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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF FRESNO

11 **GHOST GOLF, INC., DARYN COLEMAN,  
12 SOL Y LUNA MEXICAN CUISINE, and  
13 NIEVES RUBIO,**

14 Plaintiffs,

15 v.

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

21 Defendants.

Case No. 20CECG03170

**DEFENDANTS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

Date: September 27, 2022  
Time: 3:30 p.m.  
Dept: 501  
Judge: The Hon. D. Tyler Tharpe  
Trial Date: None Set

Action Filed: October 26, 2020

**(Exempt from Filing Fees:  
Gov. Code, § 6103.)**

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## INTRODUCTION

1  
2 Plaintiffs, a restaurant and an indoor miniature golf venue, challenge California’s Blueprint  
3 for a Safer Economy, which was the State’s plan for reopening the economy from the COVID-19-  
4 related restrictions in a manner consistent with public safety, by tailoring the restrictions to the  
5 level of virus transmission in local communities and to the risks of particular activities. Plaintiffs  
6 seek a declaration that the Blueprint was invalid, based on facial challenges to the Blueprint and  
7 the statutes that authorize it. The State rescinded the Blueprint more than a year ago, when the  
8 widespread availability of vaccines for COVID-19 and other improved circumstances rendered  
9 the Blueprint’s restrictions unnecessary, yet Plaintiffs still seek a declaration about the validity of  
10 the now-rescinded measure. This Court already has ruled that Plaintiffs are not likely to succeed  
11 on the merits of their claims, and, soon after this Court reached that conclusion, the Third District  
12 Court of Appeal squarely rejected an identical challenge to the Governor’s emergency powers.  
13 (*Newsom v. Superior Court (Gallagher)* (2021) 63 Cal.App.5th 1099, review denied (Aug. 11,  
14 2021) (“*Gallagher*”).) *Gallagher* is now dispositive of this lawsuit, and Plaintiffs’ claims would  
15 demonstrably lack merit in any event.

16 Plaintiffs challenge the Blueprint based on two legal theories. First, they claim that neither  
17 the Governor nor the State’s health officials possessed statutory authority to adopt Blueprint.  
18 Second, they claim that if the Blueprint was authorized by statute, the statutory authorization  
19 violates the California Constitution’s non-delegation doctrine. Both claims lack merit.

20 Contrary to Plaintiffs’ contentions, the Legislature has granted both the Governor and the  
21 California Department of Public Health clear authority to adopt emergency public health  
22 measures like the Blueprint. The Emergency Services Act grants the Governor broad authority  
23 during a proclaimed state of emergency to issue orders and regulations as necessary to mitigate  
24 the effects of the emergency. In addition, Health and Safety Code grants the State’s health  
25 officials express authority to issue such orders as are necessary to prevent the spread of infectious  
26 disease. Each of these statutes independently authorized the Blueprint, as explained below.

27 Plaintiffs’ non-delegation challenge also lacks merit. The non-delegation doctrine permits  
28 the Legislature wide latitude to delegate quasi-legislative authority to executive-branch officials

1 in order to implement the State’s policy objectives, as long as the Legislature itself sets the  
2 overarching policy of the law and includes basic standards and safeguards to guide  
3 implementation. The statutes at issue easily satisfy those requirements, as explained below.

## 4 BACKGROUND

### 5 I. THE COVID-19 OUTBREAK.

6 The COVID-19 pandemic has posed a public health crisis of a magnitude not seen in this  
7 country in more than a century. The COVID-19 pandemic has now infected more than 80.7  
8 million people in the United States, and the disease has taken the lives of over one million  
9 Americans to date, a figure that “exceeds the number of U.S. soldiers killed in combat in the  
10 Vietnam War and both World Wars combined.” (*Cty. of L.A. Dep’t of Pub. Health v. Superior*  
11 *Ct. of L.A. Cty.* (2021) 61 Cal.App. 5th 478, \*9 (“*L.A. Dep’t of Public Health*”); see Jones Decl.  
12 Ex. V.) In California alone, over 91,700 people have died from the disease. (Jones Decl. Ex. T.)

13 COVID-19 is transmitted primarily by respiratory droplets and aerosolized particles  
14 containing SARS-CoV-2, the virus causing the disease, which are exhaled when, for example,  
15 individuals breathe, speak, or sneeze. (*L.A. Dep’t of Public Health, supra*, 61 Cal.App.5th at  
16 p. 482; see also *Slidewaters v. Washington State Dep’t of Labor and Ind.* (9th Cir. 2021) 4 F.4th  
17 747, 752 (“*Slidewaters*”).) This virus can transmit asymptotically, meaning that many infected  
18 people have no symptoms and thus may be unaware that they are infected, but may nonetheless  
19 transmit COVID-19 to others. (*Slidewaters, supra*, 4 F.4th at p. 752.) Thus, until vaccines for  
20 the virus became widely available (see *infra*, p. 9), measures that limited physical contact, such as  
21 closure of places where people gather and physical distancing, were the only effective way to  
22 slow the spread of the disease. (*L.A. Dep’t of Public Health, supra*, 61 Cal.App.5th at pp. 482-  
23 483, 494-495; *Slidewaters, supra*, 4 F.4th at p. 752.) Therefore, such measures were critical to  
24 preventing the health care system from being overwhelmed and, ultimately, to save lives. (*Ibid.*)

### 25 II. THE STATE’S RESPONSE TO THE PANDEMIC.

#### 26 A. The Blueprint for a Safer Economy.

27 In the face of the grave threat posed by the pandemic, the Governor and state health  
28 officials acted swiftly to protect public health. On March 4, 2020, the Governor proclaimed a



1 State of Emergency in California. (Jones Decl. Ex. A.) On March 19, 2020, the Governor issued  
2 the “Stay-at-Home Order,” which required “all individuals living in the State of California to stay  
3 home or at their place of residence except as needed to maintain continuity of operations of the  
4 federal critical infrastructure sectors.” (*Id.* Ex. C.) The Stay-at-Home Order further directed the  
5 public to “heed the current State public health directives” issued by the California Department of  
6 Public Health (“CDPH”). (See *id.* Exs. B, C.)

7 After issuing the Stay-at-Home Order, the State sought to reopen businesses and institutions  
8 affected by the pandemic as promptly as was feasible, consistent with the protection of public  
9 health. The Governor initially announced a plan for the safe reopening of the State in April 2020,  
10 but a rise in cases mid-summer forced a pause in the process. (*Id.* Exs. E-G.)

11 In August 2020, after the spread of the virus had again slowed, the State developed the  
12 “Blueprint for a Safer Economy” (“Blueprint”), a detailed plan for reopening the state based on  
13 the experiences of the first six months of the pandemic and the latest scientific evidence about  
14 how the virus is transmitted. (*Id.* Ex. H [State Public Health Officer Order (Aug. 28, 2020)].)  
15 The Blueprint, issued under the authority of the Emergency Services Act and the Health & Safety  
16 Code (see *id.* Exs. E & H at p. 3]), imposed restrictions on various sectors or activities based on  
17 the risk that they pose to public health, assessed in light of criteria such as the number of people  
18 involved, the riskiness of the activity, and the ability to employ protective measures such as  
19 masks and physical distancing. (*Id.* Ex. H.) The stringency of these restrictions varied depending  
20 on the level of community spread of COVID-19 in each county. Each county was assigned to one  
21 of four color-coded tiers based on local conditions, with the restrictions relaxing in each  
22 successive tier as conditions improved. (*Ibid.*)

### 23 **B. The Rescinding of the Blueprint and Current Policies.**

24 In December 2020, the United States Food and Drug Administration approved two COVID-  
25 19 vaccines for emergency use authorization, and it approved a third in February 2021, which  
26 permitted their distribution to the public. (*Brach v. Newsom* (9th Cir. June 15, 2022) -- F.4th --,  
27 No. 20-56291, 2022 WL 2145391, at \*3 (“*Brach*”).) Supplies of the vaccines initially were very  
28 limited, and in California vaccines thus were available only to certain segments of the population

1 most at risk. (*Ibid.*; see also Jones Decl. Ex. K.) Supplies of the vaccines steadily expanded  
2 throughout the spring and early summer of 2021. By April 15, all adults over 18 in California  
3 were eligible for vaccination and, by summer 2021, the vaccines generally were available to all  
4 adults who wanted one. (*Brach, supra*, 2022 WL 2145391, at \*3; Jones Decl. Ex. K.)

5 As vaccines became more widely available, they displaced the need for non-pharmaceutical  
6 interventions, and the State began scaling back capacity restrictions and other measures aimed at  
7 promoting social distancing and limiting person-to-person contact. On March 4, 2021, the  
8 Blueprint was modified to take into account the statewide level of vaccination, allowing counties  
9 to shift into a less restrictive tier once the State met certain vaccination benchmarks. (*Id.* Ex. I.)  
10 Then, on April 6, 2021, the Governor announced that, as of June 15, “California will fully open  
11 its economy” and “mov[e] beyond the Blueprint for a Safer Economy” if two criteria were met—  
12 sufficient vaccine supply, and low hospitalization rates. (*Id.* Ex. J.)

13 On June 11, 2021, the Governor issued EO N-07-21, which rescinded the Blueprint and the  
14 related emergency orders at issue in this case in their entirety, effective June 15, 2021. (*Id.*  
15 Ex. L.) Additionally, on June 11, 2021, the State Public Health Officer issued an order that  
16 expressly superseded its prior order establishing the Blueprint (the August 28, 2020, Order), as  
17 well as earlier related orders. (*Id.* Ex. O.) As a result, as of June 15, 2021, the Blueprint no  
18 longer existed, and CDPH required only that individuals follow the State’s masking guidance, the  
19 State’s rules on large indoor “mega events,” and the State’s COVID-19 Public Health Guidance  
20 for school and youth activities—none of which are at issue in this case. (*Id.* Ex. O.)<sup>1</sup>

21 In February 2022, the State unveiled the current framework for managing COVID-19,  
22 known as the SMARTER Plan. (*Id.* Ex. W.) The SMARTER Plan again does not contemplate  
23 capacity restrictions, and instead maintains the State’s focus on increasing vaccination rates,  
24 monitoring COVID-19 case levels, keeping schools open safely, and maintaining an adequate

25 \_\_\_\_\_  
26 <sup>1</sup> The health orders addressing the pandemic since that date likewise have focused on  
27 measures that are not at issue in this case, such as promoting vaccination and testing, and  
28 expanding or protecting the capacity of the State’s health-care system. (See, e.g., Orders of the  
State Public Health Officer dated July 6, 2021, August 5, 2021, August 11, 2021, August 19,  
2021, August 26, 2021, and September 28, 2021, all available at  
<https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Guidance.aspx>.)

1 supply of masks as well as therapeutics for treating COVID infections.

2 In short, by June 2021, all of the emergency orders at issue in this case were fully  
3 rescinded, and Plaintiffs have not been subject to the restrictions they challenge since then.

### 4 **III. STATUTORY BACKGROUND.**

#### 5 **A. The Emergency Services Act.**

6 The Legislature enacted the Emergency Services Act (Gov. Code, § 8550 et seq.) (“ESA”)  
7 to fulfill the State’s “responsibility” to “mitigate the effects of natural, manmade, or war-caused  
8 emergencies that result in conditions of disaster or in extreme peril to life, property, and the  
9 resources of the state.” (*Id.*, § 8550.) The ESA endows the Governor with the power to proclaim  
10 a “state of emergency” when the State is confronted with “conditions of disaster or of extreme  
11 peril to the safety of persons and property within the state.” (*Id.*, §§ 8558, subd. (b); 8625.) The  
12 ESA “confers upon the Governor broad powers to deal with such emergencies.” (*Cal. Corr.*  
13 *Peace Officers Ass’n v. Schwarzenegger* (2008) 163 Cal.App.4th 802, 811.)

14 In particular, during an emergency, the Governor may, among other powers, issue orders  
15 and regulations with “the force and effect of law” (Gov. Code, § 8567, subd. (a)); “suspend any  
16 regulatory statute, or statute prescribing the procedure for conduct of state business” if it would  
17 “in any way prevent, hinder, or delay the mitigation of the effects of the emergency” (*id.*, § 8571);  
18 coordinate a state emergency plan (*id.*, §§ 8569-8570); and expend funds to carry out the  
19 purposes of the Act. (*id.*, §§ 8566, see also *id.* § 8645, 8654). The ESA also provides that in a  
20 proclaimed state of emergency, the Governor shall have “complete authority over all agencies of  
21 the state government” and the right to exercise “all police power vested in the state in order to  
22 effectuate the purposes of [the ESA],” and that, in exercising those powers, “shall promulgate,  
23 issue, and enforce such orders and regulations as he deems necessary . . . .” (*Id.*, § 8627.)

24 The ESA requires the Governor to proclaim “the termination of a state of emergency at the  
25 earliest possible date that conditions warrant.” (*Id.*, § 8629.) It also permits the Legislature to  
26 terminate a state of emergency via concurrent resolution, i.e., without the Governor’s signature.  
27 (*Ibid.*) “All of the powers granted the Governor by [the ESA] with respect to a state of  
28 emergency shall terminate when the state of emergency has been terminated.” (*Ibid.*)

1           **B. Statutory Authority of CDPH to Address Infectious Disease.**

2           California law also grants the California Department of Public Health (“CDPH”) and other  
3 health officials broad authority to address public health crises, including the prevention and  
4 control of communicable diseases. Specifically, the Communicable Disease Prevention and  
5 Control Act provides that CDPH “shall examine into the causes of communicable disease . . .  
6 occurring or likely to occur in this state,” and it grants state health officials broad powers to take  
7 action necessary to stem the spread of such diseases and to protect the public health. (Health &  
8 Saf. Code, §§ 27, 120125 et seq.) For example, the Health and Safety Code provides that CDPH  
9 “may from time to time adopt and enforce regulations requiring strict or modified isolation, or  
10 quarantine, for any of the contagious, infectious, or communicable diseases, if in the opinion of  
11 the department the action is necessary for the protection of the public health.” (*Id.*, § 120130,  
12 subd. (c), (d); see also *id.*, §§ 120135, 120145 [additional powers to address infectious disease].)  
13 In addition to these specific powers, in a section titled “Additional measures to prevent spread of  
14 disease,” the Code broadly provides that CDPH may take such “measures as are necessary to  
15 ascertain the nature of the disease and prevent its spread.” (*Id.*, § 120140.)

16           The Health and Safety Code also grants local health officials similar powers to act in order  
17 to prevent the spread of communicable disease, and local officials are required to enforce rules  
18 and orders issued by CDPH. (*Id.*, §§ 120175, 120195.) Violation of the department’s rules and  
19 orders is punishable as a misdemeanor. (*Id.*, § 120275.)

20           **IV. PLAINTIFFS’ CHALLENGE TO THE BLUEPRINT.**

21           **A. Plaintiffs’ Allegations.**

22           Plaintiffs, an indoor miniature golf venue in Fresno, a restaurant in Kern County, and their  
23 owners, challenge the restrictions that the Blueprint and related orders placed on their businesses  
24 to combat the COVID-19 pandemic. Specifically, the Complaint challenges the two executive  
25 orders that underpin the Blueprint—Executive Order (“EO”) N-33-20, which was the stay-at-  
26 home order, and EO N-60-20, issued on May 4, 2020, which was the Governor’s order directing  
27 the State’s Public Health Officer to promulgate a risk-based framework for reopening the  
28 economy—as well as CDPH’s ensuing orders establishing the Blueprint (and its predecessors).

1 (Comp. ¶¶ 13-22.) Ghost Golf alleges that the Blueprint required it to remain closed, due to  
2 conditions in Fresno County at the time. (Compl. ¶ 56.) Sol y Luna alleges that the Blueprint  
3 prohibited it from offering indoor dining, although it could offer outdoor dining. (Compl. ¶ 74.)

4 Plaintiffs challenge the Blueprint based on two legal theories. First, Plaintiffs claim that  
5 both the Governor and CDPH lack statutory authority to issue the Blueprint, and that the  
6 Blueprint therefore is ultra vires. (Compl. ¶¶ 100-125.) Second, Plaintiffs claim that, if the  
7 Blueprint is authorized by statute, the Legislature’s grant of such authority to the Governor and  
8 CDPH violates the California Constitution’s non-delegation doctrine. (Compl. ¶¶ 128-148.)  
9 Plaintiffs seek declaratory and injunctive relief invalidating the Blueprint. (Compl. ¶¶ 1, 92-98.)<sup>2</sup>

10 **B. Undisputed Material Facts.**

11 This case presents no genuine dispute of material fact. (Code Civ. Proc., § 437c, subd. (c).)  
12 Plaintiffs raise no factual challenge to the Blueprint—they do not, for example, dispute the severe  
13 risks of the pandemic or the Blueprint’s critical importance in protecting public safety and saving  
14 lives prior to the widespread availability of vaccines. To the contrary, Plaintiffs specifically  
15 allege that their claims require “[n]o factual development” and that they raise a “purely legal  
16 challenge.” (Compl. ¶ 94.) Furthermore, Plaintiffs raise only a facial challenge. They do not  
17 challenge the Blueprint based on the specific facts of its application to them, as would be required  
18 to state an as-applied claim, and instead challenge inherent characteristics of the Blueprint and the  
19 statutes that authorized it. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084  
20 [explaining that a facial challenge considers only the text of the measure itself].) As such, this  
21 case poses no triable issues of fact, and instead presents purely legal issues.

22 **C. Procedural History.**

23 On November 12, 2020, just days after filing this lawsuit, Plaintiffs filed a motion for a  
24 preliminary injunction seeking an order enjoining enforcement of the Blueprint. On January 29,  
25 2021, this Court denied the motion, ruling both that Plaintiffs are unlikely to succeed on the  
26 merits of their claims, and that the balance of equities weighed against entry of a preliminary

27 \_\_\_\_\_  
28 <sup>2</sup> The Complaint’s prayer for relief also requests nominal damages, but this Court has dismissed the prayer for nominal damages as a matter of law. (Minute Order (Dec. 17, 2021).)

1 injunction. (Order on Plaintiffs’ Motion for Preliminary Injunction (Jan. 29, 2021).)

2 Plaintiffs filed an interlocutory appeal of this Court’s preliminary injunction ruling to the  
3 Fifth District Court of Appeal. (See Case No. F082357.) On August 9, 2021, the Fifth District  
4 ruled that the appeal was moot because, while the appeal was pending, the State had rescinded the  
5 Blueprint and related orders that Plaintiffs had sought to preliminarily enjoin. (Fifth District  
6 Court of Appeal, Case No. F082357, Opinion (Aug. 9, 2021).)

7 Following the appeal, Defendants moved for judgment on the pleadings, arguing that this  
8 lawsuit is moot for reasons similar to those found by the Fifth District. This Court denied the  
9 motion. (See Law and Motion Minute Order (Dec. 17, 2021).)

## 10 ARGUMENT

11 A motion for summary judgment “shall be granted if all the papers submitted show that  
12 there is no triable issue as to any material fact and that the moving party is entitled to a judgment  
13 as a matter of law.” (Code Civ. Proc., § 437c, subd. (c); see also *Aguilar v. Atlantic Richfield Co.*  
14 (2001) 25 Cal.4th 826, 843.) To be entitled to summary judgment, the defendant only needs to  
15 show “that one or more elements of the cause of action . . . cannot be established.” (*Id.* at p. 853.)

### 16 I. THE COURT OF APPEAL’S OPINION IN *GALLAGHER* IS DISPOSITIVE OF THIS CASE.

17 In *Gallagher, supra*, the Court of Appeal addressed precisely the same claims challenging  
18 the ESA that Plaintiffs raise here and ruled that those claims lack merit. The *Gallagher* opinion is  
19 dispositive of this case and compels entry of judgment in Defendants’ favor.

20 The plaintiffs in *Gallagher*, like Plaintiffs here, challenged executive orders the Governor  
21 issued under the ESA to address the COVID-19 pandemic (in that case, executive orders related  
22 to the 2020 election) based on the same two legal claims that Plaintiffs allege here. First, the  
23 plaintiffs alleged, as a matter of statutory interpretation, that the ESA should be construed  
24 narrowly as not granting the Governor any independent quasi-legislative authority to issue orders  
25 and rules in an emergency, and that the executive order at issue therefore was unauthorized.  
26 (*Gallagher, supra*, 63 Cal.App.5th at pp. 1113-1114.) The plaintiffs had relied, like Plaintiffs  
27 here, on the canon of constitutional avoidance, arguing this construction was necessary to avoid  
28 an alleged violation of the California Constitution’s non-delegation doctrine. (*Id.* at p. 1111.)

1 Second, the plaintiffs argued, like Plaintiffs here, that if the ESA does authorize the Governor to  
2 issue quasi-legislative orders, the ESA violates the non-delegation doctrine. (*Id.* at p. 1114.)

3 The Court of Appeal rejected both claims. First, *Gallagher* rejected the “attempt[] to  
4 interpret section 8627 to exclude any grant of authority to the Governor to issue quasi-legislative  
5 orders.” (*Id.* at p. 1113.) It held instead that “the plain language of section 8627” gives the  
6 Governor “the state’s ‘police power,’ i.e., *quasi-legislative power*, in an emergency.” (*Id.* at p.  
7 1113, italics added.) Importantly, in so ruling, *Gallagher* found that the ESA is “unambiguous”  
8 in this respect, and therefore the canon of constitutional avoidance was inapplicable, since the  
9 terms of the ESA are clear and present “no ambiguity to resolve” via the canons of construction.  
10 (*Id.* at p. 1112.) Therefore, *Gallagher* rejected the same statutory challenge to the Governor’s  
11 emergency powers under the ESA that Plaintiffs allege here, and its ruling is binding in this case.  
12 (*Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, 569 [“[d]ecisions of every division of  
13 the District Courts of Appeal are binding upon all the ... superior courts of this state”].)

14 Second, *Gallagher* rejected the plaintiffs’ claim that the ESA violates the non-delegation  
15 doctrine by authorizing the Governor to issue quasi-legislative orders without sufficient standards  
16 and safeguards—again, the same claim Plaintiffs raise here. (*Gallagher, supra*, 63 Cal.App.5th at  
17 pp. 1113-1118.) *Gallagher* held that the ESA includes sufficient standards and safeguards to  
18 guide the Legislature’s delegation of authority to the Governor, as the doctrine requires. (*Ibid.*) It  
19 squarely held that “the Emergency Services Act, and specifically section 8627 of the Emergency  
20 Services Act, is *not an unconstitutional delegation of legislative power.*” (*Id.* at p. 1118, italics  
21 added.) This ruling, again, forecloses Plaintiffs’ non-delegation challenge to the ESA here. (See  
22 *Lafferty v. Wells Fargo Bank, supra*, 213 Cal.App.4th at p. 569.)

23 The *Gallagher* opinion is dispositive of this entire case, despite the fact that *Gallagher* only  
24 addressed a challenge to the ESA, while Plaintiffs here challenge both the ESA and the statutory  
25 powers of CDPH. The Blueprint issued under both the ESA and CDPH’s statutory authority, and  
26 both sources of statutory authority fully and independently authorized the Blueprint. (See *infra*,  
27 pp. 16, 18.) Because the ESA fully authorized the Blueprint, and *Gallagher* forecloses Plaintiffs’  
28 challenge to the ESA, Plaintiffs would not be entitled to declaratory or injunctive relief

1 invalidating the Blueprint, even if their challenge to the statutory authority of CDPH had merit  
2 (and it does not). Because an order adjudicating Plaintiffs’ challenge to CDPH’s statutory  
3 authority would have no practical effect, there is no justiciable controversy as to that issue; any  
4 ruling would be purely advisory and, as such, improper. (See *Wilson & Wilson v. City Council of*  
5 *Redwood City* (2011) 191 Cal.App.4th 1559, 1574 [explaining courts do not issue “advisory  
6 opinions” or “declare principles or rules of law which cannot affect the matter in issue in the case  
7 before it”]; see also Code Civ. Proc., § 1060 [providing that a claim for declaratory relief requires  
8 an “actual controversy relating to the legal rights and duties of the respective parties”].)

9 Therefore, the *Gallagher* opinion is dispositive of this lawsuit.

## 10 **II. PLAINTIFFS’ CLAIMS WOULD LACK MERIT EVEN ABSENT *GALLAGHER*.**

11 Even apart from *Gallagher*, California law is abundantly clear that Plaintiffs’ claims cannot  
12 succeed as a matter of law. First, Plaintiffs claim that neither the Governor nor CDPH possessed  
13 statutory authority to issue the Blueprint. But the Blueprint and the orders that underpinned it  
14 issued under both the ESA and the Health and Safety Code provisions authorizing CDPH to  
15 combat the spread of infectious disease, and both of those statutes, independently, provided  
16 unambiguous authorization for the Blueprint, as explained below. Second, contrary to Plaintiffs’  
17 allegations, both statutes easily satisfy the non-delegation doctrine.

### 18 **A. Plaintiffs’ Claim that the Blueprint Lacked Statutory Authorization Fails 19 as a Matter of Law.**

#### 20 **1. The Governor’s Statutory Powers under the Emergency Services Act 21 Authorized the Blueprint.**

21 Plaintiffs first claim that the Governor lacked statutory authorization to issue the Blueprint.  
22 (Compl. ¶ 100.) The claim lacks merit. The ESA grants the Governor broad powers to issue  
23 orders and regulations with the force and effect of law to mitigate the effects of an emergency. In  
24 the exercise of those emergency powers, the Governor ordered all residents to heed the orders and  
25 guidelines of state and local health officials issued to control the spread of COVID-19, and  
26 separately ordered CDPH to develop a risk-based framework for reopening the economy, the  
27 result of which was the Blueprint. (Jones Decl. Exs. B, C, E.) Therefore, contrary to Plaintiffs’  
28 allegations, the ESA provided express statutory authorization for issuance of the Blueprint.



1 Contrary to Plaintiffs’ allegations, the ESA expressly authorizes the Governor to issue  
2 orders and regulations to address an emergency. The ESA states that “[t]he Governor may make,  
3 amend, and rescind orders and regulations necessary to carry out the provisions of [the ESA],”  
4 and that such “orders and regulations shall have the force and effect of law.” (Gov. Code, § 8567,  
5 subd. (a).) This authority is “in addition to any other powers” that the ESA grants the Governor.  
6 (*Id.*, § 8565.) In addition, section 8627 expressly grants the Governor broad quasi-legislative  
7 authority to address an emergency. (*Id.*, § 8627.) The Governor issued the orders in question  
8 pursuant to the authority granted by these and other sections of the ESA. (Jones Decl. Exs. C, E.)

9 Despite this express statutory authority, Plaintiffs allege that section 8627 only grants the  
10 Governor the power to control and coordinate the State’s various executive-branch agencies, but  
11 that it does not grant the Governor himself any additional, independent power to issue generally  
12 applicable rules or orders in response to an emergency. (Compl. ¶¶ 108-111.) This contention is  
13 baseless, as *Gallagher* correctly ruled. Section 8627 and the other above-cited provisions of the  
14 ESA expressly grant the Governor independent authority to issue quasi-legislative orders and  
15 rules to respond to a proclaimed emergency. Section 8627 states as follows:

16 During a state of emergency the Governor shall, to the extent he deems necessary,  
17 have complete *authority over all agencies* of the state government and the right to  
18 *exercise . . . all police power vested in the state* by the Constitution and laws of the  
19 State of California *in order to effectuate the purposes of this chapter*. In exercise  
thereof, he shall promulgate, issue, and enforce such orders and regulations as he  
deems necessary, in accordance with the provisions of Section 8567.

20 (Gov. Code, § 8627, emphasis added.) Thus, section 8627 expressly grants the Governor *both*  
21 (1) “complete authority over all agencies of the state government,” “and” (2) the right to exercise  
22 “all police power vested in the state . . . in order to effectuate the purposes of this chapter” via  
23 duly issued orders and regulations. (*Ibid.*) Plaintiffs’ effort to read the latter grant of authority  
24 out of the statute contradicts the ESA’s plain language. (See, e.g., *Copley Press, Inc. v. Sup. Ct.*  
25 (2006) 39 Cal.4th 1272, 1284 [in statutory construction, courts “look first to the language of the  
26 statute” and “strive to give effect and significance to every word and phrase”].)

27 The foregoing interpretation also is consistent with longstanding understandings of the  
28 Governor’s emergency powers. For example, in 1977, at the request of the Governor’s Office,

1 the Attorney General issued a formal opinion interpreting section 8627 that specifically rejected  
2 the construction that Plaintiffs urge here. (60 Cal. Op. Att’y Gen. 99 (1977) 1977 WL 24861, at  
3 fn. 5.) Attorney General opinions are entitled to “great weight,” because courts “presume that the  
4 Legislature was cognizant of the Attorney General’s construction” and “would have taken  
5 corrective action if it disagreed with that construction.” (*Ennabe v. Manosa* (2014) 58 Cal.4th  
6 697, 717 fn. 14.) Similarly, the Governor has issued orders and regulations under the ESA absent  
7 separate statutory authority on numerous occasions prior to the COVID-19 emergency,<sup>3</sup> and the  
8 fact that the Legislature has declined to amend or clarify the ESA despite such orders provides  
9 strong indicia that such orders are consistent with the ESA. (*Save Our Heritage Org. v. City of*  
10 *San Diego* (2018) 28 Cal.App.5th 656, 668.)

11 For these reasons, the ESA provided full and complete statutory authorization for the  
12 Blueprint. The Complaint’s first cause of action (“Count 1”) therefore fails as a matter of law.

13 **2. CDPH’s Statutory Powers to Stem the Spread of Infectious Disease**  
14 **Independently Authorized the Blueprint.**

15 Independent of the ESA, the Health and Safety Code grants the State’s public health  
16 officials broad authority to combat the spread of infectious disease, and CDPH issued the orders  
17 that Plaintiffs challenge pursuant to those statutory powers. (Jones Decl. Ex. H.) Specifically, in  
18 addition to certain specific powers to combat infectious disease (*supra*, p. 12), the Health and  
19 Safety Code expressly grants the Department broad additional authority to take such measures “as  
20 are necessary to ascertain the nature of the disease and prevent its spread.” (Health & Saf. Code,  
21 § 120140.) This authority of CDPH fully authorized the Blueprint, independent of the ESA.

22 Health and Safety Code section 120140 states as follows:

23 “Upon being informed by a health officer of any contagious, infectious, or  
24 communicable disease *the department may take measures as are necessary to*  
25 *ascertain the nature of the disease and prevent its spread. To that end, the department*  
*may, if it considers it proper, take possession or control of the body of any living*  
*person, or the corpse of any deceased person.”*

26 (Health & Saf. Code, § 120140, italics added.)

27 \_\_\_\_\_  
28 <sup>3</sup> See, e.g., “Proclamation of a State of Emergency,” signed by Governor Newsom on  
October 13, 2017; Executive Order B-37-16, signed by Governor Newsom on May 9, 2016.

1 The language of section 120140 is clear and unambiguous. COVID-19 is a “contagious,  
2 infectious, or communicable disease” that indisputably posed a grave threat to the public health.  
3 (*Supra*, pp. 8, 13.) The Blueprint’s restrictions on business activity were “necessary” to “prevent  
4 [the] spread” of COVID-19 and protect public safety—again, this case presents no claim to the  
5 contrary. (*Supra*, p. 13.) Therefore, section 120140 clearly and unambiguously authorized the  
6 Blueprint. (*People v. Hagedorn* (2005) 127 Cal.App.4th 734, 741 [“[i]f the statutory language is  
7 clear and unambiguous, then we need go no further”]; see also *Dep’t of Public Health, supra*, 61  
8 Cal.App.5th 478 at pp. 490-495 & fn. 5 [rejecting a challenge to COVID-19-related business  
9 restrictions issued under the similar powers that the Code grants to counties].)

10 The courts repeatedly have recognized that section 120140 grants broad discretion to  
11 respond to infectious disease and protect public health, as the plain language of that section  
12 indicates. For example, construing the virtually identical authority granted to local health  
13 officials, the Court of Appeal explained that, while the Health and Safety Code sets out numerous  
14 specific actions that health officials may take, those actions are “not exhaustive,” and this broad  
15 language is intended to “leav[e] the course of action to the health officer’s discretion.” (*AIDS*  
16 *Healthcare Found. v. Los Angeles Cty. Dep’t of Pub. Health* (2011) 197 Cal.App.4th 693, 702;  
17 see also *Derrick v. Ontario Cmty. Hosp.* (1975) 47 Cal.App.3d 145, 152 [similar].)

18 For these reasons, the Health and Safety Code expressly authorized CDPH to issue the  
19 Blueprint, separate and independent of the Governor’s statutory authority under the ESA.  
20 Therefore, Plaintiffs’ second cause of action (“Count 2”) fails as a matter of law.<sup>4</sup>

### 21 **B. Plaintiffs’ Non-Delegation Challenge Fails as a Matter of Law.**

22 Plaintiffs allege that both the ESA and Health and Safety Code provisions that authorized  
23 the Blueprint confer “unfettered” powers, “without any procedural, substantive or temporal  
24 constraints,” and as such violate the California Constitution’s non-delegation doctrine. (Compl.

25 <sup>4</sup> CDPH also issued the Blueprint under Health and Safety Code sections 120130, 120145,  
26 which prescribe specified authority to quarantine and isolate property and places to stem the  
27 spread of infectious diseases, in addition to section 120140. (See Jones Decl. Ex. H.) While  
28 sections 120130 and 120145 also authorized the Blueprint (as well as other COVID-19 measures  
not at issue here, such as certain work exclusions and isolation rules), Defendants do not rely on  
those sections in this motion, and the Court need not address them, in light of the clear statutory  
authority as set forth above.

¶¶ 134-139, 144-147.) Contrary to Plaintiffs’ assertion, neither statute confers “unfettered” authority. Instead, both statutes include important standards and safeguards that guide their implementation, and both easily satisfy the non-delegation doctrine.

### 1. Legal Standards Governing the Non-Delegation Doctrine.

The non-delegation doctrine arises from the separation-of-powers provision of the California Constitution. (Cal. Const., art. III, § 3.) “The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch.” (*Carmel Valley Fire Prot. Dist. v. State* (2001) 25 Cal.4th 287, 297.) The separation of powers principle, however, “does not command a hermetic sealing off of the three branches of Government from one another.” (*O'Brien v. Jones* (2000) 23 Cal.4th 40, 48.) On the contrary, the doctrine “recognizes that the three branches of government are interdependent, and it permits actions of one branch that may ‘significantly affect those of another branch.’” (*Carmel Valley Fire Prot. Dist. v. State* (2001) 25 Cal.4th 287, 298.)

Plaintiffs rely on the non-delegation doctrine, which is a component of separation of powers. (See *Salmon Trollers Mktg. Assn. v. Fullerton* (1981) 124 Cal.App.3d 291, 299 (“*Salmon Trollers*”).) The purpose of the non-delegation doctrine is to ensure that “the legislative body must itself effectively resolve the truly fundamental [policy] issues.” (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 376.) The Legislature, however, “properly may delegate some quasi-legislative or rulemaking authority,” and “[f]or the most part, delegation of quasi-legislative authority . . . is not considered an unconstitutional abdication of legislative power.” (*Gerawan Farming, Inc. v. Agric. Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1146 (“*Gerawan Farming*”).) Indeed, courts recognize not just that the Legislature can delegate quasi-legislative power, but that “delegation by legislative bodies is essential to the basic ability of government to function.” (*Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1515; see also *Salmon Trollers, supra*, 124 Cal.App.3d at p. 300 [similar].) Therefore, delegations of quasi-legislative authority are common, and “courts are understandably reluctant to interfere with such delegations.” (*Ibid.*)

An unconstitutional delegation occurs only when a legislative body (1) leaves the resolution of the fundamental policy issue to others, (2) fails to provide adequate direction for the

1 implementation of that policy, or (3) fails to contain safeguards adequate to prevent its abuse.  
2 (*Gerawan Farming, supra*, 3 Cal.5th at pp. 1146, 1150-1151.) Both the ESA and CDPH’s  
3 authorizing statutes readily satisfy these standards, as set forth below.

4 **2. Plaintiffs’ Non-Delegation Challenge to the ESA Fails.**

5 **a. The Legislature Established the Fundamental Policy.**

6 The Legislature established the fundamental policy of the ESA, consistent with the non-  
7 delegation doctrine. The ESA expressly states its fundamental purpose, which is to “mitigate the  
8 effects of natural, manmade, or war-caused emergencies that result in conditions of disaster or in  
9 extreme peril to life, property, and the resources of the state,” and to “protect the health and safety  
10 and preserve the lives and property of the people of the state.” (Gov. Code, § 8550.) Thus, the  
11 Legislature made the fundamental policy decision, namely to fulfill the State’s “responsibility” to  
12 mitigate the effects of emergencies and to protect the people of the state, by granting the  
13 Governor and the state’s public officials the tools needed to swiftly and effectively respond to the  
14 varied and unanticipated emergencies that may arise in California. (*Ibid.*)

15 The courts have upheld statutes based on far more general policy goals than this. For  
16 example, the courts have held that a “general welfare standard” adequately establishes the  
17 fundamental policy of a law. (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 510.) A policy of  
18 conferring “significant community benefit” also has been found to suffice. (*Sacramentans for*  
19 *Fair Planning v. City of Sacramento, supra*, 37 Cal.App.5th at p. 717.) As explained, the ESA  
20 states its fundamental purposes with more specificity than this, and readily satisfies the  
21 requirement that the Legislature establish the fundamental policy of the Act.

22 **b. The ESA Prescribes Adequate Standards.**

23 The Legislature also provided standards to guide implementation of the ESA that are more  
24 than adequate under the non-delegation doctrine, as *Gallagher* correctly ruled. (*Gallagher,*  
25 *supra*, 63 Cal.App.5th at p. 1115 [ruling that the ESA “does furnish standards to guide  
26 implementation of [Government Code] section 8627,” satisfying the doctrine].)

27 To satisfy the doctrine’s requirement of adequate standards, the Legislature need not  
28 “articulate a formula” or impose “rigid standards.” (*Gerawan Farming, supra*, 3 Cal.5th at pp.

1 1149, 1150; *Carson Mobilehome Park Owners' Assoc. v. City of Carson* (1983) 35 Cal.3d 184,  
2 191.) To the contrary, the Legislature may provide the flexibility needed to carry out the  
3 fundamental policy it has determined. (*Gerawan Farming, supra*, 3 Cal.5th at p. 115.)  
4 Therefore, the “yardstick” it provides need only be “as definite as the exigencies of the particular  
5 problem permit.” (*Birkenfeld v. City of Berkely* (1976) 17 Cal.3d 129, 168, quotation omitted.)  
6 Furthermore, the “standards for administrative application of a statute need not be expressly set  
7 forth; they may be implied by the statutory purpose.” (*Sims v. Kernan* (2018) 30 Cal.App.5th  
8 105, 114; see also *Rodriguez v. Solis, supra*, 1 Cal.App.4th at p. 509 [same].)

9 The ESA easily satisfies this element. The ESA defines when the Governor may exercise  
10 the powers granted in section 8627, it describes the purpose for which he may do so, and it  
11 requires a close nexus with those purposes. Specifically, the Act provides that the Governor may  
12 exercise the police powers vested in the State only “[d]uring a state of emergency.” (Gov. Code,  
13 § 8627.) It also provides clear guidance regarding how the Governor should exercise this  
14 authority. It requires that the Governor exercise this authority “in order to effectuate the purpose  
15 of this chapter [i.e., the ESA]” (*ibid.*), which, again, expressly states its purposes. (*Id.*, § 8550).  
16 The ESA also requires a nexus with those purposes. It requires that the Governor exercise his  
17 authority only as necessary for those purposes, and that he do so “in accordance with the  
18 provisions of Section 8567” (*id.*, § 8627), which authorizes him to make orders and regulations  
19 “necessary to carry out the provisions of this chapter.” (*Id.*, § 8567, subd. (a).) Therefore, the  
20 Act authorizes the Governor to act only as reasonably necessary to carry out the Act’s stated  
21 purposes—that is, to respond to and mitigate the effect of emergencies. (*Id.*, § 8550; see *Yamaha*  
22 *Corp. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10-11 [explaining that quasi-legislative  
23 rules must be “reasonably necessary to implement the purpose of the statute”].)

24 These standards easily satisfy the non-delegation doctrine. (See *Beshear v. Acree* (Ky.  
25 2020) 615 S.W.3d 780, 811 [explaining that “[g]iven the wide variance of occurrences that can  
26 constitute an emergency, disaster or catastrophe, the criteria are necessarily broad and result-  
27 oriented”].) Indeed, California courts have ruled that guidance less specific than this satisfies the  
28 non-delegation doctrine. For example, *Rodriguez v. Solis* addressed a zoning law that established

1 a fundamental policy of “promotion of ‘public . . . welfare.’” (*Rodriguez v. Solis, supra*, 1  
2 Cal.App.4th at pp. 509-510.) The decision explained that “[t]his, in itself, can be construed as a  
3 guideline (to the promotion of public welfare).” (*Id.* at p. 510; see also *Sacramentans for Fair*  
4 *Plan. v. City of Sacramento* (2019) 37 Cal.App. 5th 698, 717 [ “[A] general welfare standard is a  
5 sufficient guideline to enable an agency to act constitutionally”].) Again, in the ESA, the  
6 Legislature provided far greater guidance than this—it expressly prescribed the fundamental  
7 purposes of the Act and required a nexus between the Governor’s exercise of his delegated  
8 authority and those stated purposes. The ESA provides adequate standards.

9 **c. The ESA Prescribes Sufficient Safeguards.**

10 Finally, the ESA also includes safeguards sufficient to guard against abuse, as the  
11 *Gallagher* court again correctly held. (*Gallagher, supra*, 63 Cal.App.5th at p. 1116 [explaining  
12 that “of greater significance than ‘standards’ is the requirement that legislation provide  
13 ‘safeguards’ against the arbitrary exercise of quasi-legislative authority”; ruling that the ESA  
14 contains important safeguards sufficient to satisfy the doctrine].)

15 The ESA includes several safeguards to guard against abuse. First, the Governor can  
16 exercise the ESA’s delegated powers only in limited circumstances—only when the Governor  
17 expressly determines that emergency circumstances exist, under criteria prescribed by the  
18 Legislature, and proclaims a state of emergency on that basis. (Gov. Code, §§ 8558, 8625-8626.)  
19 This proclamation must be in writing, must be filed with the Secretary of State, and must be  
20 widely publicized. (*Ibid.*) These safeguards guarantee transparency regarding the basis for the  
21 Governor’s exercise of emergency powers, facilitating oversight.

22 Second, as explained, the Legislature provided standards to cabin the Governor’s exercise  
23 of the State’s police powers by authorizing the Governor to act only as necessary “in order to  
24 effectuate the purposes of” the ESA. (*Supra*, p. 22.) Therefore, the Legislature did not merely  
25 confer “unfettered” authority to the Governor as Plaintiffs allege (Compl. ¶ 134), but rather  
26 authorized the Governor to exercise the State’s police powers during a proclaimed state of  
27 emergency only as reasonably necessary for the Act’s expressly stated purposes.

28 Third, the Legislature required that the Governor abide by important procedural formalities

1 in the exercise of the Act’s delegated powers, to ensure transparency. Section 8627 not only  
2 provides that the Governor shall have the right to exercise the police powers of the State “in order  
3 to effectuate the purposes of” the ESA, but also that, “[i]n exercise thereof,” he “shall”  
4 promulgate orders and regulations “in accordance with the provisions of Section 8567.”  
5 Therefore, the Governor must exercise his powers via duly issued orders and regulations pursuant  
6 to section 8567, which states that such orders and regulations must be in writing, and that the  
7 Governor “shall cause widespread publicity and notice to be given” of such orders and  
8 regulations. (Gov. Code, § 8567, subds. (a)-(b).) A requirement, such as this, that measures  
9 taken under the statute be conducted openly and transparently “provides a check on the  
10 [Governor’s] power.” (*Alexander v. State Pers. Bd.* (2000) 80 Cal.App.4th 526, 538.)

11 Fourth, the Act includes temporal limitations. The Legislature provided that the Governor  
12 “shall proclaim the termination of a state of emergency at the earliest possible date that conditions  
13 warrant.” (Gov. Code, § 8627, italics added.) It also clarified that “[a]ll of the powers granted  
14 the Governor by this chapter with respect to a state of emergency shall terminate when the state of  
15 emergency has been terminated.” (*Ibid.*) Therefore, the Act authorizes the Governor to exercise  
16 emergency powers only while the specified emergency conditions persist.

17 Fifth, importantly, the Legislature retained for itself the ultimate power to, if necessary,  
18 terminate the Governor’s emergency powers. Specifically, it provided that the state of emergency  
19 shall terminate either as provided in the prior paragraph or “by concurrent resolution of the  
20 Legislature declaring it at an end.” (*Id.*, § 8629.) That is, the Legislature can terminate the state  
21 of emergency by a simple majority vote, without the Governor’s signature. Therefore, the  
22 Legislature has ultimate authority to oversee the Governor’s exercise of his emergency powers  
23 and ensure that the delegated authority is not misused. (See, e.g., *Golightly v. Molina* (2014) 229  
24 Cal.App.4th 1501, 1517 [explaining that “[c]learly” there was no total abdication where the  
25 legislative body retained the power to rescind the delegated authority, among other safeguards];  
26 see also *Gallagher, supra*, 63 Cal.App.5th at p. 1116 [ruling that the ESA’s temporal limitations  
27 and the Legislature’s ability to terminate the state of emergency constitute safeguards sufficient to  
28 satisfy the non-delegation doctrine].)



1           Therefore, the ESA includes suitable safeguards. For these reasons, the ESA easily satisfies  
2 the non-delegation doctrine, and the Complaint’s “Count 3” thus fails as a matter of law.

3           **C. Plaintiffs’ Non-Delegation Challenge to CDPH’s Authority Fails.**

4           Plaintiffs also allege that Health and Safety Code section 120140, which authorized CDPH  
5 to issue the Blueprint (see *supra*, p. 18), violates the non-delegation doctrine. (Compl. ¶¶ 145.)  
6 As explained, this Court need not address Plaintiffs’ non-delegation challenge to CDPH’s  
7 statutory authority, since the Governor’s emergency powers under the ESA fully and completely  
8 authorized the Blueprint, independent of CDPH’s authority. (See *supra*, pp. 15-18.) Therefore,  
9 Plaintiffs would not be entitled to a declaration that the Blueprint was invalid or injunctive relief  
10 regardless of the merit of their challenge to CDPH’s statutory powers. (See *supra*, pp. 15-16.)  
11 Even so, Plaintiffs’ non-delegation challenge to CDPH’s statutory authority also lacks merit.

12           The Legislature decided the fundamental policies of the Communicable Disease Prevention  
13 and Control Act. (Health & Saf. Code, § 27; see *supra*, p. 12 [summarizing the Act].) The  
14 purpose of the Act, of course, is to prevent and control the spread of communicable diseases. The  
15 Act provides, for example, that CDPH “shall examine into the causes of communicable  
16 disease . . . occurring or likely to occur in this state” (Health & Saf. Code, § 120125), and it  
17 grants CDPH specified authority to act for the expressly stated purpose of controlling the spread  
18 of communicable disease. (See, e.g., *id.*, §§ 120130, 120155, 120175.) Therefore, the  
19 Legislature determined the fundamental policy of the statute.

20           The Legislature also prescribed appropriate guidance for the implementation of the Act.  
21 Indeed, section 120140 expressly indicates how the Department should implement the delegated  
22 authority: it states that, upon being informed of any communicable disease, the Department is  
23 authorized to take measures that are “necessary” to “ascertain the nature of the disease and  
24 prevent its spread.” (*Id.*, § 120140.) The Act thus includes clear standards. (See, e.g., *Gerawan*  
25 *Farming, supra*, 3 Cal.5th at pp. 1149, 1150, [explaining that the Legislature need not “articulate  
26 a formula” or impose “rigid standards”].) Indeed, this expressly stated standard—that CDPH act  
27 only as “necessary” to “ascertain the nature of the disease and prevent its spread”—is far more  
28 precise than the guidance in some statutes that California courts have affirmed against non-

1 delegation challenges. (See, e.g., *Rodriguez v. Solis*, *supra*, 1 Cal.App.4th at pp. 509-510 [ruling  
2 that a purpose of “promotion of ‘public . . . welfare’” is a sufficient standard]; *supra*, pp. 21-23  
3 [collecting cases].) As explained, the “yardstick” need only be “as definite as the exigencies of  
4 the particular problem permit.” (*Birkenfeld v. City of Berkely*, *supra*, 17 Cal.3d at p. 168; *supra*,  
5 pp. 50-53.) The Legislature certainly could reasonably conclude that the exigencies of  
6 responding to outbreaks of infectious disease require that the Department have broad latitude to  
7 determine the precise actions needed to stem the spread of a disease, since the Legislature does  
8 not know, in advance, what diseases will arise, how they will spread, the health risks they pose,  
9 and what measures are needed and effective to address them—and addressing infectious disease  
10 may require swift action. (See *Beshear v. Acree* (Ky. 2020) 615 S.W.3d 780, 811 [explaining  
11 that, in such circumstances, “the criteria are necessarily broad and result-oriented”].)

12 Finally, the Act also is subject to appropriate safeguards. Section 120140 authorizes the  
13 Department to take action only insofar as “necessary” for the narrow and precise purpose  
14 described above—preventing the spread of infectious disease. Therefore, the measures can  
15 remain in place only while the conditions persist that render them necessary. If an affected party  
16 were to believe that the Department had taken action not reasonably needed for that purpose or  
17 that such action had outlived its need, the party can challenge it on that basis. (See, e.g., *LA*  
18 *Dep’t of Public Health*, *supra*, 61 Cal.App.5th at pp. 490-495 & fn. 5.) As stated, Plaintiffs have  
19 disavowed any such challenge. (*Supra*, p. 13.) Furthermore, accountability is inherent in the  
20 structure of the Department. The director of CDPH appoints all officers and employees of the  
21 Department, and the director, in turn, holds office at the pleasure of the Governor. (Health & Saf.  
22 Code, §§ 131005, 131020.) Finally, if the Legislature determines that the Department acted  
23 inappropriately in a particular instance, it also is free to overturn the Department’s action.

24 For these reasons, Plaintiffs’ non-delegation challenge to CDPH’s powers lacks merit.

## 25 CONCLUSION

26 For the foregoing reasons, Defendants respectfully request that the Court grant this motion  
27 for summary judgment and enter judgment in Defendants’ favor.

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Dated: July 1, 2022

Respectfully Submitted,  
  
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## Kiren Mathews

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