ROB BONTA
Attorney General of California
PAUL STEIN
Supervising Deputy Attorney General
AARON JONES
Deputy Attorney General
State Bar No. 248246
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3805
Fax: (415) 703-1234
E-mail: Aaron.Jones@doj.ca.gov
Attorneys for Defendants

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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** Date: September 27, 2022 Time: 3:30 p.m. Dept: 501 Judge: The Hon. D. Tyler Tharpe Trial Date: None Set Action Filed: October 26, 2020 **(Exempt from Filing Fees: Gov. Code, § 6103.)**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

Plaintiffs do not dispute that this case presents no triable dispute of material fact, and they cannot show that their claims have any merit as a matter of law. Indeed, Plaintiffs identify no valid grounds on which to distinguish their challenge to the Governor's emergency powers from *Newsom v. Superior Court* (2021) 63 Cal.App.5th 1099 ("*Gallagher*"), which squarely rejected precisely the same statutory and non-delegation challenges to the Governor's authority that Plaintiffs allege here. Furthermore, because *Gallagher* conclusively establishes that the Blueprint was validly issued under the authority of the Emergency Services Act, Plaintiffs' challenge to CDPH's independent authority to adopt the Blueprint poses no justiciable controversy. Plaintiffs seek to manufacture a justiciable controversy by arguing that CDPH theoretically could adopt an uncertain measure that affects them at a time when no emergency proclamation is in effect, but this case does not, *and never has*, presented such circumstances. Plaintiffs cannot create a justiciable controversy by hypothesizing a theoretical future dispute such as this. Regardless, their claims utterly lack merit. Plaintiffs' claim that the Blueprint lacked statutory authorization ignores the plain language of the Emergency Services Act and the Health and Safety Code, both of which unambiguously authorized the Blueprint, and Plaintiffs' non-delegation challenge is wholly unsupported and cannot succeed as a matter of law, as set forth below.

ARGUMENT

I. PLAINTIFFS' CHALLENGE TO THE GOVERNOR'S EMERGENCY POWERS FAILS.

A. Plaintiffs' Claim that the Governor Lacked Statutory Authority to Adopt the Blueprint Fails.

1. *Gallagher* Forecloses Plaintiffs' Statutory Challenge.

Plaintiffs argue *Gallagher* is not binding because, they claim, it did not consider their "core arguments" about the scope of the Governor's authority under the ESA. (P's Opp. 5.) Specifically, they argue that their theory is different because they contend the term "police power" in Government Code section 8627 should be deemed to mean only "the power to *enforce* existing law" but "not the power to *make* new law." (P's Opp. 5-6, italics in original.) Based on this premise, they argue that section 8627 only authorizes the Governor to issue orders to enforce

the "preexisting" rulemaking authority of other agencies (and that no such preexisting authority authorized the Blueprint), but that it does not authorize the Governor to issue orders that "make law," a claim they contend *Gallagher* did not consider. But *Gallagher* rejected that theory.

In *Gallagher*, the plaintiffs also claimed that the executive order was "null and void" because the ESA allegedly did not authorize it. (*Gallagher*, *supra*, 63 Cal.App.5th at p. 1106.) *Gallagher* rejected the claim because, it held, the ESA *does* grant the Governor authority to "make law." Specifically, it ruled, "[t]he police power is the authority to *enact laws* to promote the public health, safety, morals and general welfare," and the ESA's grant of "police power" thus unambiguously grants the Governor quasi-legislative rulemaking authority—not merely authority to "enforce" other statutes. (*Id*. at p. 1113, italics added.) Therefore, *Gallagher* forecloses Plaintiffs' theory that the ESA does not confer authority to issue orders that "make law." In fact, Plaintiffs effectively concede that their theory is inconsistent with *Gallagher*. (See P's Opp. 5.)[1]

Furthermore, Plaintiffs here, as in *Gallagher*, rely heavily on the canon of constitutional doubt and other canons of construction (see P's Opp. 3-4), but as explained, *Gallagher* also forecloses those arguments. (Defs. Mtn. 15.) *Gallagher* explained that canons of construction apply only to resolve ambiguity in statutes, and, it held, section 8627's grant of quasi-legislative authority (i.e., authority to "enact laws") is unambiguous, and therefore "there was no ambiguity to resolve in section 8627" via the canons. (*Gallagher*, *supra*, 63 Cal.App.5th at p. 1112.)

For these reasons, Plaintiffs cannot distinguish their challenge from *Gallagher*.[2]

---

[1] Specifically, they assert "*Gallagher erroneously concluded* that there was no way to reasonably construe Section 8627" as conferring less than "the power to craft legislative rules without any basis in existing law." (P's Opp. 5, italics added.) Thus, they acknowledge *Gallagher* "concluded" section 8627 authorizes the Governor to "craft rules" not authorized by "existing law." As such, their theory is in direct contravention of *Gallagher*. This Court cannot rule that *Gallagher's* holding was "erroneous" as Plaintiffs request. (Defs.' Mtn. 15; *infra*, p. 10.)

[2] Plaintiffs fail accurately to describe *Gallagher* in other respects. They assert that the issue in *Gallagher* was only whether the Governor could "issue an order conditionally suspending certain provisions of the Elections Code," which they imply was authorized by section 8571. (P's Opp. 5.) But the executive order at issue did not merely suspend statutory provisions—it also adopted new rules that temporarily replaced the suspended ones, an exercise of the Governor's quasi-legislative authority to "enact laws." (*Id*. at pp. 1106, 1112-1113.)

2. The ESA Unambiguously Authorized the Blueprint.

Plaintiffs' statutory challenge to the Governor's emergency powers would fail even absent *Gallagher*. (See Defs.' Mtn. 16-18.) Plaintiffs' arguments to the contrary lack merit.

As explained, Plaintiffs argue that the ESA did not authorize the Blueprint because, they contend, the term "police power" in section 8627 means only authority to "enforce existing laws" but not to issue orders that "make law." (P's Opp. 5.) For this reason, they argue, section 8627 only grants the Governor rulemaking authority "conferred by law to state agencies" under "preexisting" statutes. (P's Opp. 4-6.) That, however, is not what the term "police power" means—as Plaintiffs themselves previously acknowledged.[3] Indeed, as *Gallagher* correctly held, the "police power" is "the authority to *enact laws* to promote the public health, safety, morals and general welfare" (*Cmty. Mem'l Hosp. v. Cty. of Ventura* (1996) 50 Cal.App.4th 199, 206, italics added), or to "impose reasonable regulations upon private property rights" for the public good. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 146; see also *Gallagher*, *supra*, 63 Cal.App.5th at p. 1113.) Therefore, even if the term "police power" could be construed to *include* the power to "enforce" the law,[4] section 8627, by its plain terms, would not limit the Governor *just* to enforcing the law, since it grants the Governor "all" police power vested in the state in order to effectuate the purposes of the Act. (Gov. Code, § 8627.)

Plaintiffs suggest that the phrase all police power vested in the state "by the Constitution and laws of the State of California" somehow limits the Governor to exercising rulemaking authority conferred by law to "state agencies." (P's Opp. 3-4.) Plaintiffs fail to explain why "all police power vested in the state" by the Constitution and laws of the state is limited to pre-existing powers of "state agencies," and it plainly is not. (Cal. Const., Art. III, § 3 ["[t]he powers of state government are legislative, executive, and judicial"]; id., Art. IV, § 1 [describing the

[3] See Plaintiffs' MPA iso Motion for Summ. Judg. or, In the Alternative, Summ. Adjudication at 7 (arguing "[t]he police power" is "the Legislature's power to make law," and that "the police power entails **all** of the Legislature's power," emphasis in original).

[4] Plaintiffs identify no authority supporting their claim that "police power" means the power to "enforce" the law. They cite *Nollan v. Cal. Coastal Comm'n* (1987) 483 U.S. 825 (P's Opp. 5), but it held no such thing. It used the term to refer to arguments about a "legitimate state interests" for purpose of takings law, an irrelevant concept here. (*Id*. at pp. 835-836.)

legislative power vested in the Legislature].) Section 8627 expressly grants the Governor "all" police power "vested in the state" by the Constitution and laws of the State in order to effectuate the purposes of the Act, not just the power to execute prior statutes. (Gov. Code, § 8627.)

Plaintiffs' theory is inconsistent with the express language of section 8627 in additional respects. Plaintiffs argue that section 8627 only authorizes the Governor to act within the "rulemaking authority conferred by law to *state agencies*." (P's Opp. 4, italics added.) But section 8627 does not say the Governor may exercise all "police power" delegated to the "state agencies"—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," again, is not limited to previous statutory delegations to state agencies. (*Supra*, p. 8; Defs.' Opp. to Pltfs.' MSJ at 12.)

Plaintiffs also argue that the Attorney General's formal 1977 opinion is not "binding," and that it is not even persuasive because its analysis allegedly was "cursory." (P's Opp. 6-7.) Defendants did not argue that the opinion was "binding," but rather explained that Attorney General opinions are entitled to "great weight" since courts presume that the Legislature is aware of them and would take corrective action if it disagreed. (Defs.' Mtn. 17-18.) And the opinion's conclusion was not "cursory," but rather was a direct, reasoned answer to one of two questions formally presented. (60 Cal. Op. Att'y Gen. 99 (1977) 1977 WL 24861, at *2-3 & fn. 5.)

Finally, Plaintiffs argue that the cramped construction they urge is necessary "to avoid surplusage and non-delegation concerns" (P's Opp. 3, 4), but as explained, those canons are inapplicable here. (*Supra*, p. 7; see also Defs.' Opp. to Pltfs.' MSJ at 13-14.)

B. Plaintiffs' Non-Delegation Challenge to the ESA Fails.

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

Plaintiffs' non-delegation challenge to section 8627 cannot survive *Gallagher's* express ruling that section 8627 is not an unconstitutional delegation of legislative authority.

Plaintiffs argue that *Gallagher* is not binding because the executive order in *Gallagher* allegedly did not concern "what acts or omissions . . . are unlawful." (P's Opp. 19.) Plaintiffs fail to explain the point, and the distinction they posit makes no sense. *Gallagher*, like this case,

concerned a binding executive order issued under the ESA that specified acts that were lawful or unlawful. (See *Gallagher*, *supra*, 63 Cal.App.5th at p. 1106.) Regardless, non-delegation analysis focuses on the purposes, standards, and safeguards of the challenged statute itself (the ESA), not particular executive orders or measures issued under it. (See Defs.' Mtn. 20-24.)

Plaintiffs also argue that *Gallagher* did not consider the "fundamental policy" element, and that *Gallagher's* holding that the ESA contains adequate safeguards is "non-binding" because it did not discuss every argument Plaintiffs make here. (P's Opp. 19-20.) *Gallagher*, however, certainly considered the requirement that the Legislature establish the fundamental policy (*Gallagher*, *supra*, 63 Cal.App.5th at p. 1114-1116 [discussing the requirement]), and it squarely held that the ESA contains sufficient safeguards. (*Id*. at pp. 1116-1118.) Indeed, *Gallagher* expressly held that section 8627 "is not an unconstitutional delegation of legislative power." (*Id*. at p. 1118.) That holding of course was the "the principle or rule which constitutes the basis of the decision," and thus is "binding." (*United Steelworkers of Am. v. Bd. of Educ.* (1984) 162 Cal.App.3d 823, 834; *Bunch v. Coachella Valley Water Dist.* (1989) 214 Cal.App.3d 203, 212 [statements of law "necessary to the decision" are binding].) As such, *Gallagher* is binding here.[5]

2. Plaintiffs' Non-Delegation Challenge Lacks Merit.

While *Gallagher* is dispositive here, Plaintiffs' non-delegation challenge to the ESA would lack merit even absent *Gallagher*. (See Defs.' Mtn. 19-25.) Plaintiffs' arguments to the contrary misstate the ESA's purposes and terms and ignore the applicable California authority.

a. The Legislature Established the Fundamental Policy.

Plaintiffs contend that the Legislature failed to establish the ESA's fundamental policy, but their argument misstates the ESA's express purposes. They argue that the ESA's purpose is just "a generalized purpose of protecting public health and safety." (P's Opp. 12.) That, however, is not the purpose, as Defendants explained. (See Defs.' Mtn. 21; see also *Gallagher*, *supra*, 63 Cal.App.5th at p. 1115-1116 [the purpose of the ESA is "to empower the Governor to deal with the exigencies of widely differing emergencies in California from wildfires to floods to a

[5] Plaintiffs also argue *Gallagher* did not "consider" two century-old cases (P's Opp. 19), but it applied California's settled standards for the doctrine as articulated by the California Supreme Court far more recently, and those decisions are irrelevant in any event. (*Infra*, p. 11.)

pandemic," and "to provide a coordinated response to the emergency].) Plaintiffs simply ignore the Act's actual purposes. Their straw-man argument should be ignored.

Plaintiffs also argue that the inaccurate purpose they posit would not pass muster under what they assert are the "seminal" non-delegation cases, *Hewitt v. Bd. of Med. Examiners of the State* (1906) 148 Cal. 590, and *In re Peppers* (1922) 189 Cal. 682. (See P's Opp. 12-13.) Far from being the "seminal" non-delegation cases, however, those two opinions, which issued a half-century before the California Supreme Court's modern non-delegation jurisprudence, did not address the non-delegation doctrine at all. Instead, they ruled that the statutes at issue were void for vagueness, an entirely different constitutional principle (due process) not at issue here. (See *People v. Duz-Mor Diagnostic Lab'y, Inc.* (1998) 68 Cal.App.4th 654, 670 [explaining that *In re Peppers* applied the void-for-vagueness doctrine, which "concerns due process"]; *In re Peppers*, *supra*, 189 Cal. at p. 688 [ruling a statute was "too vague, indefinite and uncertain to form the basis of a criminal proceeding"]; *Hewitt*, *supra*, 148 Cal. at p. 595 [similar].)[6]

Plaintiffs also misconstrue *Rodriguez v. Solis* and *Sacramentans for Fair Planning v. Sacramento*. (Defs.' Mtn. 21-23.) Plaintiffs assert that in *Rodriguez*, there was "a legislative judgment prioritizing community aesthetics as a paramount value" (P's Opp. 13), but that is wrong. Instead, *Rodriguez* focused on the requirement that signs be "[c]ompatible with their surroundings" simply because that was the provision that the plaintiff had challenged. (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 501.) It held that the statute's overall purpose of promoting "public welfare" provided sufficient guidance in implementing that provision. (*Id*. at p. 510.) *Sacramentans for Fair Planning v. Sacramento* (2019) 37 Cal.App.5th 698, 717 was similar.

b. The ESA Prescribes Adequate Standards.

The Legislature also prescribed adequate standards consistent with the non-delegation

[6] *In re Peppers* further held that because the statute was void for vagueness, it could not validly delegate the task of defining the criminal offense. (*In re Peppers*, *supra*, 189 Cal. at p. 688.) That ruling also has no relevance here, since Plaintiffs do not claim any statute is void for vagueness. Furthermore, the precise claim before the court in that case was that, "while the [Act] empowered the director of agriculture . . . 'to define, promulgate and enforce such rules and regulations as may be deemed necessary to carry out the provisions of this act,' *there was not enacted any provision declaring that a violation of such rules and regulations should be a crime*," and, hence, "the applicant could not be successfully prosecuted. . . ." (*Id*. at p. 684, italics added.) In contrast, the ESA contains such a provision. (Gov. Code, § 8665.)

doctrine. (See Defs.' Mtn. 21.) Plaintiffs again cannot establish otherwise. Plaintiffs once again rely primarily on *Hewitt v. Board of Medical Examiners of the State*, *supra*, and *In re Peppers*, *supra* (P's Opp. 14-15), but as explained, those cases are irrelevant here. (*Supra*, p. 11.)

Plaintiffs also cite *People's Federal Savings & Loan Association v. Franchise Tax Board* (1952) 110 Cal.App.2d 696 (P's Opp. 15), but the Court of Appeal opinion in that case again issued long before the California Supreme Court's modern non-delegation authority of *Kugler v. Yocum* and its progeny, and is readily distinguishable. In that case, a tax statute provided "[n]o guide or standard of any kind" to guide its implementation. (*Id*. at p. 700.) That is not true here, as explained. (Defs.' Mtn. 21-25; see *Alexander v. State Pers. Bd.* (2000) 80 Cal.App.4th 526, 538 [ruling *People's Federal Savings* was inapplicable where, as here, the Legislature did not grant "uncontrolled and unguided" discretion, and where, as here, "there are safeguards," which, under *Kugler v. Yocum*, "is often the key in determining whether a delegation is improper"].)

Plaintiffs also rely on an opinion of the Michigan Supreme Court, *In re Certified Questions From United States Dist. Ct. , W. Dist. of Michigan* (2020) 506 Mich. 332 (P's Opp. 16), but that opinion construed the Michigan Constitution's non-delegation doctrine, which the court found to be governed by standards that differ starkly from California's well-settled standards. (Defs.' Mtn. 20-25.) Other state appellate courts that have addressed similar challenges—including California's—have disagreed with the Michigan opinion.[7]

Finally, Plaintiffs argue the Legislature must provide "a guiding list of factors" (P's Opp. 16), but that is incorrect, as explained. (Defs.' Mtn. 21-23; Defs.' Opp. to P's MSJ at 17-19.)

c. The ESA Prescribes Sufficient Safeguards.

Plaintiffs' contention that the ESA lacks sufficient safeguards also is baseless. Plaintiffs argue that the ESA's temporal restrictions are inadequate because they allegedly allow Defendants to terminate a state of emergency in their "subjective judgment," whereas, Plaintiffs argue, the "adequate safeguards" test requires "objective restraints." (P's Opp. 17, 18.) Plaintiffs cite no authority that supports this proposition (*ibid*.), but regardless, the ESA does include

[7] See, e.g., *Gallagher*, *supra*, 63 Cal.App.5th at p. 1118; *Beshear v. Acree* (Ky. 2020) 615 S.W.3d 780, 811-813; *Casey v. Lamont* (2021) 338 Conn. 479, 502-521; *Desrosiers v. Governor* (2020) 486 Mass. 369, 384; *Friends of Danny DeVito v. Wolf* (2020) 658 Pa. 165, 198.

objective standards and safeguards, as Defendants explained. (Defs.' Mtn. 21-25.)

Plaintiffs also argue that the ESA's procedural safeguards are inadequate because they do not "ensure opportunity for public input," and that the Legislature's ability to terminate the Governor's emergency powers is not a "meaningful safeguard." (P's Opp. 18-19.) Plaintiffs again identify no authority that supports these assertions,[8] and they simply ignore the extensive California authority providing otherwise. (See Defs.' Mtn. 23-24.)

II. PLAINTIFFS' CHALLENGE TO CDPH'S AUTHORITY FAILS.

A. The Court Need Not, and Should Not, Reach Plaintiffs' Challenge to CDPH's Authority in Light of *Gallagher*.

Plaintiffs argue that the Court should address their challenge to CDPH's authority despite *Gallagher's* dispositive ruling foreclosing the relief they seek. (See Defs.' Mtn. 15-16.) This, they argue, is because CDPH theoretically could impose a future measure without an emergency proclamation in effect. (P's Opp. 10-11.) This case, however, does not present—*and never has presented*—any such circumstances. The speculative possibility that, in the future, CDPH might issue unspecified measures for unspecified reasons absent an emergency proclamation poses no justiciable controversy. As explained, courts do not decide such speculative and hypothetical disputes. (Defs.' Mtn. 16; *Consumer Cause, Inc. v. Johnson & Johnson* (2005) 132 Cal.App.4th 1175, 1186 [courts do not decide cases "based on hypothetical facts or speculative future events"].) Importantly, this is not a question of mootness, since this case *never has* presented such a dispute. (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573 [a moot case is one in which the particular controversy once "did exist" but has "ceased to exist"].) For this reason, Plaintiffs' reference to this Court's mootness ruling—and the mootness exception for important issues of public interest that are likely to recur—are irrelevant. Plaintiffs do not allege that they are now, *or ever have been*, subject to an allegedly improper measure absent an emergency proclamation. This Court should decline Plaintiffs' invitation to decide

[8] Plaintiffs cite the Washington case *Matter of Powell* (1979) 92 Wash.2d 882, but that case addressed wholly different and irrelevant circumstances, and it applied standards that differ from the California non-delegation standards that govern here. (*Id*. at p. 892.) Plaintiffs also cite the Wisconsin case *Fabick v. Evers* (2021) 396 Wis.2d 231, but it did not address the non-delegation doctrine at all, much less this particular element under California law.

their sweeping attack on CDPH's powers based solely on speculative future events.

B. Plaintiffs' Challenge to CDPH's Authority Lacks Merit.

1. CDPH's Statutory Authority to Stem the Spread of Infectious Disease Independently Authorized the Blueprint.

If the Court decides to reach Plaintiffs' challenge to CDPH's authority, the challenge fails. As explained, Health and Safety Code section 120140 authorizes CDPH to take such measures "as are necessary to ascertain the nature of the disease and prevent its spread," and this authority unambiguously authorized the Blueprint. (Defs.' Mtn. 18-19.) Plaintiffs do not dispute that the Blueprint was "necessary" to prevent the spread of COVID-19 and save lives, and they do not even attempt to explain how the text of section 120140 could exclude such a measure. (P's Opp. 8-9; see *Brasher's Cascade Auto Auction v. Valley Auto Sales* (2004) 119 Cal.App.4th 1038, 1051 [statutory construction "begins by scrutinizing the actual words of the statute"].)

Instead, ignoring California law, Plaintiffs rely on two federal cases. (P's Opp. 8-9, citing *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.* (6th Cir. 2021) 5 F.4th 666, 671 and *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.* (2021) 141 S. Ct. 2485.) But those cases addressed very different statutes and issues, and their reasoning is inapposite. Both cases involved challenges to the eviction moratorium issued by the United States Centers for Disease Control (CDC). This case, of course, does not concern either an eviction measure or the authority of CDC. And the reasoning of those cases does not apply here, since the statute at issue in those cases was very different than section 120140. For example, those opinions relied on the canon of *ejusdem generis*, but unlike the CDC statute, section 120140 does not use the formulation to which that canon applies—a list of specific items followed by a general reference using the term "other."[9] Furthermore, those decisions emphasized that their reasoning was animated by

[9] See *Zumbrun L. Firm v. Cal. Legis.* (2008) 165 Cal.App.4th 1603, 1619 (explaining that this canon of construction "is typically applied to phrases that list several specific items, then refer to a general reference, *using the term 'other*,'" italics added; *Sterling Park v. City of Palo Alto* (2013) 57 Cal.4th 1193, 1202 (this canon "implies the addition of *similar* after the word *other*," italics in original). Section 120140 does not use this formulation. (See Defs.' Mtn. 18.) Similarly, these decisions reasoned that the second sentence of the federal statute qualified the first for reasons that are wholly inapplicable here—unlike the federal statute, the second sentence of section 120140 does not purport to modify or limit the first sentence in any way.

federalism concerns that do not apply here. (*Tiger Lily*, *supra*, 5 F.4th at p. 671 [emphasizing that the construction they reached was necessary to avoid "alter[ing] the federal-state framework by permitting federal *encroachment upon a traditional state power*," emphasis added]; *Ass'n of Realtors*, *supra*, 141 S. Ct. at p. 2489 [similar].) Here, of course, this reasoning cuts the other way, since protection of public health and safety is within the traditional police power of the states. (See, e.g., *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 475.)[10]

2. Plaintiffs' Non-Delegation Challenge Fails.

Plaintiffs largely abandon their non-delegation challenge to section 120140, alluding to it only in passing. (P's Opp. 12-19.) Plaintiffs' fleeting references to the challenge simply ignore the purposes, standards, and safeguards of section 120140 that Defendants described. Plaintiffs argue that the fundamental policy of section 120140 is just a "general purpose" to "protect public health" (P's Opp. 12), but Plaintiffs misstate the statute's purpose, as Defendants explained. (Defs.' Mtn. 25 [describing the purpose].) Similarly, Plaintiffs simply ignore the Act's standards and safeguards that Defendants described. (Defs.' Mtn. 25-26.) Indeed, Plaintiffs raise no new argument in support of their non-delegation challenge to section 120140 and instead simply lump section 120140 together with their non-delegation arguments about the ESA. (P's Opp. 12-19.) Those arguments lack merit for the reasons set forth above. (*Supra*, pp. 9-13.)[11]

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion for summary judgment and enter judgment in Defendants' favor.

[10] Plaintiffs also briefly reference *West Virginia v. EPA* (2022) 142 S. Ct. 2587 (P's Opp. 9), but that case addressed statutory language under the federal Clean Air Act that bears no resemblance to the statutes here. Furthermore, California law has not adopted the principle of construction on which it relied, and the ESA would satisfy it in any event.

[11] In a footnote, Plaintiffs argue that oversight of CDPH by the Governor somehow is not relevant, although they cite no authority for this proposition. (P's Opp. 17 fn. 9.) Oversight by another executive agency, however, can help guide implementation. (See, e.g., *Alexander v. State Pers. Bd.*, *supra*, 80 Cal.App.4th at p. 538 [statute did not grant "uncontrolled and unguided discretion" because "the affected agency must agree," among other reasons].) And Plaintiffs simply ignore the remaining safeguards that Defendants identified. (See Defs.' Mtn. 26.)

Dated: September 13, 2022

Respectfully Submitted,

ROB BONTA
Attorney General of California
PAUL STEIN
Supervising Deputy Attorney General

AARON JONES
Deputy Attorney General
Attorneys for Defendants

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 September 13, 2022, I served the attached

- **DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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

Luke Wake
Daniel M. Ortner
Pacific Legal Foundation
Email: lwake@pacificlegal.org
dortner@pacificlegal.org
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 September 13, 2022, at San Francisco, California.

M. Mendiola
Declarant

M. Mendiola
Signature

SA2020304306
43396059.docx

Kiren Mathews

From: eservice@onelegal.com
Sent: Tuesday, September 13, 2022 5:00 PM
To: Incoming Lit
Subject: eServe notification for Ghost Golf, Inc. vs. Gavin Newsom

Incoming Lit Has Been Electronically Served

Submitted	9/13/2022 4:59 PM PT by Melissa Mendiola
Case	Ghost Golf, Inc. vs. Gavin Newsom #20CECG03170
Court	Superior Court of California, Fresno County (Fresno)
eServe recipient	Incoming Lit - IncomingLit@pacificlegal.org

Served Documents

- Defendants' Reply In Support of Motion for Summary...

Download these documents on the Electronic Service page

If the link above doesn't work, copy this URL into your browser's address bar:
https://platform.onelegal.com/Eservice/Index/G2bXbm7Qn0KDN_0aLYRqkQ

Thank you,
The One Legal Team