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,

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)

APPELLANTS' REPLY 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*):

Appellants 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 Wake Date: **April 29, 2021.**
LUKE WAKE

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INTRODUCTION

This case is about whether the Executive Branch can continue to make and enforce laws restricting businesses through unilateral executive orders more than a year after declaring a state of emergency. The answer is no.[1] The California Constitution and established case law unequivocally reject the notion that one man, or an administrative agency, may write laws, especially on major economic and social issues.

The Respondents seek to deflect. They invoke cases that merely affirm administrative agencies may exercise some limited gap-filling authority. But the Governor and the California Department of Public Health are not simply "filling in" technocratic details. They are deciding major policy issues of the highest order—including such weighty questions as whether entire industries should be shuttered. Not only that, but the Emergency Services Act (ESA) and the Health and Safety Code (HSC) also impose no objective temporal limitation on these extraordinary powers.

After more than thirteen months the Governor and CDPH continue to rule the state through an ever-shifting series of unilateral orders and

[1] The Respondents repeatedly assert that the Superior Court rejected Appellant's arguments; however, the decision below was entirely perfunctory, without any analysis on either Appellants' non-delegation or statutory arguments. So it is impossible to say that the Superior Court embraced or rejected any particular merits argument. And in any event, the standard of review for questions of law is *de novo*. *Sahlolbei v. Providence Healthcare, Inc.*, 112 Cal. App. 4th 1137, 1145 (2003).

pronouncements. They continue to improvise without a scintilla of legislative guidance or direction other than a supposed charge to act reasonably. But a general reasonableness standard is insufficient to serve as a meaningful yardstick, much less an objective limitation on the authority of the Executive Branch. Indeed, the non-delegation doctrine requires something more than a open-ended charge to "figure it out."

The California Constitution does not demand that the Legislature set out every possible detail for governing. But on the big things—the fundamental policy questions of major social and economic import—legislative action is required. California case law holds that if the Governor is to be given authority to shut down or restrict businesses, the Legislature must say so expressly and it must set out sufficient guidance, direction, and safeguards to constrain the Governor's exercise of discretion.

Yet the Respondents say that the ESA and HSC must confer broad "quasi-legislative" powers because it would be impracticable to expect the Legislature to respond to a public health crisis of this nature. For that matter, they claim that they have been delegated *all* the police power of the State of California to take any action that the Legislature might have reasonably chosen to take in response to a public health emergency. But after more than a year of one-man rule, the argument of 'necessity' is no longer valid because the Legislature has had plenty of time to respond. There is simply no basis for suspending constitutional norms on an indefinite basis.

What is more, if the ESA and the HSC are construed as authorizing business closure or restriction orders then there is a total lack of objective and meaningful safeguards against arbitrary rules. This is itself a fatal defect under the non-delegation doctrine. Respondents point to only weak safeguards in the ESA, which leaves everything to the discretion of the Governor—with no option for the Legislature to override Blueprint restrictions absent ending the entire emergency or passing new legislation for which the Governor might veto. And they fail to point to any objective standards or safeguards under the HSC. Much more is needed if the Executive Branch has been delegated such vast and all-encompassing authority. When legal standards are crafted outside the transparent and deliberative legislative process there is a heightened risk of arbitrary decisions or outright favoritism, as more politically powerful groups gain access to the inner circle of power.

Of course, this Court can avoid this constitutional minefield by accepting Appellant's construction of both the ESA and HSC. Appellants offer plausible limiting constructions of these laws that appropriately harmonize the statutory text, while preserving latitude to the State to respond effectively to public health emergencies. Indeed, the canon of avoidance strongly militates against the Respondent's construction.

Finally, the Respondents' suggestion that the entire Blueprint regime can be upheld as a "quarantine" or "isolation" measure is completely

untenable. The Respondents merely assert that the statutory text means what they say. But they do not begin to explain why this Court should assume that the Legislature intended to adopt an open-ended definition of "quarantine" or "isolation" orders. That is especially problematic here because the Respondent's construction is divorced from the historic and commonplace usage of these terms. No one would refer to general business regulation as a "quarantine" or "isolation" measure. For that matter, not even CDPH uses the terms "quarantine" or "isolation" in this expansive manner outside the context of this litigation.

Accordingly, the Blueprint must be viewed for what it is—*i.e.*, an extraordinary exercise of the State's *police power*. And to the extent either the ESA or the HSC confer the State's police power they violate the non-delegation doctrine. This shouldn't even be a close call. If the non-delegation doctrine means anything, it means that the Legislature cannot give away its police powers. Indeed, it is difficult to conceive of any enactment conferring a broader and more standardless delegation of authority than that claimed by the Governor and CDPH in this case.[2]

[2] In the interest of equity this Court should deny Respondents' request for a sur-reply. A sur-reply is disfavored given that this Court previously granted Petitioners urgent request to expedite this appeal. *Ghost Golf, Inc. et al. v. Newsom et al.*, F082357, Order Granting Calendar Preference (Mar. 1, 2021). Further, Respondents were on notice of the relevant arguments based on Petitioners' reply at oral argument below. Respondents are merely asking to draw the briefing schedule out further so that the Government may have the last word.

ARGUMENT

I. Respondents Lack Statutory Authority to Enforce the Blueprint Regime

A. The Blueprint is Not a Quarantine or Isolation Measure

Respondents' argument that the Blueprint is a "quarantine" or "isolation" measure strains credulity. There is simply no support for Respondents' expansive notions of "quarantine" and "isolation." Nothing in California case law, in dictionaries, or even in real world usage supports their construction. For that matter, the State's own usage of these terms outside of this litigation confirms their narrow meaning.

Respondents either misunderstand or misstate the thrust of Appellants' argument concerning the quarantine and isolation power. For instance, Respondents argue that Appellants fail to discuss the text of the ESA and ignore the State's power to quarantine and isolate "property" or "places." Resp. Br. at 24-25. But Appellants do not dispute that the ESA gives CDPH the authority to quarantine or isolate "property" or "places." AOB at 53-57 (addressing HSC §§ 120130 and 120145). For example, if an apartment had been exposed to a deadly disease, there is no question that CDPH could quarantine that place until it no longer was infectious. But that common place understanding of a "quarantine" or "isolation" measure cannot justify the Blueprint.

The cases that Appellants cite to in their Opening brief demonstrate that the term "quarantine" had a well-established meaning at the time these provisions were first enacted—dating back to at least the 1930s. *See* Chapt. 6, Art. 2 § 2522 (1939).[3] Specifically, the use of "quarantine" was limited by several background legal principles. A valid quarantine measure must: (a) Specifically target the persons, place or things that have been exposed to an infectious disease, (*Ex parte Culver*, 187 Cal. 437, 442 (1921)); (b) Be justified by some measure of probable cause or specific suspicion, (*see Ex parte Dillon*, 44 Cal. App. 239, 243 (1919); *Ex parte Arata*, 52 Cal. App. 380, 383 (1921)); (c) Last only as long as strictly necessary, (*Application of Halko*, 246 Cal. App. 2d 553, 558 (Ct. App. 1966)); and (d) Be applied objectively to all rather than selectively or inconsistently, (*see, e.g.*, Cal. Health & Safety Code § 120235 [leaving no discretion to local health officials in enforcing quarantine procedure]).[4]

Respondents do not contest the existence of these background principles in the case law. Indeed, some of the cases that the Respondents heavily rely on support these principles. *See Ex parte Martin*, 83 Cal. App.

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[3] *Available* at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1939/39Vol1_Chapters.pdf.

[4] Respondents argue that this fourth point is "less than clear" and therefore waived. Resp. Br. at 30. But the point is that quarantine measures require public health officials to treat any person or place suspected of being exposed evenhandedly and consistently. This makes sense because the disease does not care about subjective value judgments of the sort reflected in the Blueprint as to what businesses are "essential" or "non-essential."

2d 164, 167 (1948) ("It would seem unnecessary to state that the delegation of such complete authority over one of the most fundamental of our constitutional rights—the right of personal liberty—must of necessity carry with it the obligation to exercise such unusual powers only when, under the facts as brought within the knowledge of the health authorities, 'reasonable ground exists to support the belief' that the person so held is infected."). Instead, Respondents simply brush aside the cases Appellants rely upon because they predate the current version of the HSC.[5] But they make no case as to why this Court should assume the Legislature intended to give the terms "quarantine" and "isolation" a meaning divorced from the historic understanding. They simply have no answer to the presumption that terms of art are construed consistent with their historic meaning in established case law.[6] *See People v. Scott*, 58 Cal. 4th 1415, 1424 (2014).

Respondents merely assert, unconvincingly and without any evidence, that "the Legislature [] intended the phrase 'isolation, or

[5] Yet as noted above, similar language can be traced in public health statutes dating back to at least 1939.

[6] Given the well settled historic understanding of the quarantine and isolation powers, it is no surprise that the New Mexico Supreme Court expressly distinguished between quarantine and isolation measures and other restrictions on gatherings or economic activity. *Grisham v. Reeb*, 480 P.3d 852, 868 (N.M. 2020) ("Preventing gatherings of people and quarantining people are complementary but discrete methods of containing the spread of an infectious disease."). For that matter, Respondents cite to no case upholding business restrictions as a quarantine or isolation measure.

quarantine' to have a broader reach…" Resp. Br. at 26.[7] Respondents provide no analysis to support their conclusion that the "usual, ordinary meaning" of either "quarantine" or "isolation" entails a state-wide industry shutdown or restriction scheme—much less a regime lasting over a year and applying to businesses without evidence of any specific exposure. Resp. Br. at 25. Nor do they cite to a single dictionary or any example of *anyone* using the terms "quarantine" and "isolation" as expansively as they do in this litigation.

Contrary to Respondents' unproven assertion, the Blueprint does not comport with the "usual, ordinary meaning" of the terms "quarantine" or "isolation." To begin, the Third Edition of Black's Law Dictionary—published in 1933, roughly contemporaneous with the first enactment of the relevant provisions—defines 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 by authority in the harbor of her

[7] Respondents have not asserted deference as to any of their statutory constructions and have therefore waived any potential deference arguments. Nor would they be entitled to deference. At best agencies in California are entitled to "weak" rather than controlling deference, which is akin to *Skidmore* deference in federal courts. *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 15 (1998) (comparing deference in California to *Skidmore*). Given that CDPH has never promulgated regulation expounding its expansive interpretation and that it advances this theory for the first time in litigation, there is no basis affording any degree of deference. *See Spanish Speaking Citizens' Found., Inc. v. Low*, 85 Cal. App. 4th 1179, 1215 (2000), *as modified on denial of reh'g* (Jan. 25, 2001) (signaling that deference is inappropriate for newly pronounced interpretations and where there is no careful consideration by agency officials).

port of destination, or at a station near it, without being permitted to land or to discharge her crew or passengers."[8] QUARANTINE, Black's Law Dictionary (3rd ed. 1933). In other words, a "quarantine" period lasted for only a limited time, as was necessary to allow a disease to fully run its course.[9]

To this day Black's Law Dictionary defines "quarantine" as a restriction on movement that is directed specifically at preventing the spread of disease for the period when there is a risk that an exposed individual or object will spread the disease. QUARANTINE, Black's Law Dictionary (11th ed. 2019) ("[Quarantine is] [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, the purpose being to prevent the spread of disease.") Likewise, the highly regarded Oxford Textbook of Infectious Disease Control notes that the most prominent medical sources in common usage provide "very strict definitions for the terms, *quarantine* and

[8] The 1913 edition of Webster's *Revised Unabridged Dictionary* likewise defines the noun "quarantine" as: "Specifically, the term, originally of forty days, during which a ship arriving in port, and suspected of being infected a malignant contagious disease, is obliged to forbear all intercourse with the shore; hence, such restraint or inhibition of intercourse; also, the place where infected or prohibited vessels are stationed." *Available at* https://www.websters1913.com/words/Quarantine.

[9] The term quarantine derived from the Italian number 40 or *quaranta*, which was traditionally believed to be the period after which a ship could be given a clean bill of health because no breakout was likely. QUARANTINE, Black's Law Dictionary (11th ed. 2019).

isolation." Andrew Cliff & Matthew Smallman-Raynor, *Oxford Textbook of Infectious Disease Control* 65 (2013), ("Oxford Textbook") Quarantine specifically involves "restriction upon the activities of *well* persons or of animals … who have been exposed to a case of a communicable disease during its period of communicability." *Id.* And "[i]n contrast to quarantine, isolation refers to action taken with the *infected* rather than the susceptible population to prevent the transmission."[10] *Id.*

Appellants' plain meaning construction is supported also by real world usage of the terms "quarantine" and "isolation." A review of 239 uses of the term "quarantine" in the Corpus of Historical American English (a large database containing a balanced sample of millions of historical uses of American English) from 1900 to 1940 strongly supports the conclusion that the "usual, ordinary meaning" of the term quarantine referred to measures taken in response to allegations that a specific person or place had been

[10] Respondents suggest that they are free to define "isolation" expansively because the cases Appellants cited in their opening brief addressed the definition of "quarantine" rather than isolation. Opp. at 26. But as shown by the Department's own usage and the myriad of evidence discussed here, the term isolation is always exclusively used to refer to a restriction of activity for someone who has been diagnosed with an illness. In any event, Respondents provide no support for their suggestion that the term "isolation" is more permissive than "quarantine." Further, it is no surprise that there are fewer cases challenging isolation orders. Those who are actually infected with a communicable and deadly disease are unlikely to challenge their temporary confinement; those who are merely exposed, are comparatively more likely to challenge their confinement.

exposed to an infectious disease.[11] *See* https://www.english-corpora.org/coha/ (search for "quarantine"). The overwhelming majority of examples either involve ships quarantined before being allowed to make landfall at port after exposure to an infectious disease, or a clear reference to the temporary quarantine of a concrete geographic location.[12] And there are no examples consistent with a quarantine being extended for more than a year or covering a business (or any other place) when there was no specific evidence that there had been exposure.

One example is particularly illustrative. A 1928 article in the Chicago Tribune reported that a town was placed under a "strict quarantine" after an epidemic of a virulent throat disease. *14 Dead and 600 Ill from Infected Milk*, Chicago Tribune (July 10 1928) at page 1.[13] In addition to this imposed quarantine, the article noted that the State Health Commissioner had taken

[11] *See* https://bit.ly/3ag7wSc (providing all 239 examples, along with their coding).

[12] Of the 239 results, not a single use of the term suggested a definition that might contemplate a regulatory scheme akin to systematic business closures. Of these, 67 deal with a specific location in New York Harbor called Quarantine, which was used for quarantining incoming travelers and cargo or some other usage of Quarantine as a proper noun, 31 deal with the quarantine of ships and cargo, and 71 are uses that unambiguously indicate a strict quarantine of a concrete physical location. Twenty-seven are geopolitical uses of the term mostly made after President Roosevelt gave a speech in 1939 about rising world-wide tensions, which called for a "quarantine." Thirty results are ambiguous. Only 12 results suggested a more abstract definition of the term quarantine, but not so open-ended as to provide support for Respondents' construction.

[13] Available at https://www.newspapers.com/newspage/355217319/.

several other measures, including an imposed prohibition on public gatherings and business curfews. *Id.* This clearly signals that quarantine measures were understood as distinct from restrictions on commercial activity.

Similarly, a random sample of 200 contemporary uses (from January 1, 2020 to April 15, 2021) of the terms "quarantine" and "isolation" in close proximity of each other (collocates in linguistic terms) reveals that these terms are almost exclusively used to refer to specific individuals suspected of being infected with or exposed to a contagion, who have their mobility temporarily limited in order to restrain the spread of a disease.[14] None support Respondents' view that business restrictions may be synonymous with the terms "quarantine" and "isolation."

For that matter, not even the State uses the terms "quarantine" and "isolation" in this expansive manner outside the context of this litigation. For example, in a July 30, 2020 guidance document, CDPH defined "Quarantine" as a restriction on "the movement of persons who were exposed to a contagious disease in case they become infected," and defined "Isolation" as the separation of "those infected with a contagious disease from people who

[14] The NOW Corpus is a continually updating database, which adds about 300,000 articles a month. *See* https://www.english-corpora.org/now/. There were 1,225 uses of "quarantine" within 5 words of "isolation" since January 1, 2020. *See* https://bit.ly/3srg9zy (providing a random sample of 200).

are not infected."[15] This document further clarifies that "isolation" applies to individuals who actually have COVID-19, while "quarantine" applies to those who have had close contact with someone with COVID-19. The Department's own guidance also places limitations and restrictions on the use of quarantine and isolation, which signal the Blueprint is not an exercise of the quarantine or isolation power. Notably, CDPH guidance contemplates at most a 14-day quarantine for exposed individuals and likewise provides for only short-term isolation measures: "[A] very limited number of persons with severe illness or who are severely immunocompromised may warrant extending duration of isolation for up to 20 days after symptom onset."

Respondents ultimately fall back on the HSC's allowance for "modified" quarantine and isolation orders—as if this gives CDPH license to ignore the "usual, and ordinary meaning" of "quarantine" or "isolation." (Resp. Br. at 26, n. 12.) But a "modified" quarantine or isolation order merely refers to a slightly more relaxed version of a traditional quarantine or isolation. The Oxford Textbook notes for instance that the CDC sets out seven grades of isolation ranging from strict isolation, wherein a patient is confined to a private sealed room, to less restrictive forms of isolation that

[15] Sonia Y. Angell, *Guidance on Isolation and Quarantine for COVID-19 Contact Tracing* (Jul. 30, 2020), CDPH, https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-on-Isolation-and-Quarantine-for-COVID-19-Contact-Tracing.aspx.

allow patients with the same disease to share a room. Oxford Textbook, *supra*, at 65.

The distinction between strict and "modified" quarantines has borne out also in practice in the way some public entities have enforced quarantine protocols. For instance, over the past year some universities have employed "modified" quarantines in allowing students exposed to COIVD-19 to leave their dorm-rooms to use the restroom or to get food from a campus dining facility, while otherwise requiring potentially exposed students to remain in their rooms.[16] Likewise, some school districts also employed "modified" quarantines to allow students who had been exposed to continue to attend class (but not participate in extracurricular or other communal school activities) unless COVID-19 symptoms appeared due to the low risk of developing the disease.[17] This modest approach comports with the plain meaning of a "modified" quarantine, and in no way supports CDPH's system of business regulation.

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[16] Modified Quarantine at F&M: Frequently Asked Questions, Franklin & Marshall University, https://www.fandm.edu/uploads/files/707473302789390902-f-m-modified-quarantine-faqs.pdf; https://www.springfieldmo.gov/5369/Modified-Quarantine; Modified Quarantine Protocols (Dec. 03, 2020), Francis Howell School Dist., St. Charles, MO, https://www.fhsdschools.org/covid-19/c_o_v_i_d-19_news_and_updates/modified quarantine protocols.

[17] K-12 Schools During the COVID-19 Pandemic Modified Isolation and Quarantine Requirements (Mar. 23, 2021), State of Kansas https://www.coronavirus.kdheks.gov/DocumentCenter/View/1377/Guidance-for-Modified-Quarantine-in-K-12-Schools---3-21-2021?bidId=.

B. The Health and Safety Code Does Not Confer Open-Ended Authority to Regulate Business Operations

HSC § 120140 confers authority on CDPH to take certain "measures as are necessary" to prevent the spread of contagious disease. As an initial matter, Appellants and Respondents disagree as to how the term "necessary" should be interpreted. This is an ambiguous term that may be construed either broadly or narrowly. *See* Randy Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Penn. J. Const. L. 183, 208 (2003) (discussing the original meaning of "necessary" in the U.S. Constitution's Necessary and Proper Clause, and concluding "[t]he evidence suggests that, while it is a mistake to equate 'necessary' with 'convenient,' neither was as stringent a standard as connoted by the terms 'indispensably' or 'absolutely' necessary."). In this case it should be narrowly construed as a matter of constitutional avoidance because of the non-delegation problems that an overly broad reading creates. Yet even if "necessary" is construed as conferring significant discretion to decide when a given "measure" is appropriate, the operative question is what sort of "measures" did the Legislature authorize? And does the Blueprint qualify as a public health measure for the purposes of this statute?

The canons of construction make clear that the Legislature did not authorize CDPH to pursue any conceivable measure to curb the spread of contagious disease, but instead limited its authority to taking actions similar

in nature to the examples provided in Section 120140. First, the canon ejusdem generis counsels for a narrowing construction because the specific examples provided in the statute (related to bodies and corpses) indicate the types of "measures" the Legislature had in mind. AOB at 58. But the Blueprint with its far-reaching standards, limitations, and regulations is of a different kind than targeted measures to retrieve an infected body or a corpse.

Respondents argue that this canon has no application here because the examples provided in Section 120140 are not part of a list ending with ambiguous general catch-all language. They also argue that the sentence providing examples is phrased permissively, rather than in a limiting fashion. But Respondents take an overly formalistic view of the canons of construction. The canons are intended to serve as logical tools of deduction in inferring the meaning of statutes and they should be employed to the extent that they help contextualize the operative language. To that end, the canon of ejusdem generis serves as a useful intrinsic aid to understanding the scope of powers conferred in Section 120140. Its logic confirms that in providing examples of what kinds of measure the Legislature had in mind we may deduce that Legislature intended only to authorize similar "measures." And this canon is "particularly appropriate when" as here "[t]he broad and standardless construction" that Defendants call for "would [otherwise] confer … virtually unrestrained power." *Friends of Davis v. City of Davis*, 83 Cal. App. 4th 1004, 1013 (2000)).

Second, Appellants raise the canon that "specific statutory language controls over the general." AOB at 59. Given the background principles intended to protect individual liberties, as outlined in the foregoing "quarantine" and "isolation" discussion, it is unlikely that the Legislature would have intended to confer a far more expansive authority under the more generic allowance for CDPH to take general health "measures." Respondents seem to misunderstand Appellants' argument on this point. They suggest, for instance, that Appellants "argue that section 120140 does not confer *any* authority on the state's public health officials." (Resp. Br. at 34) That is inaccurate. Appellants fully acknowledge that the Department can adopt public health measures of the type and sort similar in nature to those examples offered in Section 120140. But there is simply no indication the Legislature contemplated CDPH imposing a comprehensive system of business regulation like the Blueprint regime.

Third, Appellants rely on the canon against surplusage because Respondents' expansive interpretation of "measures" would render a lot of the other language of the HSC superfluous. AOB at 59-60. For one thing, there would be no need for the Legislature to confer a "quarantine and isolation" power if the CDPH had unlimited authority to impose any conceivable public health orders. Respondents answer that this canon is not "absolute." Resp. Br at 35. But nonetheless the canon serves as a helpful tool

of construction in illuminating the scope of the powers the Legislature intended to confer—once again, counseling for a narrowing construction.

Finally, Appellants invoke the canon of constitutional avoidance because Respondents' construction would leave CDPH unfettered discretion to decide fundamental policy issues and because the HSC provides no safeguards against arbitrary rules. Respondents do not address this issue directly. Nor do they dispute that this Court must address the non-delegation doctrine as part of its canon of avoidance analysis. Yet they advance a completely open-ended construction of CDPH's statutory authority, which cannot square with the non-delegation doctrine for the reasons set forth in Section II.

C. The ESA Does Not Confer Authority for the Governor to Create New Legal Regimes

Properly construed, Section 8627 of the ESA vests the Governor with unified control over the State's emergency response—including the power to exercise previously conferred rulemaking authority properly delegated to executive branch agencies. Thus, to the extent state law gives agencies authority to issue regulations to protect public health, the Governor is authorized to act on behalf of those agencies and to enact rules under Section 8627 without following the usual procedural requirements for new regulation. But Respondents maintain that Section 8627 should be construed as giving an open-ended authority for the Governor to issue any order or

regulation that has a conceivable connection to an emergency declaration as an exercise of supposedly "quasi-legislative" police powers. Their expansive construction should be rejected.

For one, Respondents' construction would violate the canon against surplusage. Respondents cannot explain why it would be necessary for the Legislature to have included numerous subsections conferring authority to take very specific actions such as Section 8627.5's grant of authority to suspend rules "imposing nonsafety related restrictions on the delivery of food products, pharmaceuticals, and other emergency necessities" if Section 8627 broadly confers "all police powers of the State" as they claim.[18]

Respondents maintain that Appellants' reading renders the "police powers" language superfluous. But under Appellants' reading no section of the ESA is superfluous. The Governor receives both the authority to issue "order[s] and regulations" on behalf of the unified executive branch and the power to implement or enforce these orders and regulations which comes from the "complete control" provision. Indeed, only Appellants' interpretation yields total harmony, giving separate effect to each provision

[18] Under the State's reading the "police power" provision gives the power "to enact laws to promote the public health, safety, morals and general welfare." Resp. Br. at 38. But if the Governor has this power, what need would he have for a separate grant of authority to issue orders and regulations under Section 8567?

of the ESA. And only Appellants' interpretation avoids the serious constitutional issues discussed below.

Finally, Respondents argue that the Legislature has acquiesced to the Governor's interpretation in failing to amend or clarify the ESA in the face of an Attorney General opinion and past practice. But never until 2020 had any governor exercised emergency powers on such an extraordinary scale. It would be improper to assume that the legislature acquiesced to such an unprecedent display of executive authority without even a cursory debate about the scope of emergency power. And the Attorney General's 1978 opinion is of limited probative value given that it addressed the scope of the Governor's powers only in passing, in a single footnote within a decision that otherwise dealt with a relatively uncontroversial exercise of emergency power. Moreover, the Attorney General's opinion failed to consider the non-delegation and canon of avoidance arguments presented here.

II. Appellants Should Prevail Under the Non-Delegation Doctrine

A. This Court Must Consider Whether Government Code § 8627 and Health and Safety Code § 120140 Violate the Non-Delegation Doctrine

The non-delegation doctrine stands as a constitutional backstop against expansive interpretations of Government Code § 8627 and HSC § 120140. If either of those code sections are interpreted as conferring statutory authority for the Blueprint, then this Court must decide whether

these provisions violate the non-delegation doctrine. There is no avoiding that analysis.

But Respondents argue that this Court need not address Appellants' non-delegation argument with respect to HSC § 120140 because Appellants somehow waived this argument in the Superior Court.[19] This waiver argument is predicated on the thinnest possible reed of authority—a single citation to a footnote in *Black v. Fin. Freedom Senior Funding Corp.*, 92 Cal. App. 4th 917, 925 (2001). In *Black* the Fourth Appellate District refused to accept arguments advanced on appeal where the party had utterly failed to "identify the elements of the causes of action" or to "argue the merits…" *Id.* at 925 n.9. By contrast, Appellants had set out the elements of a non-delegation claim and provided extensive authority to support their non-delegation theory, which Appellants plainly intended to incorporate by reference when they asserted that "[j]ust as the Legislature is precluded from conferring 'all police power' on the Governor, it is also precluded from conferring the open-ended authority for an agency to 'take measures as are necessary' to prevent the spread of disease." JA at 110.

[19] Respondents ignore the fact that Count IV of the complaint alleges a violation of the non-delegation doctrine in challenge to Section 120140. JA 026-027. And Appellants' opening brief in support of their motion for preliminary injunction plainly invoked the non-delegation doctrine. JA 108-110.

Respondents cite *Premier Med. Mgmt. Sys., Inc. v. California Ins. Guarantee Ass'n*, 163 Cal. App. 4th 550, 564 (2008), for the proposition that a party cannot raise arguments not raised below. But, in fact, Appellants clarified during a hearing held before Judge Tharpe that they were relying on the same authorities in their non-delegation challenge to Section 120140. *See Ghost Golf Inc. et al. v. Newsom, et al.*, No. F082357 (Feb. 11, 2021), Declaration of Luke A. Wake in Support of Appellant's Motion for Calendar Preference, ¶ 5 (explaining that the Superior Court denied Appellants the opportunity for a written reply brief, but that Judge Tharpe allowed Appellants to provide their reply at oral argument). Moreover, Respondents' waiver argument fails because a reviewing court must necessarily consider the constitutional question when confronted with a constitutional avoidance argument.

In any event, *Premier Med. Mgmt. Sys.* affirms that the reason for requiring parties to advance their arguments initially in the lower court is to ensure adequate notice of what may be argued on appeal. 163 Cal. App. 4th at 564. In this case the Respondents had full opportunity to argue their non-delegation defense and defended Section 120140 against Appellants' non-delegation claim by incorporating reference to the legal principles already set forth in their opposition brief. JA at 156 n.25; *see also infra* at 148-56. Since both sides raised arguments as to whether Section 120140 violates the non-delegation doctrine, the Court had full "opportunity to consider" the issue.

Moreover, *Black* and *Premier Med. Mgmt. Sys.* are inapposite as far as they concern appeals from final judgments on the merits. It makes sense that courts would prohibit parties from raising new issues on appeal after the trial court has rendered a decision on the merits; however, this is an interlocutory appeal. Appellants certainly have not waived their merits claim that Section 120140 violates the non-delegation doctrine. Accordingly, this Court should not hesitate to address these arguments now in the interest of equity, and for the sake of judicial efficiency. *JRS Products, Inc. v. Matsushita Electric Corp. of America*, 115 Cal. App. 4th 168, 179 (Cal. Ct. App. 2004) ("In any event, a Court of Appeal is at liberty to reject a waiver claim and consider the issue on the merits."). It would be highly inequitable to force Appellants to file a new preliminary injunction motion just to raise an issue that is squarely before this Court at this time. Appellants desperately needed relief months ago, and their situation has only grown more dire as time has dragged on without relief. And, in any event, it would be a waste of judicial resources to have the parties relitigate these issues from scratch.

B. Respondents Attempt to Misstate but Ultimately Concede the Proper Non-Delegation Standard

It is a violation of separation of powers for the Legislature to give away its lawmaking powers because the prerogative to make law is inherently legislative and therefore inalienable. *See Kugler v. Yocum*, 69 Cal. 2d 371, 375 (1968) ("[t]he power to change a law of the state is necessarily

legislative in character, and is vested exclusively in the legislature, and cannot be delegated by it."). The California Supreme Court has set out specific standards for non-delegation claims. A statute is unconstitutional if the Legislature fails to either: (a) decide fundamental state policy; (b) set adequate guidelines for exercising conferred discretion; or (c) establish adequate safeguards to prevent abuse. Resp. Br. at 45.

Respondents attempt to misstate the operative test by suggesting that a non-delegation violation must derive from one branch's "arrogat[ion] to itself the core functions of another branch[,]" or acts of one branch that "'defeat or materially impair' the core function of another branch." Resp. Br. at 44 (quoting *Carmel Valley Fire Prot. Dist. v. State*, 25 Cal. 4th 287 (2001), and *Marine Forest Soc'y v. Cal. Coastal Comm.*, 36 Cal. 4th 1 (2005).) But none of the cases that Appellants rely on for this point are non-delegation cases. In any event, Respondents ultimately acknowledge the correct operative standard and that the test is disjunctive—which means that Appellants need only prevail on one of the three non-delegation tests. *See* Resp. Br. at 50. In this case the ESA fails on all three counts.

C. Government Code § 8627 Violates the Non-Delegation Doctrine Under Respondent's Construction

i. Respondents Have Admitted Their Construction Confers Lawmaking Powers

Respondents admit that the ESA's conferral of "all police powers" represents a delegation of the power to make law. JA at 144 (stating that

"[t]he police power is the authority to *enact laws*…" and adding emphasis in quotation from *Cmty. Mem'l Hosp. v. Cty. of Ventura*, 50 Cal. App. 4th 199, 206 (1996)). Yet while Respondents admit that the police power entails the power to make law, they seek to qualify that admission by repeatedly characterizing the Governor's conferred lawmaking powers as "quasi-legislative" authority. *E.g.*, Resp. Br. at 45. This Court should look past this self-serving characterization. The conferral of "all police power" is an impermissible delegation of the Legislature's lawmaking power precisely because it conveys the Legislature's lawmaking power *without reservation* for the duration of an emergency (which might last for years). *See Clean Air Constituency v. California State Air Res. Bd.*, 11 Cal. 3d 801, 817 (1974).

This is not a case of mere administrative gap-filling authority, of the sort that is commonplace in regulatory statutes. Appellants are not calling into question the Legislature's uncontroversial practice of conferring modest discretion to regulatory agencies charged with responsibility of enforcing or administering enacted statutes. *E.g.*, *Salmon Trollers Mktg. Ass'n v. Fullerton,* 124 Cal. App. 3d 291 (1981) (concerning regulation of fisheries); *Rodriguez v. Solis*, 1 Cal. App. 4th 495 (1991) (concerning regulation on the placement of signs); *Golightly v. Molina*, 229 Cal. App. 4th 1501 (2014) (concerning administrative discretion in awarding social service contracts). No one is arguing that the Legislature must anticipate every eventuality when crafting statutory language. Indeed, some degree of gap-filling authority is

acceptable so long as the Legislature has decided fundamental policy, provided adequate standards guiding the exercise of discretion and provided safeguards against abuse. *See First Industrial Loan Co. v. Daugherty*, 26 Cal. 2d 545, 549 (1945) ("The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to *fill up the details*' by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect.") (emphasis added).

Even a law granting the Governor the power to close businesses during a pandemic could be consistent with the non-delegation doctrine so long as it clearly set out objective criteria or factors in deciding which businesses should be subject to restrictions and what sort of restrictions should be imposed. But an unbridled conferral of "all police power" is another matter. Rather than allowing the Governor to color-in the details, the ESA hands the Governor a blank page and the pen for drawing all the lines.

ii. The General Purpose of the Act Does Not Establish Fundamental Policy with Regard to Business Regulation

While Respondents acknowledge that the Legislature must establish fundamental policy, they contend that the ESA's general purpose of keeping Californians safe from a disaster satisfies this requirement even though the ESA leaves undecided such weighty subjects as whether and to what extent whole industries should be shuttered. This is inconsistent with the approach

California courts take to the fundamental policy test. *See Sims v. Kernan*, 30 Cal. App. 5th 105, 111 (2018) (affirming that the fundamental policy test asks whether the Legislature has made the truly "momentous decision[s]"). If the generalized purpose of protecting public health and safety was automatically deemed enough to satisfy the fundamental purpose test—notwithstanding unanswered policy questions of major social and economic import—then it is difficult to conceive any statute ever failing. Indeed, the ESA's aspirational goal of protecting public health and safety fails to set any fundamental policy at all because this goal is synonymous with the purpose of the police power and therefore merely delegates to the Governor to make purely legislative judgments without setting out any specific policy.

Respondents' approach is also inconsistent with precedent. For example, in *Hewitt v. State Board of Medical Examiners*, 148 Cal. 590 (1906), the California Supreme Court ruled that an Act authorizing the regulation of the medical profession violated the California Constitution in leaving unanswered the fundamental policy question of whether and to what extent a physician could make controversial public statements on medical issues.[20] There the Court found that there was a constitutional violation

[20] In *Hewitt* the Legislature's failure to decide fundamental policy was inextricably intertwined with its concurrent failure to provide adequate standards: "Instead of furnishing some standard by which the physician can determine in advance what statements shall be treated as 'grossly improbable,'" the statute left that question to be determined by the caprice of the medical board. *Id*. at 594.

notwithstanding the fact that the Legislature had sought to advance a general goal of protecting public health. *Id*. at 594. *See also In re Peppers*, 189 Cal. 682 (1922) (holding that the Legislature had failed to set a fundamental policy in defining what should constitute a defect in citrus that should prohibit shipment, notwithstanding a general legislative goal of protecting the "reputation of the citrus industry").

Just as the statute at issue in *Hewitt*, the ESA pronounces an overarching goal of protecting public health but leaves unresolved critical issues for which the Legislature provides no colorable policy. And while it is a given that the Legislature sought to protect public health, that general aspirational goal says nothing as to how competing public policy concerns should be weighed in the attainment of that goal. *See Clean Air Constituency v. California State Air Res. Bd.*, 11 Cal. 3d 801 (1974) (finding the Legislature had established fundamental policy because it made "clean air a higher priority than the concern for fuel consumption, the problem of rising costs in transportation, or the economics of the automobile industry…").

Respondents cite no case to support their view that a general goal of protecting public health constitutes a fundamental policy decision where the statute leaves unresolved major social or economic issues.[21] They rely

[21] Respondents flippantly dismiss persuasive authority from the U.S. Supreme Court in asserting that *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Ref. Co. v. Ryan*, 293 U.S. 388,

primarily on *Sacramentans for Fair Planning v. City of Sacramento*, 37 Cal. App. 5th 698, 705 (2019) and *Rodriguez*, 1 Cal. App. 4th 495 (1991). But neither case endorses such a vague and open-ended standard.

In *City of Sacramento* there was both a general goal of building more residential units in downtown Sacramento and a fundamental policy decision as to how to accomplish that goal. 37 Cal. App. 5th 698, 705-06. Specifically, the City Planning and Design Commission was authorized to permit more intensive development than was otherwise permissible under the zoning code upon a finding of a "significant community benefit." *Id*. at 705. While the Commission had a fair amount of latitude in deciding what constituted a significant community benefit, this passed the fundamental policy test because there was a legislative judgment on the "momentous decision" to prioritize the policy goal of enabling new construction over other values reflected in the zoning code. *See Sims*, 30 Cal. App. 5th at 111. By contrast, there was no clear legislative judgement in the ESA that the State should pursue the protection of public health by shutting down whole sectors of the state economy.

406 (1935) were "*Lochner*-era" cases. But those cases remain good law, as they applied the standard for which non-delegation claims are assessed in federal courts today. *See Gundy v. United States*,139 S. Ct. 2116, 2123 (2019) (reaffirming the rule, set forth in the 1920s, that Congress must provide an intelligible principle).

Likewise, in *Rodriguez*, there was a legislative judgment that any approved sign should be "compatible with [its] surroundings," which meant that in enacting the zoning code, the City had prioritized community aesthetics. 1 Cal. App. 4th at 503. Thus, there was a legislative judgment establishing fundamental policy "requiring compatibility with surroundings before a sign permit could be approved…" *Id*. at 507. That is not the case with the ESA.

iii. Respondent's Nexus Test Provides No Meaningful Standard Constraining the Exercise of Broadly Conferred Police Powers

The Respondents acknowledge that Section 8627 confers authority for the Governor to act in whatever way he deems necessary. But California's non-delegation doctrine requires that the statutory text must provide an objective yardstick against which we may measure the Governor's conduct.

The Respondents maintain that the Governor's authority is somehow cabined by a general charge to make orders and regulations as is "necessary to carry out the provisions of this chapter." Resp. Br. at 51 (quoting Section 8567). Yet that circular logic enables the Governor unfettered authority to decide what orders and regulation is appropriate under the circumstances without any more direction than that the Governor should act reasonably.[22]

[22] Respondents cite to *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 11 (1998). But *Yamaha Corp. of Am.* did not begin to address the question of what constitutes adequate standards under the non-delegation

Resp. Br. at 50-51. The text vests the Governor alone with the responsibility of deciding what is or is not a necessary response. In this case, Governor Newsom was free to decide for himself whether the Blueprint regime was (or was not) reasonably necessary and to weigh the social value of different businesses without any legislative direction at all. The requirement that an action be "necessary" fails to meaningfully constrain the Governor's conferred powers during an on-going pandemic where literally any in-person human interaction could pose public health risk.[23]

None of the California cases cited by Respondents support their conclusion that a statute provides adequate standards in vesting executive officials with power to do whatever is "necessary" on such a vast scale.[24]

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doctrine. It stands only for the proposition that, where an agency is acting within the scope of *legitimately conferred* gap-filling authority, its regulations will generally be upheld.

[23] For the same reason, the Respondents' out-of-state authority is unpersuasive. Moreover, the Respondents cite to no case upholding a conferral of "all police power of the State." *See Casey v. Lamont*, No. 20494, 2021 WL 1181937, at *11 (Conn. Mar. 29, 2021); *Beshear v. Acree*, 615 S.W.3d 780 (Ky. Nov. 12, 2020).

[24] Respondents suggest that Appellants' arguments would implicate at least six statutes that provide that administrative bodies should act as may be necessary to effectuate statutory purposes. Resp. Br. at 51 n.20. But none of these statutes confer open-ended powers on anything approaching the scale of the ESA's delegation of "all police powers of the State." Those cited statutes concern discrete conferrals of authority on narrow regulatory subjects—as opposed to an unbounded authority to control every aspect of social and economic life. *See In re Certified Questions From United States Dist. Court, W. Dist. of Mich., S. Div.*, No. 161492, 2020 WL 5877599, *15 (Mich. Oct. 2, 2020) ("[A]s the scope of the powers conferred upon the Governor by the Legislature becomes increasingly broad, in regard to both

While *Rodriguez* demonstrates that the adequate standard test allows flexibility in promoting general public welfare goals, there were several factors guiding the City Director of Development's discretion in reviewing sign permit applications in that case—including a charge that the Director should "consider the size, design, colors, character and *location* of the proposed signs." 1 Cal. App. 4th at 503 (emphasis in original). Likewise, *Sims* is inapposite because in that case the Court found that the legislative history provided guidance in signaling that state executions should be carried out consistent with a preexisting body of case law defining cruel and unusual punishments. *Sims*, 30 Cal. App. 5th at 114–15.

Respondents also fail to square their lax nexus test theory with those cases that have found non-delegation problems. For example, in *Am. Distilling Co. v. State Bd. of Equalization*, the California Supreme Court invoked the non-delegation doctrine in rejecting a statutory interpretation that would have provided subjective discretion. 55 Cal. App. 2d 799 (1942). *Am. Distilling Co.* emphasized that it was insufficient for the Legislature to "delegate authority … to adopt and enforce reasonable rules for carrying into effect the expressed purpose of a statute[,]" where the Executive Branch has been conferred authority enough to "determine what the law shall be in a

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the *subject matter* and their *duration*, the *standards* imposed upon the Governor's discretion by the Legislature must correspondingly become more detailed and precise.").

particular case." *See also Baltz Brewing Co. v. Collins*, 69 Cal. App. 2d 639, 645-46 (1945) (observing that "the Legislature provided no yardstick for the regulation of out-of-state beer manufacturers in the manner attempted by the board…").

Similarly, in *People's Federal Savings v. State Franchise Tax Bd.*, there was a non-delegation violation notwithstanding the fact that there was a general goal of administering orderly tax administration in the furtherance of the public welfare with enactment of amendments to the Tax Act. 110 Cal. App. 2d 696, 697 (1952). The specific provision in question gave the tax commissioner "absolute discretion" to set certain allowable deductions and therefore failed to provide adequate standards to determine whether rates should be set based on an aggregated statewide basis or with reference to any "particular locality…"[25]

Here, the Legislature has similarly left it entirely to the Governor to weigh competing public health and other policy concerns in deciding the State's response to the pandemic. There is no clear directive to weigh public health concerns over all other economic or social considerations. Nor is there

[25] Respondents seek to brush aside *People's Federal Savings*, asserting that that the case is "readily distinguishable" without offering explanation for that assertion. They cite *Alexander v. State Pers. Bd.*, 80 Cal. App. 4th 526, 538 (2008); however, *Alexander* acknowledged *People's Federal Savings* as good law and merely distinguished the case, in that instance, because the statute in question conferred less administrative discretion than the challenged regime in *People's Federal Savings*.

any yardstick providing direction as to how the Governor should make value judgements in picking and choosing which businesses to close or restrict.

The Respondents only answer is that the Legislature need only provide standards "as definite as the exigencies of the particular problem permit." But no one is arguing that the Legislature needed to proscribe "rigid standards" or "articulate a formula." It would have been sufficient for the Legislature to provide factors for the Governor to consider in the exercise of his conferred discretion. *See Gerawan Farming, Inc. v. ALRB*, 3 Cal. 5th 1118, 1148 (2017) (affirming that there is sufficient guidance where the Legislature states its purpose *and* provides factors to be considered). And it certainly would have been possible for the State to provide some general guidance on whether and to what extent businesses should be restricted in operations during an on-going emergency because it is entirely foreseeable that business operations may pose a public health threat during an emergency. *See Macias v. State of California*, 10 Cal. 4th 844, 858 (1995) (affirming that "the Legislature is peculiarly well suited" to set policy guiding the State's approach to emergencies).

Finally, Respondents fail to sufficiently distinguish or dismiss persuasive authority from the Michigan Supreme Court.[26] Resp. Br. at 54.

[26] Just as with the ESA, Michigan's Emergency Powers of the Governor Act (EPGA) provided a general charge that the Governor should take actions "necessary to protect life and property or to bring the emergency situation

The Michigan Supreme Court emphasized that the broader a delegation of authority to an executive officer the more specific standards the legislature is required to put in place. *In re Certified Questions from United States Dist. Ct.*, 2020 WL 5877599, at *15. This sliding-scale analysis is entirely consistent with California's adequate standards test, and should be employed here given the extreme breadth of the delegation in question. *See Kugler v. Yocum*, 69 Cal. 2d 371, 376 (1968) (affirming that the Legislature may legitimately leave it to the Executive to "fill up the details," while the non-delegation doctrine requires the Legislature to resolve the "truly fundamental issues").

iv. Respondents Have Failed to Identify Any Meaningful Safeguards to Protect Against Arbitrary Decisions or Favoritism

To pass muster under the adequate safeguards test the statutory text must impose substantive, procedural or temporal limitations that objectively constrain the exercise of discretion. *See Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 169, 550 P.2d 1001, 1029 (1976) ("When statutes delegate power with inadequate protection against unfairness or favoritism, and when such protection can easily be provided, the reviewing courts may well either

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within the affected area under control." *In re Certified Questions from United States Dist. Ct.*, No. 161492, 2020 WL 5877599, at *8 (Mich. Oct. 2, 2020) That general charge was held insufficient given that the EPGA conferred "a substantial part of the entire police power of the state." *Id*. at 15.

insist upon such protection or invalidate the legislation.") (quoting 1 Davis, Administrative Law Treatise (1958) s 2.15).[27] The Respondents point only to *pro forma* procedural requirements that do not meaningfully constrain the exercise of discretion.

First, they suggest that the requirement to publicize emergency declarations and orders in writing should suffice; however, that requirement does not meaningfully constrain the exercise of conferred discretion. Written publication merely facilitates compliance. It is no guard against arbitrary rules or against favoritism.

Nor do the Respondents point to any objective temporal restraint. They lean on the ESA's directive to terminate the emergency at the earliest possible date. Resp. Br. at 56. But this cannot be a meaningful safeguard because it leaves the decision of how long to maintain an emergency declaration entirely to the subjective judgment of the Governor. *Cf.* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev.

[27] Notice and comment requirements would at least modestly constrain discretion by requiring the Executive to consider public input before imposing new rules where there is adequate time. *See Matter of Powell*, 92 Wash. 2d 882, 893, 602 P.2d 711, 717 (Wash. 1979) (invoking the Davis Treatise on Administrative Law in holding that a defendant could not be convicted for violating emergency regulations promulgated by the Washington State Board of Pharmacy because the governing statute provided no opportunity for notice and comment and therefore failed to provide adequate safeguards in violation of the non-delegation doctrine).

405, 446 (1989) (arguing against deferring to the Executive Branch because "foxes should not guard henhouses").

Finally, the Respondents argue that the possibility of legislative intervention to end an emergency declaration should satisfy the sufficient safeguards test. There are significant problems with this argument that Respondents never grapple with. Specifically, the Legislature only has the power to terminate an emergency declaration in total, not to disapprove of any particular emergency order. No one disputes that COVID-19 is an ongoing emergency that justifies a coordinated disaster response, but the Legislature has no recourse short of effectively declaring that the pandemic is over and therein stymieing the State's disaster response. This is not a meaningful safeguard.

The Respondents point only to *Golightly*, 229 Cal. App. 4th 1501., But this case does not support the proposition that the ability to rescind the power given to the executive is in and of itself an adequate safeguard. In *Golightly*, the Board of Supervisors of Los Angeles had delegated administrative authority to award social service contracts. In the section of the opinion concluding that the Board had retained control over fundamental policy decisions the Second Appellate District briefly noted that the Board retained the prerogative to rescind or limit its delegation of authority and that it had in fact exercised such oversight by requiring additional Board members to sign off on a contract. *Id*. at 1517. This fact played no role in the Court's

discussion of safeguards. *Id.* at 1517-18. And even if it were relevant it would be just one of many safeguards that were in place, such as substantive limitations on which agencies could get a contract and "multiple layers of scrutiny" by board members of each contract. *Id.* By contrast, the ESA contemplates no substantive limitations on the Governor's authority, and provides nothing analogous to Los Angeles' "multiple layers of scrutiny."

As such, the Respondents offer no authority for their view that there is an adequate safeguard here in the possibility of a legislative termination of the Governor's emergency declaration. Moreover, even if *Golightly* were construed as supporting Respondents' theory, that legislative oversight could satisfy the adequate safeguards test, *Golightly* would still be of only limited probative value because it concerned a much more limited conferral of authority. Where the scope of the conferred authority grows to immense proportions, we should expect more demanding safeguards. *See Kugler*, 69 Cal. 2d at 383 (observing that courts are more permissive with regard to delegation of "minor question[s]").

D. Health and Safety Code Section 120140 Violates the Non-Delegation Doctrine Under Respondent's Construction

If HSC § 120140 truly confers authority to issue any rule deemed necessary to control the spread of contagious disease then CDPH enjoys discretionary authority every bit as broad as the Governor's powers under the

ESA.[28] Here as well, the Respondents fall back on their view that the Legislature decided fundamental policy in deciding the State should respond to public health threats; however, they fail to point to anything in the Health and Safety Code that signals that the Legislature intended to prioritize public health protocols over all other social and economic concerns—much less any sign that Legislature contemplated a complex system of business regulation.

Nor does the statute's general purposes provide an adequate standard guiding the exercise of discretion. The Respondents emphasize that the statute requires CDPH to decide whether restrictions are necessary; however, that leaves everything to the subjective judgment of the agency, which means that the CDPH ultimately has unbridled authority coextensive with the Legislature's power to reasonably respond to contagious disease.[29] *See Skyworks, Ltd. v. CDC*, No. 20-cv-2407 (N.D. Ohio Mar. 10, 2021) (opinion and order) (holding that similar language in the federal Public Health Services Act would likely raise a serious non-delegation problem if construed to as leaving CDC unbridled discretion to decide whether public

[28] As set forth in the opening brief, CDPH could exercise this authority even to issue orders in response to the seasonal flu. The Respondents object that this is unlikely; however, the non-delegation doctrine focuses on the scope of the discretionary authority conferred by the statutory text, not the Executive's assurance of self-restraint. *See Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001). And in any event, before March 2020 it would have seemed unlikely that CDPH would invoke this authority to shut down businesses throughout California for more than a year.

[29] As set forth above, there was significantly greater textual guidance in *Rodriguez*.

health measures are necessary). And it is no answer to say that the Legislature could not have provided more direction where it was entirely foreseeable that industry restrictions might be needed in response to contagious disease. Further, even if the "exigencies" of the situation might have warranted some short-term measures from CDPH, that rationale only suffices for so long. After more than a year, the Legislature has had plenty of time to respond.

Finally, the Respondents have failed to identify even marginal safeguards under Section 120140. They suggest that there is some sort of safeguard in the fact that the CDPH reports to the Governor; however, that does not guard against the Executive Branch exercising conferred authority in an arbitrary or unfair manner. Nor is the possibility that Legislature might amend existing statutes a safeguard. This is always a possibility. So, if this is an adequate safeguard then the adequate safeguards test is meaningless. Further, the Executive Branch could easily thwart any legislative effort to wrestle-back control through a gubernatorial veto.

III. The Superior Court Erred in its Balance of Harms Analysis

The Superior Court erred in its balance of harm inquiry because there was no evidence before the court that allowing two small businesses to reopen with adequate safeguards in place would have a significant impact on public health. The Superior Court focused on the supposed "monumental public harm" that an injunction would have not only on Fresno and Kern counties but also on nearby counties. JA at 274. This strongly suggests that

the court improperly considered the impact of a county or state-wide injunction even though Appellants sought relief only for their businesses.

But even if the Superior Court properly focused on the potential public health impact of lifting occupancy restrictions for just these two small businesses, it was wrong to conclude that there would be "monumental" harm. The court appears to have ignored three critical facts.

First, Respondents provided no evidence that lifting occupancy limits would pose some special threat, especially given all the businesses that were already allowed to open utilizing these same protocols throughout the state. No "monumental" harm was likely if Ghost Golf had been allowed to re-open with masks and social-distancing protocol given that virtually every other business in the state was permitted to operate to at least some capacity with such measures in place. Indeed, the State's declaration did not say a word about public health risks specific to mini-golf or arcades. *See* Resp. Br. at 65 (referencing only generic evidence as to the risk of "allowing indoor businesses… to open without restriction").

Second, Appellants were (and remain) committed to maintaining extensive health and safety protocols and have no plans to return to business as normal. The court seems to ignore this fact and Respondents engage in the same error by warning of the danger of allowing even a single business to "open without restriction." Resp. Br. at 65. That is inconsistent with the record.

Finally, the Superior Court erred by ignoring the fact that "monumental" harm is particularly unlikely given that local authorities maintain power to enact ordinances restricting business operations as they deem necessary. Respondents offer no response at all on this point. But this consideration should at least weigh into the analysis if the Court concludes that the Appellants are likely to prevail in their merits argument that the Respondents lack any legitimate interest in enforcing the Blueprint.[30]

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court direct the Superior Court to issue a preliminary injunction to prevent continued enforcement of the Blueprint.

DATED: April 29, 2021.

Respectfully submitted,

LUKE WAKE
DANIEL M. ORTNER

By _____/s/ Luke Wake_____

Attorneys for Appellants
Ghost Golf Inc., et al.

[30] Respondents attempt to distinguish *King v. Meese*, 43 Cal. 3d 1217 (1987) and *Right Site Coal v. Los Angeles Unified Sch. Dist.*, 160 Cal. App. 4th 336, 342 (2008). But both cases are clear in directing reviewing courts to consider the balance of harms in light of the plaintiff's likelihood of success on the merits. *Right Site Coal*, 160 Cal. App. 4th at 342 (emphasizing that the merits factor "affects" the balance of harms inquiry); *King*, 43 Cal. 3d at 1227 ("[T]he 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.").

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPELLANTS' REPLY BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 10,336 words.

DATED: April 29, 2021.

/s/ Luke Wake
LUKE WAKE

DECLARATION OF SERVICE

I, Luke 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.

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_____/s/ Luke Wake_____
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