LUKE A. WAKE, No. 264647
E-Mail: lwake@pacificlegal.org
DANIEL M. ORTNER, No. 329866
E-Mail: dortner@pacificlegal.org
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

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

SUPERIOR COURT 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,[1]

Defendants.

Case No. 20CECG03170

OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date: September 27, 2022
Time: 3:30 p.m.
Location: Dept. 501
Judge: The Hon. D. Tyler Tharpe
Date Action filed: Oct. 26, 2020
Trial Date: None Set

[1]The current Attorney General is Rob Bonta. The current Director of the California Department of Public Health and State Health Officer is Tomás Aragón.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Miscellaneous

SUMMARY OF ARGUMENT

This case is about first principles of our constitutional order. The Defendants claim broad powers to respond to evolving pandemic conditions "as necessary to mitigate the effects of [] emergency" under the Emergency Services Act (ESA), and "as [] necessary to prevent the spread of infectious disease" under the Health and Safety Code (HSC). Def. MSJ Br. at 7. They maintain that they are sufficiently guided by the general goals of "mitigat[ing] the effect of emergencies," and of preventing the spread of disease. *Id*. at 22, 25–26. But this is an assertion of a breathtaking power to decide every aspect of the State's pandemic response for the indefinite future because the Defendants acknowledge that "COVID-19 is not going away[.]"[2] Not only do the Governor and CDPH assert power to respond to this continuing crisis in any way that the Legislature might respond through legislation, they assume the prerogative to decide—without any input from the Legislature—whether and under what conditions any social or economic activity should be prohibited, on threat of criminal sanction.[3]

But the ESA cannot be construed as delegating the legislative police power to make such value judgments. That construction would violate the non-delegation doctrine both in conferring authority for the Governor to resolve fundamental policy matters and an open-ended power to resolve competing public policy concerns without direction from the Legislature. The Governor's expansive construction is also improper because it would render other provisions of the ESA surplusage. As such, Gov. Code § 8627 must be construed, consistent with separation of powers, merely as confirming the Governor's authority—as the head of a unified Executive Branch—to exercise gap-filling authority to the extent state agencies maintain discretion in the enforcement of previously enacted statutes. But it cannot be understood as conferring power to create regulatory regimes from the bottom-up.

Likewise, an expansive interpretation of HSC § 120140 would violate the non-

[2] Decl. of Aaron Jones in Supp. of MSJ, Exhibit W, p. 2.
[3] Plaintiffs refer to the State Public Health Officer and the California Department of Public Health interchangeably as "CDPH."

delegation doctrine by allowing CDPH to make all the consequential decisions about the State's pandemic response without any direction from the Legislature as to how decide what activities should be deemed intolerable public health risks. Just as the Constitution bars the Legislature from giving away its lawmaking powers to the Governor, it bars any delegation of lawmaking powers to the CDPH. As such, the canon of constitutional avoidance—as well as other canons of statutory construction—counsel strongly for a narrowing construction, which would allow CDPH only more limited powers. Those powers would reasonably complement (but not subsume) CDPH's quarantine and isolation powers, which are also limited under California law.

Yet without answer to Plaintiff's core arguments, the Governor and CDPH attempt to dodge the issues by asserting that the Third District Court of Appeal has definitively resolved this controversy with its decision in *Newsom v. Superior Court* (*Gallagher*), 63 Cal. App. 5th 1099 (2021). It did not. Because the *Gallagher* decision addressed ***different statutory arguments***, it can only potentially provide persuasive authority. For that matter, the *Gallagher* decision is of only limited relevance because it failed to consider either the rule against surplusage or the different plausible interpretations that the Legislature might have had in mind when delegating "all police powers of the State" to the Governor in Gov. Code § 8627.

Nor is *Gallagher* binding on the non-delegation issue for at least two reasons. First, the Third District failed to consider vital controlling precedent from the California Supreme Court—which trumps anything the Third District might have said in rejecting a constitutional challenge to unrelated emergency orders concerning election procedures. Second, the *Gallagher* opinion only applied two out of the three applicable non-delegation tests in upholding Section 8627. While the opinion rejected arguments that the Legislature failed to provide adequate governing standards or adequate safeguards in conferring "all police powers of the State," the Third District's opinion is silent on the fundamental policy test.

/ / /

ARGUMENT

I. The Governor Lacks Authority to Create New Regulatory Regimes

A. The ESA Does Not Authorize Blueprint-Like Restrictions

Invoking Gov. Code § 8627, the Defendants claim the Governor can unilaterally issue any regulatory orders so long as they touch upon the COVID-19 pandemic. The Governor has exercised this putative authority in issuing orders regulating matters as far ranging as an individual's right to send their children to school, to attend church, to enjoy a moment of fun at a mini-golf establishment, to have dinner with friends, or even to leave one's home. But this expansive interpretation is flawed. Such a broad delegation would allow the Governor to exercise "near dictatorial powers," which raises grave Constitutional concerns. *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 672 (6th Cir. 2021). This construction is disfavored. *See Harrott v. Cnty. of Kings*, 25 Cal. 4th 1138, 1153 (2001) (a reasonable alternative construction is preferable if it avoids constitutional concerns).

The Governor's interpretation is also flawed because it renders other sections of the ESA redundant or wholly superfluous. For instance, the power to suspend laws would certainly be encompassed under the State's police powers. Gov. Code § 8571. And in contrast to Plaintiffs' reasoned construction, Defendants' interpretation strips all meaning from the limitation that the Governor's power must be "vested in the state by the Constitution and laws of the State of California." Gov. Code § 8627. But the Governor fails to address any of these significant deficiencies.

Plaintiffs offer a more compelling alternative interpretation—one that reconciles all the provisions of the ESA and allows the Governor to utilize the tools at his disposal, while denying him a roving power to make law. Specifically, Plaintiffs' construction not only recognizes that the Governor maintains unified control over all operations of the executive branch during an emergency, but also enables the Governor to issue regulatory orders *on his own*, pursuant to any lawful authority "vested in the state by the Constitution and laws of the State of California." Gov. Code

§ 8627. This includes all rulemaking authority conferred by law to state agencies and to the political subdivisions of the state.

As such, Defendants are simply wrong in asserting that Plaintiffs' interpretation would deny the Governor any authority "to issue orders and regulations to address an emergency" and in suggesting that a narrower construction would inhibit the Governor from "himself" exercising "any additional, independent power." Def. MSJ Br. at 16–17. Plaintiffs readily acknowledge that Section 8627 gives the Governor authority to issue a wide variety of "orders and regulations to address an emergency" that he himself would not ordinarily be authorized to issue outside of a state of emergency. But to avoid surplusage and non-delegation concerns, Plaintiff's construction limits the Governor to issuing regulatory orders that fill-in the details of various preexisting statutes as needed in the context of the emergency at hand. For example, the Governor legitimately exercised gap-filling authority delegated to Cal/OSHA in issuing regulatory orders to allow hair and nail salons to operate outdoors in the summer of 2020.[4] Cal. Lab. Code § 6300, *et seq.* Similarly, the Governor could mandate that employees wear masks under Cal/OSHA's authority to require employers to provide "safety devices" in the workplace. Cal. Lab. Code § 6401. The ESA allows him to issue these regulatory orders even though ordinarily this authority rests with Cal/OSHA.

By contrast, the Governor lacked the authority to issue orders shutting down businesses like Ghost Golf or Sol y Luna because he was not exercising gap-filling authority under any preexisting statute. It would be different if some prior enactment authorized CDPH or another agency to issue closure orders. In such a case the Governor could exercise powers conferred to that agency to issue regulatory orders on his own accord. But the Legislature has never enacted such a statute.

/ / /

[4] *See* COVID-19 Industry Guidance: Hair Salon and Barbershop Services Provided Outdoors (July 29, 2020), included as Exhibit Y in Decl. of Luke Wake in Supp. of MSJ.

B. *Gallagher* is Not Binding

The Governor principally argues that the Court is required to follow *Gallagher*, wherein the Third District concluded that Section 8627 provides him with broad power to issue emergency orders. But the Third District did not consider Plaintiffs' core arguments—which are different than those advanced by the parties in *Gallagher*. For this reason, the *Gallagher* decision is not binding as to the arguments presented here. Indeed, it is well established that "[a]n opinion is not authority for propositions not considered." *Areso v. CarMax, Inc.*, 195 Cal. App. 4th 996, 1006 (2011) (quoting *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.*, 19 Cal. 4th 1182, 1195 (1999)).

At issue in *Gallagher* was a question as to whether it was permissible for the Governor to issue an emergency order conditionally suspending certain provisions of the state Election Code under Gov't Code § 8571. But in addition to relying on Section 8571, the Governor also invoked the "police power" language in Section 8627 as a secondary source of authority. The Third District upheld this emergency order and rejected the argument that Section 8627 denied the Governor any authority to "issue quasi-legislative orders." Yet as already discussed, Plaintiffs' fully acknowledge that Section 8627 confers authority to issue certain orders with the force of law.

Gallagher erroneously concluded that there was no way to reasonably construe Section 8627 as conferring something less than an open-ended power to craft legislative rules without any basis in existing law because the Third District did not consider Plaintiffs' more nuanced interpretation. While *Gallagher* concluded that a narrow reading would render the "police power" provision redundant, Ghost Golf and Sol y Luna have offered a reasonable construction that eliminates any redundancy. Specifically, Plaintiffs maintain that the term "police power" may refer to either the power to *make law* or the power to *enforce* existing laws. *E.g.*, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836–841 (1987) (accepting that it is generally within the "police power" of the State to enforce a permitting regime). *See also* Santiago Legarre, *The Historical Background of the Police Power*, 9 U. Pa. J. Const. L. 745, 787 (2007)

(observing "[t]he police power, by degrees, came, in practice, to refer not to the general residuary powers of the States but to their right to provide *and enforce* reasonable regulations.") (emphasis added). Thus, when Section 8627 refers to the police power that is "vested in the state by the Constitution and laws of the State of California," it should properly be understood as conferring a power to *enforce* existing law (including the exercise of gap-filling authority), but not the power to *make* new law.

But the *Gallagher* Court never had occasion to consider Plaintiffs' reasonable narrowing construction because that case concerned executive orders addressing the operation of state elections—as opposed to business closure orders representing a dramatic expansion of government control over private affairs. In that context there was no opportunity to delineate between the legislative and the law enforcement dimensions of the state's police powers. And what is more, the *Gallagher* Court did not begin to grapple with other weaknesses of the Governor's interpretation—such as the problem that the Governor's expansive construction of "all police powers" renders every other provision of the ESA redundant.

In any event, *Gallagher* is inapposite because it concerned an executive order addressing the fundamental government function of facilitating elections. That is dramatically different from the orders at issue here that criminalized otherwise lawful private conduct without a preexisting basis in law. As such, *Gallagher* should be limited to its facts.

C. The 1977 Advisory Opinion is Neither Binding nor Persuasive

Defendants also point to a 1977 advisory opinion by the Attorney General as authority for their interpretation of the ESA. 60 Cal. Op. Att'y Gen. 99 (1977). But advisory opinions are not binding, and should be given weight only to the extent they are deemed persuasive. *Mallett v. Superior Ct.*, 6 Cal. App. 4th 1853, 1869 (1992) ("We are not bound by opinions of the attorney general. Such opinions are advisory only and do not carry the weight of law.") And this advisory opinion has no persuasive value because the Attorney General's analysis was cursory at best. It consisted of only

a single tangential sentence buried in a *mere footnote*. And importantly, there was no consideration of either the canons of construction or the avoidance canon. *See Almond All. of Cal. v. Fish & Game Comm'n*, 79 Cal. App. 5th 337, 358 (2022), *review filed* (July 7, 2022) (refusing to defer to an Attorney General Opinion because of the dearth of analysis and the failure to fully consider all arguments).

Furthermore, the advisory opinion dealt with an exercise of the Governor's emergency authority that is entirely appropriate under Plaintiffs' interpretation. The issue presented was whether the Governor could ration water in the case of a drought. While counties were authorized to ration water, there was no basis for counties to coordinate together to ration throughout the state. But this type of a consolidated and unified response is precisely the purpose of the ESA. And under Plaintiffs' construction of Section 8627, the Governor can legitimately exercise police powers conferred by the Constitution or statute to either state agencies or the political subdivisions of the State. By contrast, nothing in the Constitution or in enacted statutes authorize business closure orders of the sort we saw through 2020–21. The "factual context," *Thorpe v. Long Beach Cmty. Coll. Dist.*, 83 Cal. App. 4th 655, 663 (2000), of the advisory opinion is thus significantly different, which further undermines its persuasive value.

Finally, any argument that the Legislature relied on and accepted the Attorney General's interpretation is extraordinarily weak. An advisory opinion issued decades ago that concerned a much narrower claim of authority and that buried its analysis in a single footnote is simply not entitled to a presumption that the Legislature was aware and tacitly agreed. Nor could the Legislature have envisioned that the Governor's relatively narrow claim of authority to coordinate water rationing would support a dramatically more expansive interpretation of the ESA that allows him to make rules controlling every aspect of civil society.

/ / /

/ / /

II. The HSC Does Not Grant Authority to Impose Business Regulations

A. Defendants Abandoned Their Quarantine Power Argument

Before this Court and the Court of Appeals, Defendants argued that the Blueprint was an exercise of CDPH's quarantine and isolation power. D. Opp. MPI at 16–18; Resp. Br. at 24–31. Now Defendants have abandoned this argument. But in a footnote they still claim that "sections 120130 and 120145 [] authorized the Blueprint." Def MSJ at 19 n. 4. The Court should address and reject this argument in light of the compelling historical and linguistic evidence that Plaintiffs put forward in their MSJ Briefing. PLF MSJ Memo at 15–18. Business closures targeting whole industries for months at a time are not quarantine or isolation measures.

B. Section 120140 Does Not Authorize Occupancy Restrictions

Defendants argue that Section 120140 "clearly and unambiguously authorized the Blueprint." This section gives CDPH the power to "take measures as are necessary to ascertain the nature of the disease and prevent its spread." But there are serious problems with interpreting this section to authorize a statewide business closure scheme. To start, such an interpretation raises grave non-delegation doctrine concerns and should be avoided if a more limited reading is plausible. *Harrott*, 25 Cal. 4th at 1153, 25 P.3d at 659.

This Court should follow the lead of the U.S. Supreme Court and the Sixth Circuit, both of which rejected an expansive interpretation of nearly identical statutory language that would have given the Centers for Disease Control and Prevention open-ended powers. Like CDPH, the CDC claimed that it held delegated authority to "do anything it [could] conceive of to prevent the spread of disease." *Tiger Lily, LLC*, 5 F.4th at 672. But the Sixth Circuit rejected that construction because such a "reading would grant the CDC director near-dictatorial power for the duration of the pandemic." *Id.* Looking to the canons of construction, the Court held that the statute authorized the CDC only to take "measures that are similar to inspection, fumigation, destruction of animals, and the like." *Id.*

Likewise, CDPH's authority should be confined to measures similar to and complimentary to its enumerated powers such as "tak[ing] possession or control of the body of any living person, or the corpse of any deceased person," ordering inspections for disease, and quarantining and isolating infected individuals or places. *See People v. Arias*, 45 Cal. 4th 169, 180 (2008) (restricting general statutory language "to those things that are similar to those which are enumerated specifically"). The Blueprint—a statewide, industry specific system of business regulation—falls well outside the traditional public health powers of Section 120140.

Likewise, the Supreme Court rejected the CDC's expansive interpretation because the CDC's enumerated powers "directly relate to preventing the … spread of disease by identifying, isolating, and destroying the disease itself" and the CDC claimed the power to control the disease "far more indirectly" by targeting the incidental spread of disease as individuals move through society. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488 (2021). In the same way, CDPH seeks to not only "identify[], isolat[e], and destroy[] the disease itself," but to regulate all commercial and other activity that may indirectly contribute to the spread of disease. This is categorically different from the direct disease controlling measures that CDPH is authorized to utilize under the HSC.

Finally, this Court should approach CDPH's claim with skepticism because if the Defendants are correct, then CDPH wields this extraordinary power regardless of whether the existing emergency proclamation should be rescinded. It is highly unlikely that the Legislature would have granted a single agency the vast power to shut down whole industries throughout the state even in the face of the ordinary flu. The "breadth of the authority [CDPH] has asserted" and the vast "'economic and political significance" of the decision to shut down the state economy in the face of an infectious disease can only be justified by a far more explicit grant of authority than the open-ended catch-all provision that CDPH relies on. *West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022) (affirming the presumption that legislative bodies intend to

make major policy decisions). *See Mendoza v. Fonseca McElroy Grinding Co.*, 11 Cal. 5th 1118, 1135 (2021) ("The Legislature does not, one might say, hide elephants in mouseholes") (internal quotation marks omitted).

C. There is No Support for Defendant's Expansive Construction

No cases support Defendants expansive interpretation. Defendants cite to *AIDS Healthcare Found. v. Los Angeles Cnty. Dep't of Pub. Health*, 197 Cal. App. 4th 693, 702 (2011), for the proposition that CDPH has "broad discretion to respond to infectious disease and protect public health." Def. MSJ Br. at 19. But this concerned an effort by an advocacy organization to force CDPH to enact certain disease fighting measures. The Second District Court of Appeals rejected a petition for mandamus because CDPH's authority is "not exhaustive or mandatory," meaning that CDPH had "discretion to act in a particular manner depending upon the circumstance." *Id.* So, this case has nothing to do with the scope of CDPH's power. And the same is true for *Derrick v. Ontario Cmty. Hosp.*, 47 Cal. App. 3d 145, 152 (Ct. App. 1975), which concerned whether a hospital could be liable for failure to report to CDPH.

Defendants similarly cite to *Cnty. of Los Angeles Dep't of Pub. Health v. Super. Ct. of Los Angeles Cnty.*, 61 Cal. App. 5th 478, 491 (Mar. 1, 2021). But that case did not concern a challenge to the scope of delegated regulatory authority. Instead, the plaintiffs argued that the county had failed to conduct a needed cost-benefit analysis before shutting businesses down. None of these cases provide support for CDPH's interpretation of Section 120140.

D. This Court Should Address the Scope of CDPH's Authority

Even if *Gallagher* is controlling as to the ESA, the Court should decide the scope of CDPH's authority under HSC § 120140. In that case there would still remain an "actual controversy relating to the legal rights and duties of the respective parties." Code of Civ. Proc. § 1060. CDPH claims sweeping authority to shut down Plaintiffs' businesses in response to any contagious disease, irrespective of whether an emergency proclamation remains in effect. Because it is foreseeable that CDPH may

impose restrictions on Ghost Golf and Sol y Luna, a ruling that CDPH cannot impose business restrictions will provide meaningful relief. And because the scope of CDPH's authority is a question of immense public interest that is likely to recur, this Court should address the issue. Wake Decl., Exhibit L at 7 (mootness opinion holding that the issues in this case are "clearly a matter of public concern" and "at least reasonably likely to recur").

III. The ESA and HSC Violate the Non-Delegation Doctrine

The parties all agree on the governing non-delegation standard.[5] Defendants acknowledge that the non-delegation doctrine requires the Legislature to do three things to legitimately delegate rulemaking (*i.e.*, "quasi-legislative") authority. The Legislature must: (1) decide fundamental policy issues; (2) provide adequate direction (*i.e.*, "adequate standards") to guide the Executive Branch in the exercise of discretion, and; (3) ensure that there are adequate "safeguards to prevent abuse." Def. MSJ Br. at 21–23. And they acknowledge that a delegation violates the Constitution if it fails *any* these distinct tests. *Id*.

Of course, the Governor and CDPH say that delegations are commonplace and important in a functioning state. But Plaintiffs are not calling into question a run of the mill delegation to fill in minor details of a regulatory scheme of the Legislature's creation. Rather, this case asks whether it violates the non-delegation doctrine for the Legislature to give away all of its legislative police powers to enable the Executive Branch to build complex regulatory regimes from the ground-up. And while the Defendants maintain that California's three non-delegation tests should be applied liberally to accommodate broad delegations, a delegation of "all police powers of the State" necessarily violates the Constitution's prohibition on delegating lawmaking

[5] The Defendants' citations to *Carmel Valley Fire Prot. Dist. v. State*, 25 Cal. 4th 287, 297 (2001) and *Obrien v. Jones*, 23 Cal. 4th 40, 48 (2000) are inapposite because Plaintiffs are not arguing that the Executive Branch has impeded another branch from exercising its core functions. As acknowledged by the Governor and CDPH, a violation of separation of powers occurs not only when one branch impedes another from exercising its core powers, but also when the Legislature gives away the power to make law.

powers because the police power *is* the power to make law. To hold otherwise would be to ignore the California Supreme Court's seminal non-delegation cases.

A. The Legislature Failed to Decide Fundamental Policy as to Whether or When to Require Closure of Businesses

The Governor and CDPH assert that the Legislature decided fundamental state policy when enacting Gov. Code § 8627 and HSC § 120140 because the general purpose was to protect public health in both cases. Def. MSJ Br. at 21. But neither statute speaks to the fundamental policy questions of major social and economic import that must factor into any assessment as to whether a given activity presents a tolerable or intolerable public health risk. Of concern here, the Legislature left unresolved vital—but politically fraught—questions of tremendous public concern like whether, under what conditions and for how long entire industries should be shuttered in furtherance of the general goal of protecting public health.

The Governor and CDPH envision an anemic non-delegation doctrine under which every statute would satisfy the fundamental policy test. Indeed, if the generalized purpose of protecting public health and safety was enough to satisfy the fundamental policy test then it is difficult to conceive of any statute ever failing the fundamental policy test. To be sure every statute serves *some* legislative purpose. But California's seminal non-delegation case makes clear that a general appeal to the Legislature's goal of protecting public health and safety is not enough.

In *Hewitt v. St. Bd. of Medical Examiners*, 148 Cal. 590, 594–95 (1906), the Supreme Court held that the Legislature could not delegate authority to a licensing board to decide what constitutes a "grossly improbable statement" because the statute left it entirely to the subjective judgment of the Board to decide what was prohibited. The Court found this delegation unconstitutional even though the law was enacted for the purpose of protecting public health and safety. *Id*. Likewise, the Court found a broad delegation of power unlawful in *In Re: Peppers*, because the Legislature failed to decide fundamental policy as to what it was prohibiting—despite a general goal of

protecting the reputation of California's agricultural industries. 189 Cal. 682, 684, (1922) (affirming the Legislature could not delegate authority for the Director of Agriculture to promulgate any rule that he "may [] deem[] necessary to carry out the provisions of this act"). Those cases would have turned out differently if the Supreme Court had found that an appeal to the general legislative purpose is enough.

Rather than grappling with these foundational non-delegation cases, the Governor and CDPH rely on two inapposite decisions from the intermediate courts of appeal. But neither *Rodriguez v. Solis*, 1 Cal. App. 4th 495, 510 (1991) nor *Sacramentans for Fair Planning v. City of Sacramento*, 37 Cal. App. 5th 698, 717 (2019), contravene the precept the Legislature must decide fundamental policy as to "what acts or omissions … are unlawful." *In Re: Peppers*, 189 Cal. 682 at 688.

And in contrast to the open-ended delegations at issue here, the legislative body in both *Rodriguez* and *Sacramentans for Fair Planning* had decided upon a fundamental policy for weighing competing public values. For example, while *Rodriguez* included language approving of a general welfare standard in land use permitting, it was relevant that there was a legislative judgment prioritizing community aesthetics as a paramount value in the promotion of the "general welfare[.]" 1 Cal. App. 4th at 503, 507 (observing that an approved sign needed to be "compatible with [its] surroundings"). Likewise, in *Sacramentans for Fair Planning* the City Council had decided upon both a general goal of building more residential units in downtown Sacramento and a fundamental policy as to how to accomplish that goal. 37 Cal. App. 5th at 705–06. Specifically, the City was authorized to permit more intensive development than was otherwise permissible under the zoning code upon finding a "significant community benefit." *Id*. at 705. While the Commission had a degree of latitude in deciding what constituted a significant community benefit, this passed the fundamental policy test because there was a legislative judgment on the "momentous decision" to prioritize the policy goal of enabling new construction over other values reflected in the zoning code. *Sims v. Kernan*, 30 Cal. App. 5th 105, 111

(2018). By contrast, there was no clear legislative judgement in either the ESA or the HSC that the State should pursue the protection of public health *at all costs*.

In any event, those land use permitting cases are of only limited persuasive authority because non-delegation analysis is highly contingent upon the factual context at hand. *See People v. Knoller*, 41 Cal. 4th 139, 155 (2007) (emphasizing that cited language from prior opinions "lacks authoritative force" where factual circumstances and contingent legal analysis are distinct); *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.*, 19 Cal. 4th 1182, 1195, 969 P.2d 613, 620 (1999) ("It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court.").

B. The Legislature Provided No Standards Guiding the Exercise of Discretion Regarding Business Closure Orders

The Governor and CDPH maintain that the ESA provides adequate standards cabining and channeling the Governor's exercise of discretion because the Governor may exercise "all police powers" only during a declared emergency and may issue emergency orders only consistent with Gov. Code § 8567. Def. MSJ Br. at 22. But the ESA vests the Governor with broad discretion to decide for himself when conditions imperil public health and safety enough to warrant an emergency proclamation. Gov. Code § 8625. And Section 8567 provides no limitation or direction at all as to what sort of orders the Governor may issue, except that the Governor must deem his orders necessary—in his exclusive judgment—to protect public health and safety. So here as well the Defendants fall back on the general purpose of the Act, arguing that it is sufficient that the Governor's orders bear a nexus to the goal of protecting the public during an emergency. And likewise, the CDPH maintains that HSC § 120140 provides adequate standards merely in the directive to take measures that the Department deems "necessary" to protect public health against the spread of contagious disease. Yet as demonstrated by the Supreme Court's decisions in *Hewitt* there must be something channeling the exercise of discretion beyond the general goal of protecting

the public. 148 Cal. at 592–93 (finding a lack of governing standards for a statute enacted "in the interest of public health, safety and morals"). *See also In Re: Peppers*, 189 Cal. at 686 (stressing that the general statutory goal provided no governing standards: "What defect then shall render certain of such oranges unfit for shipment as 'endangering the reputation of the citrus industry'?").

In the absence of some direction from the Legislature as to how to delineate between tolerable and intolerable public health risks, a delegation of power to decide what regulatory orders are necessary amounts to an impermissible blank-check for the Executive Branch to do anything it may deem appropriate based on its chosen criteria. *See People's Federal Sav. & Loan Ass'n v. Franchise Tax Bd.*, 110 Cal. App. 2d 696, 700 (1952) (finding inadequate governing standards where the Legislature had conferred an "uncontrolled power" for the Executive to set tax rates, notwithstanding a general legislative goal of raising public revenue). Indeed, operating without direction from the Legislature, the Defendants made unguided judgement calls at every juncture when imposing, modifying, and even in lifting COVID-19 restrictions. *See* Plaintiffs' MSJ Br. at 10–11 (noting the multitude of ways the Defendants exercised unguided discretion, including in their decisions to allow movie theaters, concert halls, sporting venues, and even Disneyland to re-open while maintaining total closure orders for family entertainment centers). Throughout the pandemic the Governor and CDPH have exercised an ungoverned discretionary power to dictate rules controlling every aspect of society because they have operated without any direction as to how they should go about deciding what sort of regulatory orders are necessary. Simply put, the ESA and HSC violate the non-delegation doctrine because they provide no yardstick for judging whether the Governor and CDPH are appropriately judging the relative public health risks of any given activity.[6] The lack of direction is especially troubling in the context of a public health emergency since,

[6] As contemplated by the Blueprint for a Safer Economy's wide-ranging restrictions, there is some degree of risk with any in-person activity because COVID-19 is a highly contagious disease. *See* Plaintiffs' MSJ Br. at 10.

as shown by the Governor and CDPH's actions throughout the pandemic, such an emergency can touch on every aspect of life.

And it would have been feasible for the Legislature to have provided more direction than a roving charge to issue any orders deemed necessary. The Legislature could reasonably have anticipated the need to authorize occupancy restrictions on businesses under certain defined conditions—such as a finding that intensive care units are at 90% capacity, or a finding of X cases of a disease with a morbidity rate above 1% percent. But the Legislature could also have provided direction while allowing maximum flexibility simply by requiring the Governor or CDPH to consider various factors before issuing closure orders.[7] *See Gerawan Farming*, 3 Cal. 5th 1118, 1148 (2017) (affirming the Legislature must at least provide a guiding list of factors).

The Governor and CDPH maintain that the roving charge to protect public health suffices because *Rodriguez* and *Sacramentans for Fair Planning* upheld broad delegations in the context of land use permitting. But those cases concerned a narrow regulatory issue of local concern, not the sort of sweeping delegation of power at issue here. A general welfare standard may suffice as legislative guidance in the context of a local land use permitting decision, but more definite standards are required as the scope of the delegated authority grows to "immense proportions," *In re Certified Questions From U.S. Dist. Ct., W. Dist. of Mich., S. Div.*, 958 N.W.2d 1, 18 (Mich. 2020), and as criminal sanctions may be involved. *In re Peppers*, 189 Cal. at 688 (stressing that "the legislature had no power to [] delegate … its exclusive power and function of determining what acts … are unlawful.").

Moreover, the municipal authorities in those cases were given much more detailed guidance and direction from the legislature. In *Rodriguez* the City Director of Development was required to "consider the size, design, colors, character and

[7] The Defendants' reliance on *Beshear v. Acree*, 615 S.W.3d 780 (Ky. 2020) is misplaced because California case law accommodates the need for flexibility while still requiring meaningful legislative direction, at least in the form of factors channeling the exercise of discretion. *See Gerawan Farming*, 3 Cal. 5th at 1148.

location of the proposed sign." 1 Cal. App. 4th at 503. And in *Sacramentans for Fair Planning*, the City's planning department was charged with a straight-forward fact-finding mission—i.e., to determine whether the proposed project would provide a "significant community benefit." 37 Cal. App. 5th at 705. By contrast, the Governor and CDPH are not required to consider factors or to make specific findings.

C. The Legislature Provided No Meaningful Safeguards

Defendants acknowledge that a statute violates the non-delegation doctrine if the Legislature neglects to provide adequate safeguards to minimize the risk of abuse. Yet they urge this Court to adopt a rule that would render the sufficient safeguards test wholly impotent. They maintain that there are sufficient safeguards because Defendants, in their *subjective judgment*, can terminate the emergency declaration or choose not to act. But the "adequate safeguards" test requires *objective restraints* that discourage arbitrary decisions and favoritism. *See In re Peppers*, 189 Cal. at 686 (stressing there must be some limitation preventing arbitrary decisions).

For one, Defendants argue that the ESA provides safeguards because the Governor is limited to issuing orders during a declared emergency and the statute directs the Governor to declare an end to the emergency as soon as "conditions warrant." But these are not sufficient safeguards because the Governor has total discretion in deciding whether conditions warrant an emergency proclamation or its termination.[8] And further, Defendants have acknowledged that CDPH's authority to issue regulatory orders under HSC § 120140 is not contingent on the Governor's decision to issue or continue an emergency declaration.[9]

They next argue that the expectation that the Governor and CDPH should act

---

[8] Moreover, the requirement that an emergency proclamation must be in writing and publicized is not a safeguard against the Governor exercising his emergency powers in an arbitrary or abusive way thereafter.

[9] Instead, they maintain that the CDPH's "structure" is a safeguard because the CDPH Director holds his office at the pleasure of the Governor. But the Governor is himself part of the Executive Branch. So CDPH's structure is not a safeguard against the *Executive Branch* mishandling conferred legislative discretion. To hold otherwise would be to allow the fox to guard the henhouse.

reasonably to advance the general goals of the ESA and the HSC is a sufficient safeguard against arbitrary or abusive orders. But again, that leaves everything to the Governor and CDPH. As we have seen, nothing inhibited the Governor or CDPH from arbitrarily picking winners and losers based on their own subjective value judgments that some businesses should be allowed to re-open, while similar businesses remained closed. And nothing prevented them from formulating the Blueprint behind closed doors with input only from well-connected interest groups.

The Defendants then grasp for straws in arguing that the requirement that regulatory orders must be in writing is a sufficient safeguard. But while such a requirement may facilitate compliance, it is no guard against arbitrary rules or favoritism. The issuance of published rules does not ensure transparency in the development of such regulatory orders. And it certainly does not ensure opportunity for public input, which is an essential safeguard. *See Matter of Powell*, 602 P.2d 711, 716–17 (Wash. 1979) (invalidating emergency regulation on this ground).

Finally, as their last redoubt, the Governor and CDPH argue that there is a safeguard in the possibility that the Legislature might reassert its prerogative to decide state policy. But legislative intervention is always a theoretical possibility, which means such a rule would render the sufficient safeguards test dead letter. And there are several other problems with this argument.

First, the theoretical possibility of a legislative resolution to terminate an emergency proclamation is not a meaningful safeguard against problematic emergency orders because such a resolution would also have the effect of ending emergency orders that legislators might still view as important. Second, it would be difficult for the Legislature to effectually police the Executive Branch in this manner because even if the Legislature could muster votes to terminate the emergency proclamation, the legislature has no mechanism to prevent the governor from turning around and once again declaring an emergency and reissuing his orders as has happened in other states during the COVID-19 pandemic. *E.g., Fabick v. Evers*, 956

N.W.2d 856 (Wis. 2021) (concerning repeated emergency declarations). Furthermore, CDPH's orders would remain in place under HSC § 120140 and it would require a supermajority vote for the Legislature to override CDPH's orders and overcome the governor's veto. Finally, the non-delegation doctrine prohibits improper delegations in the first place—meaning a *chance* of future legislative intervention is no defense.

The Defendants' only authority pre-dating this controversy is *Golightly v. Molina*, 229 Cal. App. 4th 1501, 1517 (2014). But while the *Golightly* noted the possibility that the Los Angeles Board of Supervisors might rescind their delegation in its discussion of the fundamental policy test, the opinion lends no authority for the proposition that the potential of future legislative intervention serves as an adequate safeguard. *Id*. at 1517. In fact, the Fourth District did not even mention legislative intervention in its discussion of safeguards. *Id*. at 1517–18.

D. The *Gallagher* Decision is Not Controlling

The Third District's opinion in *Gallagher* is non-binding authority because—unlike the present case—it did not concern emergency orders dictating "what acts or omissions … are unlawful." *In Re: Peppers*, 189 Cal. 682 at 688. That matters because the non-delegation doctrine demands more precise standards and more robust safeguards when delegated authority imposes criminal liabilities. Plaintiffs' MSJ Br. at 8-9, 12-13. For that matter, the Third District's decision in *Gallagher* is non-binding because it did not consider Plaintiffs' core arguments that this case should be decided under the precedents established in *Hewitt* and *In Re: Pepper*. Because precedent cannot be applied as to matters not considered, this Court must decide for itself whether the Legislature established fundamental policy as to whether or under what conditions businesses should be subject to closure or occupancy restrictions, and whether it provided sufficient standards and safeguards *in this context*.

One glaring problem is that the Third District failed entirely to address the fundamental policy test. *Gallagher* does not even offer persuasive authority on application of the fundamental policy test because it provided no analysis at all. And

to the extent the Third District implicitly concluded that the Legislature had decided fundamental policy in allowing the Governor to suspend or modify requirements of the Election Code, that ruling would not speak to the central question of this lawsuit—which is whether the Legislature decided fundamental policy governing whether, and under what conditions, the State should require closure of businesses that are compliant with lawfully imposed health and safety regulations. Indeed, this case demonstrates why context matters in assessing non-delegation claims because Plaintiffs have shown how the Governor exercised unrestrained discretion in deciding critical policy issues affecting not Ghost Golf and Sol y Luna, but all Californians—in their capacity as employees, entrepreneurs, consumers, or as free citizens.

Finally, *Gallagher*'s conclusion that the ESA contains sufficient safeguards is non-binding because the Court *did not* consider Plaintiffs' arguments that the Legislature failed to include easy and commonplace safeguards. Plaintiffs' MSJ Br. at 12–14. Nor did the Third District grapple with Plaintiffs' arguments as to why the mere possibility of unilateral termination of orders or legislative intervention is an insufficient safeguard. *See Chevron U.S.A., Inc.*, 19 Cal. 4th at 1195 ("An opinion is not authority for propositions not considered.").

DATED: August 30, 2022.

Respectfully Submitted,

LUKE A. WAKE
DANIEL M. ORTNER
Pacific Legal Foundation

By 
LUKE A. WAKE

Attorneys For Plaintiffs
Ghost Golf, Inc., et al.

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2022, I served the foregoing OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT on counsel for the Defendants via electronic mail, per the agreement among counsel to accept service via email.

LUKE A. WAKE
Cal. Bar No. 264647
Lead Counsel