1993), *as modified on denial of reh'g* (Dec. 27, 1993).

In the proceedings below, Defendants did not contest that Plaintiffs have no adequate legal remedy. JA 157 Therefore, there is no dispute on that issue. This consideration weighs in favor of granting a preliminary injunction.

B. The Superior Court Committed Legal Error in Assessing the Balance of Hardship

The Superior Court's decision denying Plaintiffs' motion for preliminary injunction rested on three errant legal assumptions. As detailed above, the first was that Plaintiffs were unlikely to prevail on the merits.

The Court committed yet another grave legal error when it weighed the respective hardship of the "admitted very significant economic harm," JA 274, to Plaintiffs against the public health concerns that might arise if the Court should enjoin enforcement of the Blueprint against businesses throughout the entire State. In determining the balance of equities, the Superior Court was required to consider the "harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." *IT Corp. v. Cty. of Imperial*, 35 Cal. 3d 63, 69-70 (1983). In doing so, the Court must take into account and weigh the real-world "harm which an erroneous interim decision may cause." *Id.*

In this case Plaintiffs have not asked for a statewide injunction. They have not asked for an injunction to open a whole industry, nor to prevent enforcement even for all similarly situated businesses in Fresno or Bakersfield. All Plaintiffs seek at this juncture is a preliminary injunction to prevent enforcement of the Blueprint against the two businesses at issue in this lawsuit. Accordingly, the Court's analysis of the "harm which an erroneous interim decision may cause" should have been focused on the potential harm that having two small businesses open for the duration of trial would have on the state's COVID-19 related response. But the Superior Court did not focus its analysis on this risk and instead weighed the risk of harm to Plaintiffs against the risk of a sudden suspension of the Governor's Blueprint throughout the whole state. This was legal error and requires reversal.

Finally, the Superior Court erroneously concluded that a preliminary injunction cannot issue to prevent irreparable economic injury without evidence demonstrating that there is no risk to the public in issuing the injunction. JA 274.

That formulation is necessarily wrong if this Court concludes that Plaintiffs are likely to prevail on the merits because the two preliminary injunction factors are "interrelated." *King v. Meese*, 43 Cal. 3d 1217, 1226, (1987). Plaintiffs' likelihood for success on the merits necessarily "affect[s] the showing necessary to a balancing-of-hardships analysis." *Right Site Coal.*

v. Los Angeles Unified Sch. Dist., 160 Cal. App. 4th 336, 342 (2008). Or in other words, "the more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue." *King v. Meese*, 43 Cal. 3d 1217, 1227 (1987). Accordingly, if this Court reverses the Superior Court on the question of whether Plaintiffs are likely to prevail on the merits, the Court must also conclude that the trial Court applied the wrong standard because it failed to weigh the State's (diminished or non-existent) interest in enforcing a shutdown regime that is likely unlawful.

Under the Superior Court's errant standard, the balance of hardship factor categorically weighs against injunctive relief where a party seeks to enjoin enforcement of COVID-related business restrictions—no matter how ruinous the harm, and even if those restrictions violate the California Constitution. This is so because the Superior Court said Plaintiffs had a duty to submit evidence demonstrably proving that an injunction would not contribute to the spread of COVID-19. JA 274. But where Plaintiffs have suffered severe and irreparable economic harm and have established a likelihood to prevail on the merits, the balance of harms inquiry should weigh in favor of preliminary injunctive relief unless the opposing party provides non-speculative evidence sufficient to show that an injunction is more likely than not to directly contribute to the spread of COVID-19.

What is more, that analysis must consider Plaintiffs' sworn declarations of measures they would be taking to minimize public health risks if the injunction should issue. For example, Ghost Golf's owner has sworn that if allowed to reopen he would minimize risks by requiring patrons to always wear masks, just as customers are required to do when visiting other indoor businesses. JA 115 ¶ 19. Ghost Golf would also minimize risks by requiring patrons to make online reservations, by limiting group sizes to four or less (presumptively family or friends who are already "podding" together), and by ensuring social distancing by requiring each mini-group to stay at least two holes apart—a measure that would guarantee patrons maintain sufficient distance from others in a manner that is impossible for most indoor facilities like grocery stores, hardware stores, and retail establishments where customers are routinely passing within six feet of each other. JA 115 ¶¶ 18-19 Additionally, Ghost Golf would minimize risks by having patrons record their scores electronically on their phones to avoid passing score sheets, by continuously sanitizing common surfaces, and of course sanitizing golf clubs between patrons—just as grocery and retail stores are sanitizing carts between customers. *Id.* Notwithstanding voluminous evidence that COVID-19 represents a serious public health threat, Defendants have put forward no evidence to suggest that an indoor mini-golf facility would pose a special threat to the community if abiding by these commonsense health and safety protocol.

Likewise, Sol y Luna's owner has committed to abiding by social distancing protocols and best industry standards—consistent with CDC guidelines. JA 120 ¶ 11. Even if an injunction should issue, Sol y Luna would not return to the "Before Times." For one, the food industry is heavily regulated. As such, Sol y Luna would continue to abide by all federal, state, and local requirements protecting consumers with the preparation and service of food. JA 120 ¶¶ 11-13. More generally, California businesses have a legal duty to take adequate measures to ensure the health and safety of their employees. For this reason alone, Sol y Luna would continue to exercise great caution, even if freed from the inflexible restrictions imposed under the Blueprint regime.

What is more, if there was real concern in the community, nothing would inhibit the City of Bakersfield or Fresno from enacting an ordinance codifying the Governor's restrictions, or otherwise modifying those restrictions, consistent with public concerns at the local level. For all of these reasons the Superior Court erred in assuming that the State has a superior interest here in protecting the local community. That assumption is seriously undermined by the fact that many counties and localities have refused to enforce and or actively opposed the Governor's Blueprint regime.[25] And in

[25] *California Cities, Counties Split on Enforcing Health Orders*, Associated Press (Nov. 19, 2020), https://www.usnews.com/news/best-states/california/articles/2020-11-19/california-struggles-with-how-to-enforce-coronavirus-orders.

any event, the decision below simply failed to recognize that if the Governor's Blueprint regime is unconstitutional, the State lacks any legitimate interest in continuing its enforcement. *See also G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (affirming that it is never in the public interest to allow for the continued violation of the Constitution). At that point, if there are truly compelling public health concerns, they can be adequately addressed (and quickly) by local authorities or by the General Assembly.

C. The Superior Court's Balance of the Equities Was Arbitrary and Capricious Given the Narrow Relief Requested

Even under an arbitrary and capricious standard, the Superior Court's decision should be reversed. As detailed above, both Plaintiffs have sworn under oath that they would be committed to maintaining social distancing and other prudent health and safety protocols in the event the Court should provide injunctive relief. Plaintiffs' declarations demonstrate that they are not "blind" to the public health concerns at issue, but would take proper precautions to safeguard the community while operating responsibly. JA 115 ¶¶ 18-19; JA 120 ¶¶ 11-13. And Defendants cast no doubt or aspersions on this point. As such, the record plainly reflects that Plaintiffs take COVID-19 seriously and would take appropriate measures to minimize public health risks if permitted to reopen. For this reason, the Superior Court was wrong

in concluding that "Plaintiffs [had] submitted . . . no evidence, or even argument, concerning public harm should the injunction be granted." JA 274.

The Court similarly erred when it concluded that the State's evidence of harm outweighed the "admitted very significant economic harm" to Plaintiffs. JA 274. As already discussed, the proper metric is the impact of the actual injunction that Plaintiffs sought. Plaintiffs sought only a narrow preliminary injunction which would apply only to two specific small businesses who have publicly committed to following strict public safety measures.

Plaintiffs have requested the narrowest form of relief possible. But the Superior Court's analysis overlooks these facts in assuming public harms in the aggregate. This was arbitrary and capricious,-because Defendants offered no specific evidence as to the likely public health impact of granting injunctive relief for two small businesses who operated consistent with their commitment to adhere to social distancing and other health protocols outlined in their declarations.

To the contrary, the only evidence in the record suggests that there is little to no 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. Accordingly, there is no compelling reason why Ghost Golf should not be allowed to reopen at this time to stem-off financial ruin—*i.e.*, the imminent risk of bankruptcy and permanent closure. Likewise, Sol y Luna should be permitted to reopen subject to the owner's commitment to taking prudent measures to safeguard patrons and employees. Given the evidence before the Court, it was an abuse of discretion for the Court to conclude that the risk of harm of allowing Plaintiffs to reopen outweighed the "admitted very significant economic harm" that Plaintiffs would suffer from continued closure.

CONCLUSION

For the above reasons, this Court should reverse the Superior Court's denial of Appellants' motion for preliminary injunction and should remand to the Superior Court with instructions to enter a preliminary injunction in Plaintiffs'/Appellants' favor enjoining Governor Newsom and CDPH from enforcing their Blueprint and related executive orders.

DATED: March 8, 2021.

Respectfully submitted,

LUKE A. WAKE
DANIEL M. ORTNER

By /s/ Luke A. Wake

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

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPELLANTS' OPENING BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 13,866 words.

DATED: March 8, 2021.

/s/ Luke A. Wake
LUKE A. WAKE

DECLARATION OF SERVICE

I, Luke A. Wake, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On March 8, 2021, a true copy of APPELLANTS' OPENING BRIEF was electronically filed with the Court through truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 8th day of March, 2021, at Sacramento, California.

/s/ Luke A. Wake
LUKE A. WAKE

Kiren Mathews

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