No. F082357

In the Court of Appeal of the State of California
Fifth Appellate District

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

Plaintiffs-Appellants,

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)

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF AMICUS

The interest of amicus is set forth in the accompanying motion for leave to file.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff-Appellants are correct that the State cannot justify the statewide shutdowns of business by reference to the State's "quarantine" authority. Shutdowns are not quarantines. A quarantine is an individualized process whereby specific people whom the government has good reason to believe are actually infected with a contagious disease are placed in confinement or detention pursuant to due process of law. The *Blueprint* and the underlying business shutdowns are not individualized, however: they apply to all persons, regardless of whether there is reason to believe they are infected. Therefore, if the *Blueprint* can be justified at all, it cannot be under the State's quarantine authority, but must be under some other statutory or common law authority.

Historically speaking, however, American law has not accepted—and certainly California law has never accepted—the proposition that, in times of crisis, a single executive officer or his administrators can take in hand the entire legal authority of the State into the indefinite future, even while the legislature is doing business. On the contrary, although the executive branch has exercised extraordinary powers in moments of acute peril, the law has never authorized the executive to unilaterally establish general rules to govern society for an indefinite period during a *chronic crisis*.

State Supreme Courts in Michigan, Wisconsin, and Kentucky have recently addressed the constitutionality of gubernatorial powers under those states' analogs to the California Emergency Services Act. *See In re Certified Questions*, No. 161492, 2020 WL 5877599 (Mich. Oct. 2, 2020); *Wisconsin Legislature v. Palm*, 942 N.W.2d 900 (Wis. 2020); *Beshear v. Acree*, 615 S.W.3d 780 (Ky. 2020). These cases have developed a helpful sliding scale of considerations that this Court should consult to determine whether executive action is lawful. Together, they evaluate the *duration* of the governor's asserted authority, the *scope* of that power, whether the legislature can convene to conduct business, whether the emergency is an acute incident such as a storm or an ongoing crisis like a pandemic, and the degree to which the executive is accountable to the public when promulgating orders.

Those factors all weigh against the *Blueprint*'s validity. Here, the Governor is asserting authority over an extremely broad scope of activities—the conduct of business in the entire state into the indefinite future—even though the legislature is currently in session and doing business. He is also promulgating orders without any public input and even without meaningful advance notice to the public. This is beyond what the Emergency Services Act contemplates, and it violates the separation of powers, as well as California's broader tradition of elevating the legislative over the executive authority.

ARGUMENT

I. The shutdowns are not "quarantines."

A quarantine is an *individualized* process. *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.'" (citation omitted)). This is reflected in the statute on which the State relies, Cal. Health & Safety Code § 120215(a), which provides that health officers may "[e]nsure the adequate isolation of *each* case, and appropriate quarantine of *the* contacts and premises" of an infected person. (Emphasis added.) It is also reflected in state regulations, which define "quarantine" in terms of *specific individuals*, not society-wide restrictions. *See* 17 Cal. Code Regs. § 2520 (defining quarantine as "the limitation of freedom of movement of persons or animals *that have been exposed*" and requiring health officer to "determine the contacts who are subject to quarantine" (emphasis added)).

In other words, quarantine refers to a case-by-case determination that a person has been exposed to a contagious disease—not to a general, statewide limitation on movement. This has always been understood as the definition of quarantine. *See, e.g.*, Black's Law Dictionary (11th ed. 2019) (defining quarantine as "[t]he isolation of a person or animal afflicted with a communicable disease or the prevention of such a person or animal from coming into a particular area … ."); Black's Law

Dictionary 976 (1891) (defining quarantine as "a period of time (theoretically forty days) during which a vessel, coming from a place where a contagious or infectious disease is prevalent, is detained … .").

The predecessor to the Health and Safety Code provisions regarding quarantine, California Political Code section 2979a, also made this clear. It provided that county health officers would have power to "take possession or control of the body of any living person." In *In re Shepard*, 51 Cal. App. 49 (1921), a woman was arrested for prostitution, but was then detained at a hospital on the pretext of a quarantine. The Court of Appeal found this unlawful because the statutory quarantine powers only authorized this sort of detention if there was some "'reason to believe' that [a] person [was] … afflicted" with a disease. *Id.* at 51. *See also Ex parte Dillon*, 44 Cal. App. 239, 241 (1919) (person may not be detained under quarantine authority "without any knowledge being had on the part of the health department or its inspectors which would give rise to reasonable cause, or even suspicion, that the persons so detained are afflicted with contagious or infectious venereal disease").

The State also relies on its power under Health & Safety Code § 120130(c) to enforce "isolation." But isolation is defined as "separation of infected persons from other persons"—meaning that it, too, applies on a case-by-case basis. *See* 17 Cal. Code Regs. § 2515. This makes sense of Health & Safety Code § 120135, which says the Health Department "may establish and maintain places of quarantine or isolation." That statute would

make no sense if the terms "quarantine" and "isolation" could be stretched to refer to a statewide shutdown order.

Likewise, Section 120145 permits the Department to "quarantine, isolate, inspect, and disinfect persons," etc.—again reflecting the assumption that "quarantine" and "isolate" refer to *specific, individual* cases of persons. None of these statutes contemplate that "quarantine" or "isolation" could be applied indiscriminately to the entire population of California without regard to whether they are actually sick or in contact with sick people.

The State's argument that Section 120145 lets it control "other property [or] places" takes those words out of context. The statute contemplates government control over property or places that it has *particularized reason to believe* have harbored infectious persons and are thus *specifically* threats to the public welfare. *See also* Paul Jerome McLaughlin, Jr., *Can They Do That?: The Limits of Governmental Power over Medical Treatment*, 37 J. Legal Med. 371, 374 (2017) ("Government agents have broad discretion when they determine whether an individual should be placed in quarantine or not, but these determinations must be based on facts that substantiate a reasonable belief that the individual may be carrying a communicable disease.").

Courts have consistently defined "quarantine" and "isolation" as case-specific concepts. In *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. (5 Otto) 465 (1877), the U.S. Supreme Court struck down a Missouri law that prohibited the importation of

certain cattle into the state during certain months. The state claimed that the law was designed to prevent the spread of a disease that was "very fatal" to cattle, *Wilson v. Kansas City, St. J. & C.B.R. Co.*, 60 Mo. 184, 186 (1875), but the Supreme Court rejected this argument, saying that the law "[was] not a quarantine law," precisely because it applied to "all natural persons and to all transportation companies … 'whether [their cattle were] free from disease or not.'" *Husen*, 95 U.S. at 473. *See also Henderson v. Mayor of New York*, 92 U.S. (2 Otto) 259, 271, 275 (1875) (state law against immigrants was not a valid law "against contagious and infectious diseases" because it was "applicable to all passengers alike"). Thus in *Dillon*, 44 Cal. App. at 244, the Court of Appeal declared that, "in view of the great concern of the law for the liberty of individuals," it was improper for public authorities to use their quarantine powers to restrain a person's free movement based on a mere assumption that the person had been exposed to a contagious disease; "for such detention to be legally justified, the return of the officer should show some further reason why the persons so detained are suspected of being afflicted."

For the same reason, the federal District Court in *Cnty. of Butler v. Wolf*, 486 F.Supp.3d 883, 914 (W.D. Pa. 2020), found that a statewide shut down order was "not a quarantine," because "[a] quarantine requires, as a threshold matter, that the person subject to the 'limitation of freedom of movement' be 'exposed to a communicable disease.'" (citation omitted). Instead, the Pennsylvania shutdown orders were an "unprecedented" form of

statewide mandate that must find their lawful authority in some concept other than quarantine or isolation authority. *Id.* at 916.

Simply put, the concepts of "quarantine" and "isolation" are irrelevant to this case. Quarantine and isolation are not at issue, because the State has not implemented either of those things and Petitioners do not challenge either of those things. What is at issue here is not a quarantine or an isolation, but a set of regulations governing businesses statewide into the indefinite future.

The State's theory that it can take whatever measures it believes would protect the public from disease, with respect to any persons whatsoever, any property at all, and any places without limit—without having to demonstrate any particularized suspicion—would literally amount to control over every aspect of behavior by all 40 million people in California for an indefinite period of time. That is not a reasonable interpretation of the state's statutes on quarantine and isolation.

II. How to regulate the public health is a legislative, not an executive, determination.

The State asserts that the Governor has authority under the Emergency Services Act to "promulgate, issue, and enforce such orders and regulations as he deems necessary," Cal Gov. Code § 8627, and, in general, that he has traditional common law police powers to combat contagious disease through emergency action. But these authorities are not nearly so broad.

A. The single-executive rule that the State defends here lacks any basis in America's or California's legal traditions.

There is no common law tradition[1] in California to warrant unilateral executive action in times of emergency. True, although some societies have relied on such authority, without legislative checks or balances, that is not the American or Californian tradition. In the ancient Roman Republic, the Senate would authorize a single official to exercise power in times of emergency without the usual legal forms; this is the origin of our term "dictator." *See* Alan Greene, *Emergency Powers in a Time of Pandemic* 15 (2020); Benjamin Straumann, *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution* 64-65 (2016). In the 1650s, in the midst of military and social crisis, the British Parliament vested Oliver Cromwell with the authority of Lord Protector, a title that had been granted to many leaders previously. Antonia Fraser, *Cromwell: Our Chief of Men* 449 (1973). Similarly, in 1799, the French government, in a time of military emergency

[1] In a recent article addressing Hawai'i's emergency management statutes, Prof. Robert Thomas has explained that emergency law is typically subject to "three constitutions," meaning the federal and state constitutions, as well as the "'popular constitution' that exists, unwritten, in the broader culture," and which is "often treated as greater than the actual limitations as adjudicated by the courts for decades" in cases involving emergency management laws. *Hoist the Yellow Flag and Spam Up: The Separation of Powers Limitation on Hawai'i's Emergency Authority*, 43 U. Haw. L. Rev. 71, 78–80 (2020). The "tradition" discussed in this section refers to this "popular constitution" conception.

and financial peril, granted Napoleon Bonaparte authority as "First Consul" to rescue the nation. M.J. Sydenham, *The First French Republic 1792-1804* at 210, 230 (1974).

The United States rejected that practice. During the Revolution, George Washington was granted extensive authority over the management of the war, but as John Adams noted, "Congress never thought of making him dictator." Letter to Abigail Adams, Apr. 6, 1777, in 1 Charles Francis Adams, ed., *Letters of John Adams Addressed to his Wife* 206 (1841). When some Virginians suggested that the state appoint a dictator for the duration of the war, Thomas Jefferson—who was himself then serving as the wartime governor of Virginia—wrote indignantly against the "wretched" proposition, which he said could not be based on "any principle in our new [state] constitution, expressed or implied[.]" Thomas Jefferson, *Notes on Virginia* (1787) *reprinted in* Merrill Peterson, ed., *Jefferson: Writings* 252 (1984). "Our antient [*sic*] laws expressly declare, that those who are but [representatives of the people] … shall not delegate to others powers which require judgment and integrity in their exercise." *Id.* at 253.[2]

Indeed, the King's purported authority to suspend the laws when he thought it necessary was among the grievances that

[2] Jefferson was paraphrasing John Locke, who wrote in the *Second Treatise* that "[t]he *Legislative cannot transfer the power of making laws* to any other hands," because the legislature only has "a delegated power from the people," and therefore may not "pass it over to others." John Locke, *Second Treatise of Civil Government* 81 (1952). The people gave the legislature power "only to make *Laws*, and not to make *Legislators*." *Id.*

animated the Revolution. *See* Declaration of Independence, 1 Stat. 1 (1776). Thus, by 1815, the Louisiana Supreme Court could declare it well settled that American law included no common law tradition authorizing the executive to take unitary control in times of emergency. *Johnson v. Duncan*, 3 Mart. (o.s.) 530, 534 (La. 1815).

During the Civil War, President Lincoln exercised unprecedented authority over the country, even suspending the writ of *habeas corpus*. Yet he acknowledged that he did this only because the crisis prevented the assembly of Congress, and he promptly called for a special session of Congress, which ratified his actions. Brian McGinty, *Lincoln and the Court* 140 (2009). Not only did Lincoln not rule without checks and balances, but Congress established a Joint Committee on the Conduct of the War, which aggressively oversaw the Administration's proceedings. *See generally* Bruce Tap, *Over Lincoln's Shoulder: The Committee on the Conduct of the War* (1998).

California's legal tradition has always been particularly hostile to the idea of a powerful single executive official exercising authority over the entire state. Far from being a "strong governor" state, California's Constitution creates a notably weak governor, by separating the executive function to a striking degree. California independently elects more of its executive officials than any other state except North Dakota,[3]

[3] A dozen executive branch officers in California are elected: the Governor, Lieutenant Governor, Attorney General, Secretary of State, Controller, Treasurer, Superintendent of Public

meaning California really has a "plural executive" that operates more like a committee than like a governorship. Brian Janiskee & Ken Masugi, *Democracy in California: Politics and Government in the Golden State* 71 (3d ed. 2011). California's Governor cannot even spend money unilaterally—that is done by the Controller, who does not answer to the Governor. Cal. Const. art. XVI § 7. Even in "fiscal emergenc[ies]," the Governor cannot act independently; he or she must still call the legislature into session to address such an emergency. *See* Cal. Const. art. IV § 10(f).

These factors well justify one writer's observation that its framers viewed the legislature as "the dominant branch with plenary power, while the governor was … certainly not a 'unitary' executive as envisioned in the federal design." David R. Carpenter, *On the Separation of Powers Challenge to the California Coastal Commission*, 79 N.Y.U. L. Rev. 281, 298 n.84 (2004).

During the Spanish Flu epidemic of 1918, Governor William Stephens never attempted to exercise unilateral authority of the sort the current governor asserts. Instead, *local* officials took the lead in closing theaters, concert halls, and other places of large public gatherings. N. Pieter M. O'Leary, *The 1918-1919 Influenza Epidemic in Los Angeles*, 86 S. Cal. Q. 391, 394 (2004). Gov. Stephens implemented a voluntary mask order, *id.* at 401, but neither he nor any other official asserted power to

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Instruction, Insurance Commissioner, and members of the Board of Equalization.

dictate the conditions of operation for every business in the state. In other words, the *Blueprint* represents an assertion of authority that is "unprecedented in the history of our [state] and our Country" and that has "never been [attempted] in response to any other disease in our history." *Wolf*, 486 F. Supp. 3d at 916.

That is not to say California has never exceeded the American common law tradition; executive officers have sometimes asserted virtually total control to deal with crises, and with regrettable results. The greatest urban emergency in California history, the San Francisco earthquake of 1906, resulted in a breakdown of city government. Although martial law was never officially declared, Mayor Eugene Schmitz and General Frederick Funston asserted almost absolute authority over the city. *See* Henry Winthrop Ballantine, *Military Dictatorship in California and West Virginia*, 1 Cal. L. Rev. 413 (1913). This vastly worsened the disaster. *See id.* at 416; Philip Fradkin, *The Great Earthquake and Firestorms of 1906* at 74-79 (2005). Military and civilian officials, and vigilantes, were "given carte blanche," *id.* at 19, which led both to violence between people and to the burning down of the city. *Id.* at 111-12. Thus, the assertion of virtually unlimited executive authority resulted in lawlessness. As Professor Ballantine observed, the idea that "a state court should sanction" the principle "that the governor has power not only to suspend all statutes, but issue edicts in

their place," is "an abdication of the supremacy of law." *Supra* at 426.[4]

Neither the American common law tradition nor California's constitutional tradition has any place for the proposition that, in an emergency, the state's power can be exercised by a single individual who may write and enforce rules for an indefinite period. On the contrary, during an emergency, "the power of the governor extends to the enforcement of the constitution and law of the state only, not to … the substitution for them of arbitrary rules and orders under the pretence [*sic*] of 'executing' them." Henry Winthrop Ballantine, *Unconstitutional Claims of Military Authority*, 24 Yale L.J. 189, 206 (1915). Therefore, whatever power the Governor may have in this case must be traceable to specific *statutory* authority, not to any traditional executive power.

B. The Emergency Services Act allows the governor to issue orders, not to make the law.

The California Emergency Services Act gives the Governor broad authority to suspend statutes, issue orders, and take actions necessary in an urgent crisis. It does not allow him to make laws for the general carrying on of business into the indefinite future.

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[4] Even if Schmitz and Funston had acted lawfully, of course, the 1906 catastrophe was a specific, acute event; it cannot therefore establish a precedent that there is any traditional practice or common law principle authorizing unitary executive rule *indefinitely* during an *ongoing* crisis.

Indeed, the power to make rules for protecting public health is fundamentally a *legislative* power; virtually *all* of the police power, after all, is concerned in some way or other with protecting the public health and safety by setting rules for people to transact business and interact in a manner best suited to prevent them from harming each other—and the power to create such rules is legislative in nature. The executive can exercise that power only during episodes of urgency that make it impracticable for the legislature to act, and even then, that power is subject to checks and balances pursuant to the necessity determination. The opposite view—that the executive can write general rules for the carrying on of business in society into the indefinite future, and can judge on his own whether the necessity exists for such an exercise of power—would be an extraordinary departure from longstanding constitutional principles.

In the classic case *People ex rel. Barmore v. Robertson*, 134 N.E. 815 (Ill. 1922), the Illinois Supreme Court upheld the mandatory quarantine of an asymptomatic carrier of typhoid—but also declared that Chicago acted unlawfully by vesting in a single official the power to make and enforce public health regulations. The court's thorough discussion made clear that "what laws or regulations are necessary to protect public health and secure public comfort is a legislative question," *id.* at 817, and that legislatures could vest "ministerial boards" with "power to prescribe rules and impose penalties" that "have the force and effect of law." *Id.* at 817-18. But, it observed, "[w]hile the powers

given to the health authorities are broad and far-reaching they are not without their limitations." *Id.* at 819.

For example, a person could not be quarantined without some individualized and specific reason to believe the person actually had a contagious disease. *Id.* (citing *In re Shepard*, *supra*). Also, health officers had no power to "promulgate and enforce rules which merely have a tendency to prevent the spread of contagious and infectious diseases," when those rules "are not founded upon an existing condition or upon a well-founded belief that a condition is threatened which will endanger the public health. The health authorities cannot interfere with the liberties of a citizen until the emergency actually exists." *Id.*

More importantly, the court emphasized that the risk of contagious disease could not justify unchecked one-man rule. Although "[m]any authorities contend that the administration of public health should be vested in an individual," it noted, it was dangerous to give "to one person the determination of such important and drastic measures as are given to [health] boards." *Id.* at 820. The usual argument for giving a single person this power was "that this form of administration of the health laws is productive of efficiency and economy," but "[t]he same argument might be made in favor of an absolute monarchy." *Id.* The "experience of the world" showed that checks and balances are necessary to "insure to the people a more reasonable and less arbitrary administration of the laws." *Id.* For that reason, the Chicago City Council "had no authority to delegate to a health

officer the powers and duties which the Legislature said it might delegate to a board of health." *Id.*

The city health commissioner, said the court, was "purely a ministerial officer" with "no legislative powers whatever," and the City therefore could not give him "authority to make rules and regulations which shall have the effect of law. … His authority is limited to carrying into execution proper orders of a legally constituted board of health." *Id.* Citing cases from Kentucky, Pennsylvania, and Iowa, the justices ruled that "a county board of health [does] not have power to delegate its duties to a health officer." *Id.* (citing *Taylor v. Adair Cnty.*, 84 S.W. 299 (Ky. 1905); *Commonwealth v. Yost*, 46 A. 845 (Pa. 1900); *Young v. Cnty. of Blackhawk*, 23 N.W. 923 (Iowa 1885)).[5]

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[5] The court also noted that insofar as the Illinois statute was constitutional, it was so only because of "the law of necessity, and when the necessity ceases the right to enforce the regulations ceases." *Id.* at 819. It was this principle of necessity that the U.S. Supreme Court relied upon in *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905), when it said that the state's vaccination requirement was "justified by the necessities of the case." There, the Court emphasized that phrase because it recognized that there might be cases in which the state exercised its public health powers "in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner" or "so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons." *Id.* The *Jacobson* Court followed this observation by pointing to two cases—*Hannibal*, *supra,* and *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U.S. 287 (1900)—in which it had found that purported public health regulations were unconstitutional. Thus, as Professor Scott Burris concludes, "[t]he rule of *Jacobson* is not one of categorical deference to a state's political decisions," as some courts have imagined. *Rationality Review and the Politics of Public Health*, 34 Vill. L.

As explained in the subsequent section, a similar analysis shows why the California Emergency Services Act does not delegate authority to the extraordinary degree suggested by the State here. Like most statutes establishing the law of emergencies, that Act primarily contemplates an discrete, urgent incident in which the executive is compelled to take charge in order to address a discrete disaster. During such times, it is appropriate for the executive to issue *commands*. But commands—which the Act characterizes as "orders and regulations," Cal. Gov't Code § 8567—are not *laws*, and the executive never has authority to issue laws. This case hinges on that distinction.

Commands are issued from a superior to an inferior, are addressed to particular people, and are inherently temporary, meaning that they "die[ ] with the occasion," rather than being "standing orders." H.L.A. Hart, *The Concept of Law* 23 (1961). Orders are also specific rather than general, and are characterized by a "managerial" rather than a "polycentric" focus. Lon L. Fuller, *The Principles of Social Order* 208-29, 254 (rev ed. 2001). This means that *commands or orders* pursue the "managerial" goals of the commanding authority—whereas in the "polycentric" order governed by *law*, the rules exist to "furnish

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Rev. 933, 965 (1989). "Rather, *Jacobson* held that the commitment of health decisions to the political branches entitles the state to proceed unimpeded with necessary actions bearing a reasonable medical relation to a demonstrable health threat. This rule…imposes a medical limitation on the state's health power, indicating the Court's adoption of a hybrid, rather than purely legislative, model of the health decision." *Id.*

baselines for human interaction," or in other words, to enable people to pursue their *own* goals in security. *Id.* at 254.

Obviously the dividing line between commands and laws is sometimes hard to draw, because they are matters of degree. But no difficult line-drawing is required in this case, because the *Blueprint* makes no pretense of being a command or an order. It is not inherently temporary, but is intended to be a standing order. It is not specific, but is general. It purports to be polycentric rather than managerial in nature. In other words, it falls on the *law* side rather than the *command* side of the line. The *Blueprint* aims to "furnish baselines for human interaction." Fuller, *supra* at 254—which means it is legislation, not an order, command, or regulation.

III. The Court should employ the sliding scale analyses used by the Michigan, Wisconsin, and Kentucky Supreme Courts.

A. Michigan, Wisconsin, and Kentucky decisions carefully balance the need for urgent executive action with the importance of checks and balances.

Courts have addressed governors' use of extraordinary emergency powers in several recent cases. The three most relevant are *In re Certified Questions*, in which the Michigan Supreme Court declared that the state's Emergency Powers of the Governor Act unconstitutional; *Palm*, in which the Wisconsin Supreme Court found that the state's Administrative Procedures Act applied to rules promulgated by the state's leading health official; and *Beshear*, in which the Kentucky Supreme Court

rejected nondelegation challenge to Kentucky's emergency statutes.

The Michigan case concerned two statutes: the Emergency Management Act (EMA) and the Emergency Powers of the Governor Act (EPGA). These statutes differed in important ways. First, the EMA allowed the governor to proclaim an emergency and to issue emergency orders, but only for a period of 28 days, after which the emergency declaration would automatically terminate unless expressly renewed by the legislature. *See In re Certified Questions*, 2020 WL 5877599 at *6. The EPGA, by contrast, contained no time limitation. *Id.* at *8.[6]

Second, while the EMA allowed the governor to issue executive orders to suspend regulations and statutes, use the state's resources, take private property, direct evacuations, and do other things necessary to carry out the EMA's provisions, *see* Mich. Comp. Laws § 30.405, the EPGA gave the governor much broader authority to "promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." 2020 WL 5877599, at *8 (citing Mich. Comp. Laws § 10.31(1)).

In assessing the constitutionality of the two acts, the court used the federal test for delegation—i.e., whether the statute

[6] *Cf.* Thomas, *supra* at 90 (noting that in the Hawai'i emergency act, the hard expiration date on a governor's emergency proclamation "is the sole democratic check on the governor's power.")

delegating authority included an "intelligible principle" that would limit the scope of the delegated authority—and also examined the "durational scope of the delegated power." *Id.* at *13- 14. The EMA passed this test, but the EPGA did not. The EPGA's "reasonableness" requirement did not qualify as an intelligible principle. Because the government lacks authority to act unreasonably to begin with, this reasonableness provision "place[d] a largely (if not entirely) illusory limitation upon the Governor's discretion." *Id.* at *16. And, unlike the EMA, the EPGA "authorize[d] indefinite exercise of emergency powers for perhaps months—or even years," which implied no real limit on the governor's authority. *Id.* It was therefore unconstitutional.

The Wisconsin case was brought by the state legislature, challenging the authority of the state's chief health officer to promulgate an order (called Order 28) which, among other things, imposed a statewide shutdown of businesses and barred travel and private gatherings. *Palm*, 942 N.W.2d at 905 ¶ 2. In holding that this was a regulation subject to the rulemaking requirements of the state's Administrative Procedure Act (APA), the court was guided by the principle of constitutional avoidance. *Id.* at 917 ¶ 55. To "expansively read" the state's emergency management statutes to allow the officer to issue Order 28 without following the rules of the APA would amount to a "delegat[ion] [of] lawmaking authority to an administrative agency," which would raise serious constitutional problems. *Id.* Order 28 went "far beyond what is authorized" by the statutes because it applied not just to "those infected or suspected of being

infected," but to "'[a]ll individuals present within the State.'" *Id.* at 916 ¶ 49. The court therefore concluded that Order 28 was the kind of regulation that could not be adopted except through ordinary rulemaking procedures.

The Wisconsin court was mindful of the argument from urgency—but found it insufficient. The executive branch's power to act unilaterally in an emergency, the court said, is "premised on the inability to secure legislative approval given the nature of the emergency." *Id.* at 914 ¶ 41. If, for example, a fire were threatening the capitol, "there is no time for debate. Action is needed. The Governor could declare an emergency and respond accordingly. But in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely." *Id.* Wisconsin's emergency statute—like the Michigan statute—included a time limitation (60 days). *See id.* at n.14. Two months was "more than enough time to follow rulemaking procedures." *Id.* The idea that the executive could ignore those procedures during an emergency, with no time constraint, was "contrary to the law." *Id.*

Finally, the Kentucky Supreme Court ruled in *Beshear* that that state's emergency statute—and the governor's exercise of power under it—did *not* violate the state constitution's nondelegation doctrine. The court, however, emphasized that the state's legislature is "a part-time legislature" that can "only meet for sixty days every other year." 615 S.W.3d at 787, 807. This meant the legislature was "without the ability to legislate quickly in the event of emergency unless the emergency arises during a

regular legislative session." *Id.* at 807. Also, the Kentucky Constitution permits, but does not require, the governor to call a special session—and the legislature has no authority to convene itself. *Id* at 809. These factors mean that the Kentucky Constitution "tilts to authority in the full-time executive branch to act in [emergency] circumstances." *Id.* at 808. This authority was time-limited, however, because, pursuant to an emergency statute adopted during the pandemic, the legislature gave itself authority to determine on the first day of the next regular session whether the emergency still existed. *See id.* at 811–12.

Moreover, Kentucky applies a heightened version of the "intelligible principle" test, which the emergency statute satisfied, *id.* at 810-11, because it provided for public notice of, and input regarding, regulations. *Id.* at 815. And the court itself operated as an independent check—for example, it invalidated an executive order that barred family members from sitting within six feet of each other at outdoor events. *Id.* at 824-25.

The Kentucky Supreme Court expressly distinguished the Michigan decision in *In re Certified Questions*, noting that, unlike the Michigan EPGA, the Kentucky emergency statutes do not give the governor emergency powers "of indefinite duration," and that, unlike the Michigan legislature, the Kentucky legislature is not continually in session. *Id.* at 812.

B. The Blueprint fails the test for valid delegations of emergency authority.

Together, these three cases provide a useful framework for evaluating the constitutionality of the *Blueprint*. That analysis

compares (1) the duration of the governor's emergency authority, (2) the scope of the asserted authority (relative to the statutory guidelines that limit it), (3) the legislature's ability to convene and conduct business, (4) the emergency's character (whether a discrete incident like a fire or storm, or an ongoing crisis like a pandemic), and (5) the degree of public accountability built into the procedures governing the executive's orders. Here, that test weighs against the state.

1. *Duration: The California Emergency Services Act imposes no meaningful time limit.*

With respect to duration, the California Emergency Services Act gives the governor power to maintain an emergency declaration until he revokes it or both houses of the legislature act. Cal. Gov't Code § 8629. Unlike the Kentucky statute, which expressly terminates an emergency declaration unless the legislature reinstates it upon reconvening, *Beshear*, 615 S.W.3d at 812, California's Emergency Services Act keeps an emergency declaration in place indefinitely.[7] In this respect, the Act resembles the Michigan EPGA and Wisconsin's emergency statute rather than the Kentucky law.

Also, the *Blueprint* itself contains no provision for expiration and is not designed to have any termination date. One of the qualitative distinctions between an *order* on one hand, and a *law* on the other, is that an order contemplates some specific termination time or end-date, whereas a law is designed to

[7] With the exception of orders temporarily suspending statutes, which are terminated after 60 days. Cal. Gov't Code § 8627.5(b).

persist into the indefinite future and to be followed "time after time by classes of persons." *See* Hart, *supra* at 23. The *Blueprint* is more a (putative) law than a command. But the Constitution and the Emergency Services Act contemplate the Governor issuing *orders*, not *laws*, because authorizing the governor to issue laws would be an unconstitutional delegation. *Clean Air Constituency v. Cal. State Air Res. Bd.*, 11 Cal.3d 801, 816–17 (1974).

2. *Scope: The Governor purports to exercise extremely broad authority.*

The State offers two bases of authority to justify the *Blueprint*: the quarantine power of California Health & Safety Code § 120130—which, as shown above, does not apply—and the Emergency Services Act, specifically Section 8627, which authorizes the Governor to "promulgate, issue, and enforce such orders and regulations as [the Governor] deems necessary." The State interprets this as meaning that the Governor has the power "to impose reasonable regulations." Opp. at 23 (quoting *Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 146 (1976)).

Yet as the Michigan Supreme Court noted in *In re Certified Questions*, 2020 WL 5877599 at *16, the "reasonableness" element is not a meaningful limit on the Governor's power. "The word 'reasonable,'" that court said, "is essentially surplusage" because "[i]t neither affords direction to the Governor for how to carry out the powers that have been delegated to [him] nor constrains [his] conduct in any realistic manner." *Id.*

True, the Emergency Services Act gives the Governor extensive powers. But it does so with an eye to the Governor

taking *urgent* and *specific* measures to address matters that the legislature *cannot* address due to an emergency. So, for example, the Court of Appeal said in *California Correctional Peace Officers Ass'n v. Schwarzenegger*, 163 Cal.App.4th 802 (2008), that the Act gave Gov. Schwarzenegger authority to make special contracts with prison guards and others to expand prison facilities, due to an emergency of prison overcrowding. It said that "the need for additional space to house prison inmates" was "urgent" and "temporary," such that "the delay incumbent" in following the usual contracting procedures "would frustrate" the purposes of the law. *Id.* at 822 (citation omitted). Indeed, the usual hiring processes would "take approximately five years"—making the governor's unilateral action obviously necessary. *Id.* at 822. Similarly, the medfly infestation presented an emergency warranting the governor's unilateral actions because pesticides had to be sprayed as swiftly as possible, and it was "not a time for uncoordinated, haphazard, or antagonistic action." *Macias v. State*, 10 Cal.4th 844, 858 (1995). And in *City of Morgan Hill v. Bay Area Air Quality Mgmt. Dist.*, 118 Cal. App.4th 861, 878 (2004), Gov. Davis's emergency order relating to the electricity shortage was authorized because it "expedite[d] the processing of applications for power plants by ensuring that the necessary environmental review of such proposals would be completed more quickly."

But here, Gov. Newsom is not asserting authority based on urgency, expedition, or a need to avoid the delays of the legislative process—because the legislature *is currently acting*.

And he is asserting authority not to resolve some discrete aspect of the problem or to address an acute emergency—like licensing power plants, spraying pesticides, or signing contracts for prison guards—but is creating a set of rules to govern how businesses operate into the indefinite future. In other words, although the Governor purports to be issuing "orders," he is actually exercising "authority to make fundamental policy decisions." *People v. Wright*, 30 Cal.3d 705, 712 (1982). That is legislating, not addressing an emergency.

To reiterate: Nothing in California's Constitution suggests that it "tilts" in favor of gubernatorial authority the way the Kentucky Constitution does. *Beshear*, 615 S.W.3d at 808. On the contrary, as noted above, California's constitutional tradition tilts in precisely the opposite direction.

California courts have made clear that the Constitution's separation of powers clause "prevent[s] the combination in the hands of a single person or group of the basic or fundamental powers of government," *Coastside Fishing Club v. Cal. Res. Agency*, 158 Cal.App.4th 1183, 1204 (2008) (citation omitted), which means the legislature can "declar[e] a policy and fix[] a primary standard, confer[ring] upon executive or administrative officers the 'power to fill up the details,'" *id.* at 1205 (citation omitted)—but it cannot give a single official the power to write what are effectively laws governing the general carrying on of life into the indefinite future. *See Schaezlein v. Cabaniss*, 135 Cal. 466, 469 (1902) (legislature cannot "confer upon a single person the right arbitrarily to determine … that the sanitary condition

of a workshop or factory is not reasonably good" and to penalize failure to comply with purported sanitary requirements); *People v. Lockheed Shipbuilding & Constr. Co.*, 35 Cal.App.3d 776, 784–85 (1973) (legislature also cannot give that power to an agency).

In sum, the proper analysis weighs the scope and duration of the governor's power—the greater the scope of power delegated, the shorter the period should be, and vice versa. *See In re Certified Questions*, 2020 WL 5877599, at *13–14. Here, as in that case, but unlike in *Beshear*, the scope of authority the Governor is claiming is extremely broad—broader than California legal tradition warrants—and the duration is indefinite. Thus, again, this case is more like the Michigan or Wisconsin cases than like the Kentucky case.

3. *The legislature can function*.

Unlike Kentucky, California has a full-time legislature, which is in session for much more than 60 days. It is in session now and currently conducting business. If, as the Wisconsin Supreme Court put it, emergency delegations of authority to the governor are "premised on the inability to secure legislative approval given the nature of the emergency," *Palm*, 942 N.W.2d at 914, then there can be no basis for concluding that the emergency requires the governor—rather than the people's elected representatives—to promulgate rules for carrying on business in California.

4. *Character of the crisis: not acute, but chronic.*

The governor's emergency powers exist to address acute emergencies—but the *Blueprint* purports to set the rules into the indefinite future of a "new normal." California courts have repeatedly rejected the idea that an executive declaration of emergency is immune from judicial scrutiny, *see* *Schwarzenegger*, 163 Cal.App.4th at 818; *Verreos v. City & Cnty. of S.F.*, 63 Cal.App.3d 86, 101–05 (1976) (citing cases), and have explained that the "central idea" of an emergency "is that a sudden or unexpected necessity requires speedy action," *Malibu W. Swimming Club v. Flournoy*, 60 Cal.App.3d 161, 166 (1976). Obviously there is no bright line between an acute crisis and a chronic one, but if the executive's exercise of extraordinary powers is based on a need for immediate or speedy resolution that the legislative process cannot timely provide, then no such justification can apply here. More than a year into this pandemic—with the California legislature currently in session—there is no reason to believe the legislature cannot exercise its lawmaking power.

5. *The Governor is subject to little accountability*.

As to the degree of public accountability, unlike the situation in Kentucky—where public comment was available, *see* *Beshear*, 615 S.W.3d at 815—Gov. Newsom's *Blueprint* was adopted without public input, and changes are regularly made

without any advance public announcement. For example, it was recently announced that one factor in determining whether counties could move from one tier to another would be the degree to which vaccines were being distributed within impoverished communities. This change was made without any public input, discussion, or disclosure until it was posted on the state's website. *See* *Blueprint for a Safer Economy*, Cal. Dept. of Pub. Health.[8]

Considering the factors addressed in the Michigan, Wisconsin, and Kentucky cases, the conclusion becomes inescapable: The *Blueprint* exceeds the executive's emergency powers. It constitutes lawmaking, which cannot be permitted, given its indefinite duration and extremely broad scope, and the legislature's ability to pass any laws necessary to address any public health issues. The *Blueprint* is not an emergency order issued to address a matter so pressing that the legislature cannot deal with it but instead crosses the line into lawmaking and is therefore unconstitutional.

CONCLUSION

The Court should *reverse and remand*.

Respectfully submitted,

/s/ *Timothy Sandefur*
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[8] Version that appeared on March 16, 2021. However, the website is routinely being changed.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing Brief Amicus Curiae of Goldwater Institute in Support of Petitioners is proportionately spaced, has a typeface of 13 points or more, and contains 7,210 words.

Dated: April 29, 2021.

/s/ *Timothy Sandefur*
Timothy Sandefur (224436)

CERTIFICATE OF SERVICE

I, Kris Schlott, declare as follows:

I am employed by the Goldwater Institute, Scharf-Norton Center for Constitutional Litigation. I am over the age of eighteen years, and not a party to the within cause; my business address is Goldwater Institute, 500 East Coronado Road, Phoenix, Arizona 85004.

On April 29, 2021, a true copy of Brief Amicus Curiae of the Goldwater Institute in Support of Petitioners 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 Phoenix, Arizona:

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