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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

GHOST GOLF, INC., DARYN COLEMAN, SOL Y LUNA MEXICAN CUISINE, and NIEVES RUBIO, Plaintiffs, **v.** **GAVIN NEWSOM, in his official capacity as Governor of California, XAVIER BECERRA, in his official capacity as Attorney General of California, SANDRA SHEWRY, in her official capacity as Acting Director of the California Department of Public Health, ERICA S. PAN, in her official capacity as Acting State Public Health Officer,** Defendants.	Case No. 20CECG03170 **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION** 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

Plaintiffs challenge the validity of California's now-rescinded Blueprint for a Safer Economy. Specifically, Plaintiffs claim that neither the Governor nor the State's health officials possessed statutory authority to adopt the Blueprint, and, in the alternative, if the Blueprint was authorized by statute, that the statutes authorizing the Blueprint violate the California Constitution's non-delegation doctrine. Plaintiffs now move for summary judgment on their claims. Plaintiffs' motion must be denied. After Plaintiffs filed this case, the Third District Court of Appeal addressed an identical challenge to the Governor's emergency powers, and rejected it. (See *Newsom v. Superior Court* (2021) 63 Cal.App.5th 1099, review denied (Aug. 11, 2021) ("*Gallagher*").) *Gallagher* is binding here and dispositive of this lawsuit.

Even apart from *Gallagher*, Plaintiffs' claims fail as a matter of law. Contrary to Plaintiffs' allegations, both the Governor and the California Department of Public Health possess clear statutory authority to adopt emergency public health measures like the Blueprint. The Emergency Services Act grants the Governor broad authority during a proclaimed state of emergency to issue orders and regulations as necessary to mitigate the effects of the emergency. In addition, the Health and Safety Code grants the State's health officials express authority to issue such orders as are necessary to prevent the spread of infectious disease. Each of these statutes independently authorized the Blueprint, as explained below.

Plaintiffs' non-delegation claim also lacks merit. The non-delegation doctrine permits the Legislature wide latitude to delegate quasi-legislative authority to executive-branch officials in order to implement the State's policy objectives, as long as the Legislature itself sets the overarching policy of the law and includes basic standards and safeguards to guide implementation. The statutes at issue easily satisfy those requirements, as explained below.

BACKGROUND

I. THE COVID-19 PANDEMIC AND THE STATE'S RESPONSE.

Defendants have described the State's response to the COVID-19 pandemic and the Blueprint for a Safer Economy in detail in prior filings, including in their motion for summary judgment filed concurrently with Plaintiffs' motion. (See Defendants' MPA iso Motion for

Summary Judgment ("Defs.' MSJ"), pp. 8-14.) In brief, after proclaiming a state of emergency and issuing the "stay-at-home" order at the onset of the COVID-19 pandemic, the State sought to reopen businesses and institutions affected by the pandemic as promptly as was feasible, consistent with the protection of public health. In August 2020, building on earlier plans to reopen the economy, the State developed the Blueprint for a Safer Economy ("Blueprint"), which was a detailed plan for reopening the state based on the experiences of the first six months of the pandemic and the latest scientific evidence about how the virus is transmitted. (Defs.' Mtn. 9.) The Blueprint issued under the authority of both the Emergency Services Act ("ESA") (Gov. Code § 8550 et seq.) and the authority that the Health and Safety Code grants to the California Department of Public Health ("CDPH") to stem the spread of infectious disease. (*Ibid*.)

Plaintiffs do not accurately describe the State's response to the pandemic in several respects (see P's Mtn. 2-4),[1] but regardless, the orders at issue in this case are publicly available and judicially noticeable, and speak for themselves. (See Defs.' Mtn. 8-11.)

II. PLAINTIFFS' CHALLENGE TO THE BLUEPRINT FOR A SAFER ECONOMY.

Plaintiffs challenge the Blueprint, which was formally rescinded in June 2021, based on two theories. First, Plaintiffs claim that both the Governor and CDPH lacked statutory authority to issue the Blueprint. (Compl. ¶¶ 100-125.) Second, Plaintiffs claim that, if the Blueprint was authorized by statute, the Legislature's grant of such authority to the Governor and CDPH violates the California Constitution's non-delegation doctrine. (Compl. ¶¶ 128-148.) Plaintiffs seek declaratory and injunctive relief invalidating the Blueprint. (Compl. ¶¶ 1, 92-98.)

Plaintiffs do not dispute the severe risks of the pandemic or the Blueprint's critical importance in protecting public safety and saving lives prior to the widespread availability of

[1] For example, Plaintiffs assert that "[e]very week, CDPH updated its coding for each county" (P's Mtn. 2), but that is inaccurate. The Blueprint's restrictions, by design, varied depending on level of community spread of COVID-19 in each county, but CDPH certainly did not alter the Blueprint itself each week. Similarly, Plaintiffs assert that a "total shutdown" of Ghost Golf continued even as "comparable businesses" were allowed to reopen (P's Mtn. 3), but that also is inaccurate. Plaintiffs assert that, "even now" Defendants "assert a continuing discretionary power to reimpose closures (or other restrictions) as they deem appropriate" (P's Mtn. 3), but Plaintiffs do not accurately describe the State's current policies. (See Defs.' Mtn. 9-10 [describing the current policies].) Nor was the Blueprint formulated "behind closed doors" as Plaintiffs assert (P's Mtn. 3), but rather with extensive public input.

vaccines. To the contrary, Plaintiffs specifically allege that their claims require "[n]o factual development" and that they raise a "purely legal challenge." (Compl. ¶ 94.) In keeping with those statements, Plaintiffs raise only a facial challenge. They do not challenge the Blueprint based on the specific facts of its application to them, as would be required for an as-applied claim, and instead challenge inherent characteristics of the statutes. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 [a facial challenge considers only the text of the measure itself].)

ARGUMENT

A party seeking summary judgment bears the burden to establish "that there is no triable issue of material fact and that the moving party is entitled to judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A plaintiff seeking summary judgment must establish that "'each element of' the 'cause of action' in question has been 'proved.'" (*Id*. at pp. 850-851; Code Civ. Proc., § 437c, subds. (d), (p)(1).)

I. PLAINTIFFS' CHALLENGE TO THE GOVERNOR'S EMERGENCY POWERS FAILS AS A MATTER OF LAW.

A. The Court of Appeal's Opinion in *Gallagher* Forecloses Plaintiffs' Challenge to the Governor's Emergency Powers.

1. *Gallagher* Forecloses Plaintiffs' Statutory Challenge.

Gallagher, *supra*, addressed and rejected a statutory challenge to the Governor's authority under the ESA that is indistinguishable from Plaintiffs' claim here. (P's Mtn. 4-5.)

Plaintiffs allege that the Blueprint is *ultra vires* because, they claim, the ESA does not grant the Governor any independent authority to issue "generally applicable" rules or orders in an emergency, only the authority to control the activities of the State's various executive-branch agencies. (Compl. ¶¶ 108-111; P's Mtn. 4-5.) *Gallagher* held the opposite—that the ESA does grant the Governor authority to issue generally applicable orders in an emergency. The plaintiffs in *Gallagher*, like Plaintiffs here, challenged an executive order the Governor issued under the ESA to address the COVID-19 pandemic (in that case, an order related to the 2020 election). (*Gallagher*, *supra*, 63 Cal.App.5th at p. 1106.) The plaintiffs alleged that the order at issue was unauthorized because, they argued, the ESA—and in particular, Government Code section 8627—does not grant the Governor authority to issue "quasi-legislative" rules and orders in an

emergency. (*Id*. at pp. 1113-1114.) The Court of Appeal rejected the claim. It explained, "[w]hile the superior court attempted to interpret section 8627 to exclude any grant of authority to the Governor to issue quasi-legislative orders, 'police power' as exercised is generally the power to legislate. 'The police power is the authority to enact laws to promote the public health, safety, morals and general welfare.'" (*Id*. at p. 1113, citation omitted.) Therefore, it concluded, "the *plain language* of section 8627" gives the Governor "the state's 'police power,' i.e., *quasi-legislative power*, in an emergency." (*Ibid*., emphasis added; see also *Am. Coatings Assn. v. S. Coast Air Quality Mgmt. Dist.* (2012) 54 Cal.4th 446, 460 ["quasi-legislative power" is power granted to the executive to issue "generally applicable" rules and regulations pursuant to statute].) Plaintiffs' theory here thus is foreclosed by *Gallagher's* ruling that the ESA does grant the Governor authority to issue "quasi-legislative" (generally applicable) orders and rules.[2]

The *Gallagher* plaintiffs, like Plaintiffs here, relied on the canon of constitutional avoidance, arguing that the construction they urged was necessary to avoid alleged non-delegation problems. (*Id*. at p. 1111.) Importantly, *Gallagher* ruled that the canon was inapplicable, because the ESA's grant of quasi-legislative power to the Governor is "unambiguous," and therefore the ESA presents "no ambiguity to resolve" via the canons. (*Id*. at p. 1112.) For these reasons, *Gallagher* is dispositive of Plaintiffs' statutory challenge to the ESA. (See *Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, 569 ["[d]ecisions of every division of the District Courts of Appeal are binding upon all the ... superior courts"].)

Plaintiffs inexplicably fail to address *Gallagher*, despite its obvious importance to the issues.[3] In a cryptic footnote, Plaintiffs assert that they "advance different—i.e., more narrow and nuanced—arguments than those presented in [*Gallagher*]," although they decline to say why this allegedly is so or the grounds on which they believe their claims could survive *Gallagher*. (P's

[2] Nor did *Gallagher* suggest that any *other* executive-branch agency possessed authority to adopt the order at issue, contrary to Plaintiffs' theory here that the ESA limits the Governor to coordinating the activities of the State's various executive agencies. (See P's Mtn. 4-5.)

[3] Plaintiffs were well aware of *Gallagher* and its importance here. This Court's preliminary injunction order stated that the Court was keeping an eye on *Gallagher* since it was addressing some of the issues in this case (Jan. 29, 2021, Order at 2 fn. 1), and after the opinion issued (when this case was on appeal), Defendants advised the parties and court of the opinion.

Mtn. 5 fn. 17; see *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [explaining that parties cannot state points for the first time on reply, when the opposing party cannot respond].) Regardless, *Gallagher* clearly forecloses Plaintiffs' statutory challenge, as explained above.

2. *Gallagher* Forecloses Plaintiffs' Non-Delegation Challenge.

Gallagher also addressed and rejected the same non-delegation challenge to the ESA that Plaintiffs allege here. In *Gallagher*, the plaintiffs argued, like Plaintiffs here, that if the ESA authorizes the Governor to issue quasi-legislative orders, it violates the non-delegation doctrine by failing to provide sufficient standards and safeguards to guide the Governor's exercise of the delegated authority. (*Gallagher*, *supra*, 63 Cal.App.5th at pp. 1113-1118.) *Gallagher* rejected the claim, holding that the ESA does indeed include sufficient standards and safeguards to guide implementation of the statute, as the doctrine requires. (*Ibid*.) *Gallagher* squarely held that "the Emergency Services Act, and specifically section 8627 of the [ESA], is *not an unconstitutional delegation of legislative power*." (*Id*. at p. 1118, italics added.) This ruling, again, forecloses Plaintiffs' claim that section 8627 is an unconstitutional delegation of legislative power.

B. Plaintiffs' Challenge to the Governor' Emergency Powers would Lack Merit Even Absent *Gallagher*.

1. Plaintiffs' Statutory Challenge to the Blueprint Fails.

Even apart from *Gallagher*, California law is abundantly clear that Plaintiffs' challenge to the Governor's emergency powers fails as a matter of law. As stated, Plaintiffs allege that the ESA did not authorize the Blueprint because, they claim, the ESA only grants the Governor the power to exercise "complete authority over all agencies of the state government," but not any additional, independent authority to issue "generally applicable" rules in an emergency. (P's Mtn. 4-5; Compl. ¶¶ 108-111.) The ESA unambiguously provides otherwise.

Contrary to Plaintiffs' allegations, the ESA expressly authorizes the Governor to issue orders and regulations to address an emergency. The ESA states that "[t]he Governor may make, amend, and rescind orders and regulations necessary to carry out the provisions of [the ESA]," and that such "orders and regulations shall have the force and effect of law." (Gov. Code, § 8567, subd. (a).) Section 8627, in turn expressly grants the Governor broad quasi-legislative authority

to address an emergency. (*Id*., § 8627.) Section 8627 states:

> During a state of emergency the Governor shall, to the extent he deems necessary, have complete *authority over all agencies* of the state government and *the right to exercise . . . all police power vested in the state* by the Constitution and laws of the 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.

(Gov. Code, § 8627, emphasis added.) Thus, section 8627 expressly grants the Governor *both* (1) "complete authority over all agencies of the state government," "*and*" (2) the right to exercise "all police power vested in the state . . . in order to effectuate the purposes of this chapter" via duly issued orders and regulations. (See *In re C.H.* (2011) 53 Cal.4th 94, 101 [explaining that the Legislature's use of the term "and" means "'an additional thing,' 'also' or 'plus.'"].) Plaintiffs' contention—that section 8627 only grants the Governor authority over executive agencies, not any independent power to issue generally applicable rules—is contrary to the plain language of that section, and simply seeks to read the latter grant of authority out of the statute.

Plaintiffs' theory is inconsistent with the language of section 8627 in additional respects. Plaintiffs argue that section 8627 only authorizes the Governor to act if some other "component of the Executive Branch (including independent agencies) is empowered to take [the] action." (P's Mtn. 5.) But section 8627 does not say the Governor may exercise authority over state agencies by exercising all "police power" delegated to the "Executive Branch"—it says the Governor has *both* complete authority over state agencies and the right to exercise "all police power vested in *the state* by the Constitution and laws of the State . . . ." (Gov. Code, § 8627, italics added.) The police power vested in "the State," of course, is not limited to previous statutory delegations to executive-branch agencies, as Plaintiffs concede. (P's Mtn. 7.) Therefore, section 8627 clearly grants the Governor independent quasi-legislative authority.[4]

[4] In this regard, it is noteworthy that the ESA specifically defines the term "state agencies" to mean *executive-branch* agencies. (See Gov. Code, § 8557, subd. (a).) Therefore, the first phrase of section 8627, granting the Governor complete authority over "agencies" of the state, clearly refers to the Governor's control over executive-branch agencies. The second phrase, however, does not use the defined term "agencies" (or "executive branch"), and instead grants the Governor "all police power vested in *the state*," clearly indicating distinct authority. (*People v. Hardacre* (2001) 90 Cal.App.4th 1392, 1398 ["When the Legislature uses different words in the same statute, we must presume it intended a different meaning"].)

The foregoing interpretation also is consistent with longstanding understandings of the ESA. In 1977, at the request of the Governor's Office, the Attorney General issued a formal opinion interpreting section 8627 that specifically rejected the construction Plaintiffs urge here. (60 Cal. Op. Att'y Gen. 99 (1977) 1977 WL 24861, at fn. 5.) Attorney General opinions are entitled to "great weight," because courts "presume that the Legislature was cognizant of the Attorney General's construction" and "would have taken corrective action if it disagreed with that construction." (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 717 fn. 14.) Similarly, the Governor has issued orders under the ESA absent separate authority on prior occasions,[5] and the fact that the Legislature has declined to amend the ESA provides strong indicia such orders are consistent with the ESA. (*Save Our Heritage Org. v. City of San Diego* (2018) 28 Cal.App.5th 656, 668.)

Plaintiffs argue that the cramped construction of section 8627 they urge "harmonizes" the ESA, and that if section 8627 is construed according to its plain terms "every other provision of the ESA is superfluous." (P's Mtn. 5-6.) That is incorrect. Instead, section 8627 simply makes clear that, in a proclaimed state of emergency, the Governor has *both* complete authority over the activities of state agencies and independent authority to issue such orders and regulations as are necessary to mitigate the effects of the emergency. Section 8627 is consistent with the overall structure of the Act. The ESA includes detailed provisions further delineating—and circumscribing—both categories of authority. Several sections of the ESA describe the former category of authority, namely the Governor's role coordinating activities of state agencies in an emergency. (See, e.g., Gov. Code, §§ 8595; 8597; 8569-8570; 8628.) Several sections also describe, and circumscribe, the latter, namely the Governor's own quasi-legislative powers in an emergency. (See, e.g., *id*., §§ 8567; 8571; 8566; 8645.) Therefore, section 8627 does not render any part of the ESA redundant, and is consistent with the Act's overall structure. (See *Farmers Ins. Exch. v. Superior Ct.* (2006) 137 Cal.App.4th 842, 858 ["A statute may clarify and emphasize a point notwithstanding the rule against surplusage"].) Plaintiffs' construction, in contrast, is contrary to the Acts' plain language and clear intent, and is not a reasonable one, as explained.

[5] See, e.g., "Proclamation of a State of Emergency," signed by Governor Brown on October 13, 2017; Executive Order B-37-16, signed by Governor Brown on May 9, 2016.

(*MCI Commc'ns. v. Cal. Dep't of Tax & Fee Admin.* (2018) 28 Cal.App.5th 635, 650 [the canon against surplusage is to be applied "only if it results in a reasonable reading of the legislation"].)

Plaintiffs also rely on the doctrine of constitutional avoidance (P's Mtn. 6), but that canon also is inapplicable here, since the ESA's grant of quasi-legislative power to the Governor is "unambiguous," as *Gallagher* correctly ruled. (*Gallagher*, *supra*, 63 Cal.App.5th at p. 1112.) The ESA raises no constitutional problems in any event, as explained below.[6]

2. Plaintiffs' Non-Delegation Challenge Fails.

Plaintiffs' non-delegation challenge to the ESA also lacks merit. The non-delegation doctrine is a component of the separation of powers doctrine. (*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.) For this reason, Plaintiffs' argument that the "police power" is "the Legislature's power to make the law" (P's Mtn. 7) is beside the point, since it is beyond dispute that the Legislature validly can delegate quasi-legislative authority, as it has done in the ESA. Indeed, courts recognize 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.) 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

[6] Plaintiffs also argue that the ESA confers "unbounded" or "near dictatorial" powers (P's Mtn. 5), but that also is incorrect. As set forth below, the ESA contains standards and safeguards that properly guide and constrain the delegated authority, as *Gallagher* ruled. (See *infra*, pp. 15-21.) *Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.* (6th Cir. 2021) 5 F.4th 666 does not suggest otherwise. (See P's Mtn. 5 & fn. 16.) It addressed a wholly different statute—authority of the U.S. Housing and Urban Development under a federal statute—and did not address standards and safeguards akin to those in the ESA.

of the fundamental policy issue to others, (2) fails to provide adequate direction for the implementation of that policy, or (3) fails to establish safeguards adequate to prevent its abuse. (*Gerawan Farming*, *supra*, 3 Cal.5th at pp. 1146, 1150-1151.) The ESA readily satisfies these standards, as set forth below.[7]

a. The Legislature Established the Fundamental Policy.

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

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

Plaintiffs argue that the Legislature left "unanswered" such questions as "whether, and under what conditions, should California industries be shuttered or restricted," and "how to

[7] Plaintiffs misconstrue the standards. Citing the three factors in the prior paragraph, Plaintiffs argue that the California Supreme Court has devised "three distinct tests" for the doctrine (P's Mtn. 6-7), but that is inaccurate. To the contrary, the courts view those factors flexibly and holistically to determine whether the Legislature provided adequate guidance for implementation of its policy. (See, e.g., *Kugler v. Yocum* (1968) 69 Cal.2d 371, 381 ["[t]he requirement for 'standards' is but one method for the effective implementation of the legislative policy decision; the requirement possesses no sacrosanct quality in itself so long as its purpose may otherwise be assured"]; *Sims v. Kernan* (2018) 30 Cal.App.5th 105, 114 [explaining that the "standards" need not be explicit and can be "inferred" from the statute's fundamentality policy].)

balance competing, and vitally important, public health and economic concerns." (P's Mtn. 8.) The non-delegation doctrine, however, does not require the Legislature to resolve every policy issue that may arise in an emergency. It requires that the Legislature establish the fundamental policy. (*Sacramentans for Fair Planning*, *supra*, 37 Cal.App.5th at p. 716.) The fundamental policy of the ESA is not to establish whether or when to restrict business. The fundamental policy is to allow the State effectively to respond to emergencies. The Legislature validly may leave to others resolution of judgments that may arise in the course of implementing that policy and applying it to specific circumstances, such as whether and to what extent restrictions on businesses are needed to respond to a particular emergency. (*Kugler v. Yocum*, *supra*, 69 Cal.2d at p. 376 [after declaring the fundamental policy, the legislature may "confer upon executive or administrative officers the 'power to fill up the details'" via rules and regulations].)

Plaintiffs cannot establish otherwise. They cite *Clean Air Constituency v. California State Air Res. Bd.* (1974) 11 Cal.3d 801, 817, for the general proposition that underlying the non-delegation doctrine "is the belief that the Legislature as the most representative organ of government should settle insofar as possible controverted issues of policy." (P's Mtn. 8.) But *Clean Air Constituency*, in that hortative statement, did not adopt a new or different test for the non-delegation doctrine. It applied the same standards set forth above. Indeed, as a later opinion explained, after making the statement quoted by Plaintiffs, *Clean Air Constituency* proceeded to rule that "the Legislature *could* delegate authority to make policy decisions," as long as the policy decisions "implement[] the goals of the statute"—and that is true "even if the subsidiary decisions involve controverted policies." (*Sims v. Kernan* (2018) 30 Cal.App.5th 105, 112, italics in original.) Here, the Blueprint is consistent with and implements the ESA's goal of mitigating the effects of emergencies—Plaintiffs do not contend otherwise. (See *supra*, pp. 7-9.) And none of the other decisions Plaintiffs cite have any relevance here whatsoever.[8]

[8] Plaintiffs cite *In re Peppers* (1922) 189 Cal. 682 (P's Mtn. 8), but that decision, which predated the modern non-delegation jurisprudence by a half-century, granted a habeas corpus petition because, it ruled, the criminal statute at issue was void for vagueness and the Legislature could not delegate the task of defining the criminal offense, a ruling that is irrelevant here. (*Id*., at p. 684.) Similarly, Plaintiffs cite *Hewitt v. Bd. of Med. Examiners of the State* (1906) 148 Cal. 590 (P's Mtn. 9), but that decision did not address the non-delegation doctrine at all. (Cont.)

b. The ESA Prescribes Adequate Standards.

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

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

The ESA easily satisfies this element. The ESA defines when the Governor may exercise the powers granted in section 8627, it describes the purpose for which he may do so, and it requires a close nexus with those purposes. Specifically, the Act provides that the Governor may exercise the police powers vested in the State only "[d]uring a state of emergency." (Gov. Code, § 8627.) It also provides clear guidance regarding how the Governor should exercise this authority. It requires that the Governor exercise this authority "in order to effectuate the purpose of this chapter [i.e., the ESA]" (*ibid*.), which, again, expressly states its purposes. (*Id*., § 8550). The ESA also requires a nexus with those purposes. It requires that the Governor exercise his

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Instead, it also ruled that the statute at issue was void for vagueness. (See *id*. at pp. 591, 595.) Plaintiffs cite a decision of the New York Court of Appeals, *N.Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y. City Dep't of Health & Mental Hygiene* (2014) 23 N.Y.3d 681 (P's Mtn. 9), but that decision, again, did not address the non-delegation doctrine. It simply ruled that a regulation of the New York City Board of Health exceeded the Board's statutory authority. (See id. at p. 690.) Finally, Plaintiffs cite a decision of the Colorado Court of Appeals, *People v. Baker* (Colo. App. 2001) 45 P.3d 753 (P's Mtn. 8), but that decision did not address the non-delegation doctrine of the California Constitution, and it *rejected* the non-delegation challenge presented under Colorado law. (See *id*. at p. 684) The decision, again, is irrelevant.

authority only as necessary for those purposes, and that he do so "in accordance with the provisions of Section 8567" (*id*., § 8627), which authorizes him to make orders and regulations "necessary to carry out the provisions of this chapter." (*Id*., § 8567, subd. (a).) Therefore, the Act authorizes the Governor to act only as reasonably necessary to carry out the Act's stated purposes—that is, to respond to and mitigate the effect of emergencies. (*Id*., § 8550; see *Yamaha Corp. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10-11 [explaining that quasi-legislative rules must be "reasonably necessary to implement the purpose of the statute"].)

These standards easily satisfy the non-delegation doctrine. Indeed, California courts have ruled that guidance less specific than this satisfies the non-delegation doctrine. For example, *Rodriguez v. Solis* addressed a zoning law that established a fundamental policy of "promotion of 'public . . . welfare." (*Rodriguez v. Solis*, *supra*, 1 Cal.App.4th at pp. 509-510.) The decision explained that "[t]his, in itself, can be construed as a guideline (to the promotion of public welfare)." (*Id*. at p. 510; see also *Sacramentans for Fair Plan. v. City of Sacramento* (2019) 37 Cal.App. 5th 698, 717 ["[A] general welfare standard is a sufficient guideline to enable an agency to act constitutionally"].) Again, in the ESA, the Legislature provided far greater guidance than this. The ESA also is broadly consistent with a range of other statutes that similarly grant executive branch officials authority to take actions they deem "necessary" to effectuate the "purposes" of a "chapter."[9] Accepting Plaintiffs' argument that such language fails to provide adequate guidance therefore would upend large swaths of California statutory law.

Plaintiffs argue that "more definite standards are required when it is feasible for the Legislature to provide such direction, and more precise standards are needed to govern delegations of particularly broad and sweeping powers." (P's Mtn. 9 & fn. 21.) Plaintiffs conspicuously cite no California authority for this proposition (*ibid*.), and California courts have not adopted that view. Instead, as explained above, the required "yardstick" need only be "as definite as the exigencies of the particular problem permit." (*Birkenfeld v. City of Berkely*, *supra*, 17 Cal.3d at p. 168, italics added.) Such flexibility is especially appropriate in the emergency

[9] See, e.g., Pub. Util. Code, § 132354; Food & Agric. Code, § 62724; Pub. Res. Code, § 5090.78; Educ. Code, § 84674; Gov. Code, § 7001; Welf. & Inst. Code, § 19755, etc.

context. "Defining the locus of power and responsibility during 'conditions of disaster or . . . extreme peril'" is "a task for which the Legislature is peculiarly well suited," and the Executive Branch "is the natural and logical repository of such power and responsibility." (*Macias v. State* (1995) 10 Cal.4th 844, 858.) As the Kentucky Supreme Court recently explained, "[g]iven the wide variance of occurrences that can constitute an emergency, disaster or catastrophe, the criteria are necessarily broad and result-oriented." (*Beshear v. Acree* (Ky. 2020) 615 S.W.3d 780, 811.)

Plaintiffs also argue that the Governor has "unguided" and "unfettered" discretion under the ESA (P's Mtn. 10-12), but as explained, that is incorrect. (*Supra*, pp. 17-18.) Finally, Plaintiffs argue that the Legislature must "at the very least" provide "a list of factors for the Governor to consider" (P's Mtn. 12), but again, they cite no authority supporting this theory, and California law is to the contrary. (See, e.g., *Rodriguez v. Solis*, *supra*, 1 Cal.App.4th at p. 510 [the Legislature need not "articulate a formula" or the define the precise "metes and bounds"].) In fact, the standards need not be "expressly set forth" at all, and can be inferred from the statutory purpose, as explained above. (*Sims v. Kernan*, *supra*, 30 Cal.App.5th at p. 114; *supra*, p. 17.)[10]

c. The ESA Prescribes Sufficient Safeguards.

Finally, the ESA also includes safeguards sufficient to guard against abuse, as the *Gallagher* court again correctly ruled. (*Gallagher*, *supra*, 63 Cal.App.5th at p. 1116.)

The ESA includes several safeguards to guard against abuse. First, the Governor can exercise the ESA's delegated powers only in limited circumstances—only when the Governor expressly determines that emergency circumstances exist, under criteria prescribed by the

[10] Plaintiffs also cite two *Lochner*-era federal cases as well as *People's Federal Savings & Loan Association v. State Franchise Tax Board* (1952) 110 Cal.App.2d 696, for the proposition that "unfettered discretion" is the "hallmark" of a non-delegation violation. (P's Mtn. 11-12.) But again, the ESA does not grant the Governor "unfettered discretion." (*supra*, pp. 7-9.) None of those cases suggest that the ESA fails to provide adequate direction under California's non-delegation doctrine. The two *Lochner*-era federal cases do not reflect the U.S. Supreme Court's modern approach to the non-delegation doctrine (much less *California's* doctrine) and the Court has since regularly upheld broad delegations. (See *Whitman v. Am. Trucking Associations* (2001) 531 U.S. 457, 474–75; see also *Marine Forests Soc'y*, *supra*, 36 Cal.4th at p. 28 [explaining that federal separation-of-powers cases "cannot be applied uncritically in resolving separation of powers questions" under the California constitution].) *People's Federal Savings* also did not address the instant issues and is readily distinguishable. (*Alexander v. State Pers. Bd.* (2000) 80 Cal.App.4th 526, 538 [distinguishing *People's Federal Savings* on the grounds that, as here, the Legislature established the fundamental policy of the statute at issue].)

Legislature, and proclaims a state of emergency on that basis. (Gov. Code, §§ 8558, 8625-8626.) This proclamation must be in writing, must be filed with the Secretary of State, and must be widely publicized. (*Ibid*.) These safeguards guarantee transparency regarding the basis for the Governor's exercise of emergency powers, facilitating oversight.

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

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

Fourth, the Act includes temporal limitations. The Legislature provided that the Governor "shall proclaim the termination of a state of emergency at the earliest possible date that conditions warrant." (Gov. Code, § 8629, italics added.) It also clarified that "[a]ll of the powers granted the Governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated." (*Ibid*.) Therefore, the Act authorizes the Governor to exercise emergency powers only while the specified emergency conditions persist.

Fifth, importantly, the Legislature retained for itself the ultimate power to, if necessary, terminate the Governor's emergency powers. Specifically, it provided that the state of emergency shall terminate either as provided in the prior paragraph or "by concurrent resolution of the Legislature declaring it at an end." (*Id*., § 8629.) That is, the Legislature can terminate the state of emergency by a simple majority vote, without the Governor's signature. Therefore, the Legislature has ultimate authority to ensure that the delegated authority is not misused. (See *Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1517 [explaining that "[c]learly" there was no total abdication where the legislative body retained the power to rescind the delegated authority]; *Gallagher*, *supra*, 63 Cal.App.5th at p. 1116.) Therefore, the ESA includes suitable safeguards.

Plaintiffs identify no authority suggesting otherwise. Plaintiffs cite *Birkenfeld v. City of Berkeley*, *supra*, 17 Cal.3d 129, for the proposition that a statute is "constitutionally deficient" if it fails to include basic protections that "can easily be provided" (P's Mtn. 12), but they cite the opinion out of context. *Birkenfeld* did not remotely suggest a statute is unconstitutional whenever a court believes that some further safeguard "could easily have been provided." (*Id*. at p. 169.)[11] Plaintiffs also cite an opinion of the Wisconsin Supreme Court, *Wisconsin Legislature v. Palm* (2020) 391 Wis. 2d 497, but that case did not address California's non-delegation doctrine, and the defendant there could not "point to any procedural safeguards" on the delegated powers. (*Id*. at pp. 522-523.) That certainly is not true here, as explained above. (*Supra*, pp. 19-21.) Finally, Plaintiffs argue that the ESA "provides no limit" on how long the Governor may continue exercising emergency powers. (P's Mtn. 13.) Again, that is simply incorrect. (*Supra*, pp. 20-21 [discussing the limitations]; *Gallagher*, *supra*, 63 Cal.App.5th at p. 1116 [ruling that the ESA's temporal limitations constitute important safeguards that satisfy the non-delegation doctrine].)

The ESA includes adequate safeguards, and satisfies the non-delegation doctrine.[12]

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[11] In language Plaintiffs quote, *Birkenfeld* actually stated, "[w]hen statutes delegate power *with inadequate protection* against unfairness or favoritism, *and* when such protection can easily be provided" the statute may implicate the non-delegaiton doctrine. (*Birkenfeld v. City of Berkeley*, *supra*, 17 Cal.3d at p. 169, italics added.) It made clear that the inquiry to determine whether protections are "inadequate" are the standards described above. (*Ibid*.; *supra*, pp. 15-20.)

[12] Plaintiffs also purport to identify various additional safeguards that they posit the Legislature "could also have provided"—such as limiting an emergency proclamation to "a set

II. PLAINTIFFS' CHALLENGE TO CDPH'S POWERS TO ADDRESS INFECTIOUS DISEASE FAILS AS A MATTER OF LAW.

A. Plaintiffs' Challenge to CDPH's Powers Presents No Justiciable Controversy in Light of *Gallagher*.

Plaintiffs also claim that CDPH lacked authority to adopt the Blueprint. Their challenge to CDPH's authority, however, presents no justiciable controversy, in light of *Gallagher*.

As explained, the Blueprint issued under *both* the ESA and the authority that Health and Safety Code grants to CDPH to stem the spread of infectious disease, and both statutes fully and independently authorized the Blueprint. (*Supra*, p. 7-8.) *Gallagher* conclusively establishes that the Blueprint issued with valid statutory authorization, regardless of Plaintiffs' challenge to CDPH's authority. In other words, in light of *Gallagher*, Plaintiffs would not be entitled to declaratory relief that the Blueprint was invalid or injunctive relief enjoining the Blueprint *even if* their challenge to the statutory authority of CDPH had merit (and it does not).

Because an order adjudicating Plaintiffs' challenge to CDPH's authority would have no practical effect, there is no justiciable controversy as to that issue; any ruling would be purely advisory and, as such, improper. (See *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1574 [explaining courts do not issue "advisory opinions" or "declare principles or rules of law which cannot affect the matter in issue in the case before it"]; see also Code Civ. Proc., § 1060 [providing that a claim for declaratory relief requires an "actual controversy relating to the legal rights and duties of the respective parties"].) Therefore, Court should decline to address Plaintiffs' challenge to CDPH's authority.

B. Plaintiff's Challenge to CDPH's Powers Lacks Merit.

1. CDPH's Statutory Powers to Stem the Spread of Infectious Disease Unambiguously Authorized the Blueprint.

If the Court decides to reach Plaintiffs' challenge to CDPH's authority, the Court should reject it. Contrary to Plaintiffs' allegations, the authority that the Health and Safety Code grants to CDPH to combat infectious disease clearly authorized the Blueprint. Specifically, in addition

number of days" or requiring "notice-and-comment procedures where practicable." (P's Mtn. 13-14.) Plaintiffs' policy proposals, of course, do not indicate that the California Constitution *requires* any such measures, and Plaintiffs cite no authority suggesting such a notion.

to certain specific powers to combat infectious disease, the Health and Safety Code grants the Department broad additional authority to prevent the spread of infectious disease:

> Upon being informed by a health officer of any contagious, infectious, or communicable disease *the department may take measures as are necessary to* 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.

(Health & Saf. Code, § 120140, italics added.) CDPH issued the orders in question pursuant to this and other statutory authority.[13]

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

In arguing otherwise, Plaintiffs effectively seek to rewrite section 120140. They argue that it authorizes the Department "*only* to implement *vitally needed conventional* disease control measures that are *complementary* to the quarantine and isolation power." (P's Mtn. 18, italics added.) But section 120140 does not say that. Instead, it broadly authorizes the Department to take such "measures as are necessary" to prevent the spread of infectious disease. (See *People v. Wilson* (2020) 53 Cal.App.5th 42, 52 [explaining that courts do not read words into statutes that

[13] CDPH also issued the Blueprint under Health and Safety Code sections 120130 and 120145, which prescribe authority to quarantine and isolate property and places to stem the spread of infectious diseases, in addition to section 120140. (See Jones Decl. Ex. H.) As the State explained in its motion, although sections 120130 and 120145 also authorized the Blueprint (as well as other COVID-19 measures not at issue here), Defendants do not rely on those sections in these cross-motions, and the Court need not address them. (See Defs.' Mtn. 19 fn. 4.)

do not exist].) Furthermore, as used in the law, the term "necessary" typically does not mean "vitally" or strictly necessary, but rather refers to measures reasonably necessary. (See Black's Law Dict., Online Ed. ["[a]s used in jurisprudence, the word 'necessary' . . . frequently imports no more than that one thing is convenient or useful or essential to another"]; *Brown v. Sup. Ct.* (2016) 63 Cal.4th 335, 351 ["when a word or phrase appearing in a statute 'has a well-established *legal* meaning, it will be given that meaning in construing the statute'"], italics added.)

Plaintiffs' construction would create confusion and uncertainty about CDPH's authority, and undermine the Act's purpose, precisely when swift and decisive action is needed. It is far from clear what constitutes a "conventional" measure, a "vitally needed" measure, or a "complementary" one, particularly in the face of a novel virus. Section 120140 instead expressly grants broad discretion to respond to infectious disease and protect public health, as courts have recognized. Indeed, construing the virtually identical authority granted to local health officials, the Court of Appeal explained that, while the Code sets out numerous specific actions that health officials may take, those actions are "not exhaustive," and the intent of the statutory scheme is to "leav[e] the course of action to the health officer's discretion" to "achieve the Department's goals and policies" of preventing the spread of contagious disease. (*AIDS Healthcare Found. v. L.A. Cty. Dep't of Pub. Health* (2011) 197 Cal.App.4th 693, 702; *Derrick v. Ontario Cmty. Hosp.* (1975) 47 Cal.App.3d 145, 152.) In any event, the Blueprint *was* "vitally needed" to control the spread of COVID-19, and it was complementary to other quarantine and isolation measures, since measures like the Blueprint were the only effective way to isolate the virus and limit its spread early in the pandemic. (*Supra*, pp. 7-9.) Again, plaintiffs do not contend otherwise. (*Ibid*.) Therefore, the Blueprint would satisfy the erroneous standard that Plaintiffs urge here.

Plaintiffs also cite three canons of construction in an effort to avoid the plain language of section 120140 (P's Mtn. 18-19), but those canons are inapplicable here. The canons of construction do not apply where, as here, language of the statute is clear and unambiguous. (*People v. Lucero* (2019) 41 Cal.App.5th 370, 398 [canons "are to be employed only when there is ambiguity" and "do not apply to restrict the plain meaning of words"]; *Farmers Ins. Exch. v.*

Sup. Ct. (2006) 137 Cal.App.4th 842, 858.) Regardless, Plaintiffs misapply those canons.[14]

2. Plaintiffs' Non-Delegation Challenge Fails.

Plaintiffs' non-delegation challenge to section 120140 also lacks merit. The Legislature decided the fundamental policies of section 120140. That section is part of the Communicable Disease Prevention and Control Act. (Health & Saf. Code, § 27.) The purpose of the Act, of course, is to prevent and control the spread of communicable diseases. The Act provides, for example, that CDPH "shall examine into the causes of communicable disease . . . occurring or likely to occur in this state" (*Id*., § 120125), and it grants CDPH specified authority to act for the expressly stated purpose of controlling the spread of communicable disease. (See, e.g., *id*., 120130, 120155.) Therefore, the Legislature determined the fundamental policy.

The Legislature also prescribed appropriate guidance for the implementation of section 120140. Indeed, that section expressly indicates how the Department should implement the delegated authority: it states that, upon being informed of any communicable disease, the Department is authorized to take measures that are "necessary" to "ascertain the nature of the disease and prevent its spread." (*Id*., § 120140, italics added.) The Act thus includes clear standards. (See, e.g., *Gerawan Farming*, *supra*, 3 Cal.5th at pp. 1149, 1150, [explaining that the Legislature need not "articulate a formula" or impose "rigid standards"].) Indeed, this expressly

[14] First, Plaintiffs rely on the canon "ejusdem generis" (P's Mtn. 18), but this canon "is typically applied to phrases that list several specific items, then refer to a general reference, *using the term 'other*.'" (*Zumbrun L. Firm v. Cal. Legislature* (2008) 165 Cal.App.4th 1603, 1619, italics added; see also *Sterling Park v. City of Palo Alto* (2013) 57 Cal.4th 1193, 1202 [the doctrine "implies the addition of *similar* after the word *other*," italics in original].) The canon therefore does not apply to section 120140. Furthermore, the second sentence of section 120140 does not purport to modify or limit the first sentence, but rather is phrased in permissive terms, specifying one particular measure health officials "may" take to prevent infectious disease. Second, Plaintiffs invoke the canon that "specific statutory language controls over the general," and they appear to argue that section 120140 does not confer *any* authority on the state's public health officials beyond the specific measures that the Act separately lists. (P's Mtn. 19.) This canon, however, applies only when two conflicting statutory provisions "cannot be reconciled." (*People v. Wheeler* (1992) 4 Cal.4th 284, 293; *Shrewsbury Mgmt., Inc. v. Superior Court* (2019) 32 Cal.App.5th 1213, 1227.) That is not true here, since section 120140 is complementary to the specifically listed powers. Third, Plaintiffs attempt to invoke the canon against surplusage (P's Mtn. 19), but that canon also is inapplicable. (See, e.g., *MCI Commc'ns Servs. v. Cal. Dep't of Tax & Fee Admin.* (2018) 28 Cal.App.5th 635, 650 [that canon is to be applied "only if it results in a reasonable reading of the legislation"].) As explained, Plaintiffs' proposed rewrite of section 120140 is contrary to the Act's plain language and is not a reasonable construction, since it is contrary to the Act's intent of granting CDPH the tools needed to combat infectious disease.

stated standard is far more precise than the guidance in some statutes that California courts have affirmed against non-delegation challenges. (See, e.g., *Rodriguez v. Solis*, *supra*, 1 Cal.App.4th at pp. 509-510 [ruling a goal of "promotion of 'public . . . welfare'" is a sufficient standard]; see also *supra*, pp. 17-19.) As explained, the "yardstick" need only be "as definite as the exigencies of the particular problem permit." (*Birkenfeld v. City of Berkely*, *supra*, 17 Cal.3d at p. 168; supra, pp. 50-53.) The Legislature certainly could reasonably conclude that the exigencies of responding to outbreaks of infectious disease require that the Department have broad latitude to determine the precise actions needed, since the Legislature does not know, in advance, what diseases will arise, how they will spread, the health risks they will pose, and what measures will be needed to address them—and addressing infectious disease may require swift action.

Finally, section 120140 also is subject to appropriate safeguards. The statute authorizes the Department to take action only insofar as "necessary" for the narrow and precise purpose described above—preventing the spread of infectious disease—and therefore the measures can remain in place only while the conditions persist that render them necessary. If an affected party were to believe that the Department had taken action not reasonably needed for that purpose or that such action had outlived its need, the party can challenge it on that basis. (See, e.g., *Clean Air Constituency v. Cal. Air Res. Bd.*, *supra*, 11 Cal.3d at pp. 816-819.) Again, Plaintiffs have disavowed any such challenge. (*Supra*, pp. 7-9.) Furthermore, accountability is inherent in the structure of the Department. The director of CDPH appoints all officers and employees of the Department, and the director, in turn, holds office at the pleasure of the Governor. (Health & Saf. Code, §§ 131005, 131020.) Finally, if the Legislature determines that the Department acted inappropriately in a particular instance, it also is free to overturn the Department's action. Therefore, section 120140 readily satisfies the requirements of the non-delegation doctrine.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion for Summary Judgment Or, in the Alternative, Summary Adjudication.

Dated: August 30, 2022

Respectfully Submitted,

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DECLARATION OF SERVICE BY E-MAIL

Case Name: ***Ghost Golf, Inc., et al. v. Gavin Newsom, et al.***
Case No.: **20CECG03170**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On August 30, 2022, I served the attached

1. **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION**

2. **DEFENDANTS' RESPONSE TO PLAINTIFFS' SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION**

3. **DEFENDANTS' OBJECTIONS TO PLAINTIFFS' DECLARATIONS AND EVIDENCE SUBMITTED IN SUPPORT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION**

4. **DEFENDANTS' OPPOSITION TO REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION**

by transmitting a true copy via electronic mail, addressed as follows:

Luke Wake
Daniel M. Ortner
Pacific Legal Foundation
Email: lwake@pacificlegal.org
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Attorneys for Plaintiffs

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 30, 2022, at San Francisco, California.

M. Mendiola
Declarant

M. Mendiola
Signature