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Ghost Golf, Inc., et al.
7

8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF FRESNO**

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

13 Plaintiffs,

14 v.

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

22 Defendants.

Case No. 20CECG03170

**PLAINTIFFS' REPLY TO
DEFENDANTS' OPPOSITION TO
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

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1 Legislature’s delegation of all police powers violates the non-delegation doctrine.¹
2 Summary judgment is appropriate notwithstanding the Defendants’ disputation of
3 various facts. Plaintiffs maintain those disputed facts could be helpful to the Court’s
4 analysis. But the Court need not accept any of Plaintiffs’ factual assertions to conclude
5 that the Defendants lack statutory authority for business-closure orders or that the
6 ESA and HSC violate separation of powers.² *See* Code of Civ. Proc. § 437c, subd. (c).
7 As the Defendants concede, the legality of Defendants’ actions rises or falls on the
8 statutory text.³ Def. Opp. Br. at 9.

9 Of course, factual context can be especially helpful in evaluating a non-
10 delegation claim because the analysis is colored by the range of actions that the
11 Executive may undertake under a contested delegation. But Plaintiffs need not prove
12 that the Defendants exercised conferred discretion in any specific way. For example,
13 what matters is not whether the Defendants maintained business closure orders
14 against Ghost Golf while allowing comparable businesses to re-open, or whether they
15 developed restrictions behind closed doors with input from only select interests. What
16 matters is that Defendants have never disputed that they were free to do just that
17 under their expansive construction of the ESA and HSC.

18 **II. Defendants Lack Statutory Authority for Closure Schemes**

19 **A. Defendants Mischaracterize Plaintiffs’ Arguments**

20 The opposition brief suggests that Plaintiffs’ construction of Gov. Code § 8627
21 would deny the Governor any independent emergency rulemaking power, and that the
22 Governor would be limited to exercising control over state agencies. Def. Opp. Br. at 9,
23 11. Not so. Plaintiffs’ construction would enable the Governor to direct agencies to

24 ¹ This Court should address and reject the Defendants’ claim that they have statutory
25 authority to create business-closure schemes under their quarantine and isolation
powers. *See* Pl. Br. in Opp. at 8.

26 ² This Court need not address Defendants’ evidentiary objections to grant relief. Code
of Civ. Proc. § 437c(q). But if this Court concludes otherwise, Plaintiffs request leave
to respond.

27 ³ Plaintiffs’ agree that the Defendants’ orders “speak for themselves.” Def. Opp. Br.
28 at 8. This Court need only look to the myriad of restrictions reflected in the archived
Blueprint in Exhibit N. Defendants have not raised objection to Exhibit N.

1 issue regulatory orders *and* would also allow the Governor, invoking the “all police
2 power” provision, to issue regulatory orders on his own. *See* Pl. Opp. Br. at 3–4.
3 Plaintiffs simply argue that Section 8627 should be construed, consistent with
4 background separation of powers doctrine, as conferring power only to exercise gap-
5 filling authority already assigned to the Executive Branch in preexisting enactments.

6 **B. Defendants’ Construction Violates the Canons of Construction**

7 Defendants’ opposition fails to reconcile their expansive interpretation of Gov.
8 Code § 8627 and HSC § 120140 with the rule that statutes should be construed to
9 avoid surplusage. While they baldly assert that their construction “does not render
10 any part of the ESA redundant,” they do not explain their logic. Def. Opp. Br. at 13.
11 They fail to explain how it would not be redundant for the Legislature to confer the
12 authority to suspend regulation under Gov. Code § 8571 and to separately confer such
13 power through the “all police power” provision in Section 8627. Nor do they explain
14 how it would not be redundant for the Legislature to confer the authority to carry out
15 inspections in HSC § 120140 and to also confer such power through the delegation of
16 authority to “take measures as are necessary ...” to prevent the spread of contagious
17 disease. Instead, they merely double-down on their redundant interpretation by
18 emphasizing the need for exceedingly broad authority. Def. Opp. Br. at 13. They rely
19 only on *Farmers Ins. Exch. v. Superior Ct.*, 137 Cal.App.4th 842 (2006).⁴ But in that
20 case the Third District simply concluded it would not employ the canon against
21 surplusage because the statute in question was not ambiguous. *Id.* at 858.

22 While the Defendants maintain that there is no ambiguity here, they ignore the
23 ambiguity in Section 8627’s delegation of “all police powers” which might, consistent
24 with separation of powers, confer only the power to enforce laws rather than the
25 Legislature’s exclusive power to make law. Pl. Opp. Br. at 3–4. Likewise, CDPH’s

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27 ⁴ They also maintain that an Attorney General opinion from 1977 supports their
28 position. But that opinion is not entitled to any weight because it did not consider the
canons of construction and its relevant analysis was relegated to a mere footnote that
did not consider any of the arguments presented here. *See* Opp. Br. at 6–7.

1 authority to “take measures as are necessary” to control contagious disease is
2 ambiguous because it is unclear what sort of measures the Legislature had in mind.⁵
3 Recent decisions contradict the Defendants’ arguments. The U.S. Supreme Court
4 construed a nearly identical delegation as conferring only limited powers to the CDC.
5 *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488 (2021);
6 *see also Tiger Lily, LLC v. U.S. Dep’t of Hous. & Urb. Dev.*, 5 F.4th 666, 671–72 (6th
7 Cir. 2021) (employing the ejusdem generis canon). Thus, there is inherent ambiguity
8 in a delegation of authority to take all “necessary” action to protect public health.

9 **C. The *Gallagher* Decision is Inapposite**

10 The opposition principally relies on *Gallagher*. But *Gallagher* is non-binding
11 because Plaintiffs advance different statutory arguments that the Third District never
12 considered.⁶ *See Chevron U.S.A., Inc. v. Workers’ Comp. Appeals Bd.*, 19 Cal. 4th 1182
13 (1999) (“An opinion is not authority for propositions not considered.”). Because
14 *Gallagher* did not concern imposition of restrictions on private conduct, the Third
15 District never had occasion to consider the distinction between the lawmaking and
16 law-executing dimensions of the State’s police power. But this distinction is critical to
17 Plaintiffs’ construction, which enables the Governor to issue regulatory orders only in
18 so far as he is filling in the details of previously enacted statutory regimes.

19 For that matter, *Gallagher* is inapposite because it concerned the
20 administration of elections, public events for which the Executive is responsible. The
21 Third District’s opinion upholding election procedures is of no consequence to the
22 question presented in this case as to whether the ESA confers authority for the
23 Governor to shutter private industries for months on end.⁷ *See* Pl. Opp. Br. at 5–6.

24 ⁵ The cases Defendants cite in support of their construction of Section 120140 are
25 inapposite. They did not squarely address the scope of CDPH’s authority. *See* Pl. Opp.
26 Br. at 10.

26 ⁶ Plaintiffs more fully addressed *Gallagher* in their Opposition, to which the
27 Defendants have an opportunity to reply.

27 ⁷ Even if this Court holds that *Gallagher* is not completely inapposite, it still has no
28 bearing on the question of whether the CDPH may lawfully impose Blueprint-like

1 **III. Defendants’ Assertion of Power to Do *Anything* Deemed Necessary**
2 **to Protect Public Health Violates the Non-Delegation Doctrine**

3 The parties agree that a statute violates the non-delegation doctrine if the
4 Legislature fails to: (1) decide fundamental policy; (2) provide adequate standards; or
5 (3) ensure adequate safeguards. *Id.* The parties merely disagree as to how these tests
6 should apply, as here, where the Legislature has conferred its legislative police power
7 to make any rule deemed necessary to protect the public.⁸

8 The Defendants’ approach is untenable. It would never find a non-delegation
9 violation if a general legislative purpose was always enough to satisfy the
10 fundamental policy test and adequate standards test. Likewise, if the possibility of
11 legislative intervention was an adequate safeguard, then no statute could ever run
12 afoul of the adequate safeguards test. The opposition does not argue otherwise. And
13 this is problematic not only because it would render the non-delegation doctrine a
14 dead letter, but because it contravenes binding Supreme Court precedent.

15 **A. Defendants Mischaracterize and Fail to Reconcile**
16 **the Supreme Court’s Seminal Non-Delegation Cases**

17 The opposition barely addresses the two cases in which the California Supreme
18 Court has found non-delegation violations. In a mere footnote they assert, without
19 explanation, that *Hewitt*, 148 Cal. 590, “did not address non-delegation doctrine at
20 all.” Likewise, in the same footnote, they blithely dismiss *In re: Peppers*, 189 Cal. 682,

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22 restrictions in the future. This Court should address that issue. *See* Pl. Opp. Br. at 10-
23 11.

24 ⁸ The Defendants have previously conceded that that these are three distinct tests.
25 *See* Respondents’ Br. at 45, Exhibit D (“An unconstitutional delegation of authority
26 occurs [] when ‘a legislative body (1) leaves the resolution of the fundamental policy
27 issues to others, **or** (2) fails to provide adequate direction for the implementation of
28 that policy;’ a statute delegating legislative power **also must** (3) contain ‘safeguards
adequate to prevent its abuse.’”) (emphasis added). And there is no basis for
Defendants’ attempt to recast these distinct tests as mere “factors” to be applied
“flexibility and holistically ...” Def. Opp. Br. at 15. *See Gerawan Farming, Inc. v. Agric.
Labor Relations Bd.*, 3 Cal. 5th 1118, 1146–47, 150–51 (2017) (affirming three distinct
non-delegation tests).

1 on the view that it was resolved under the void for vagueness doctrine.

2 First, *In re: Peppers* squarely addressed the contention that, without further
3 direction, it would violate separation of powers for the Legislature “to attempt to
4 confer ... the power” to decide when shipment of frosted oranges unlawfully endangers
5 the reputation of the citrus industry. Assuming for the sake of argument that the
6 Legislature attempted to delegate such authority, the Supreme Court said: “it is our
7 conclusion that the Legislature had no power to thus delegate to an administrative
8 board or office its exclusive power and function of determining what acts or omissions
9 on the part of an individual are unlawful.” 189 Cal. 682, 688 (citing *Hewitt* as a non-
10 delegation authority).

11 Second, *Hewitt* was unequivocal in holding that the Legislature could not
12 delegate authority for a board to impart the meaning of critical language in an
13 occupational licensing case. *Hewitt* expressly noted its decision was consistent with
14 earlier cases that had affirmed “[t]he legislature ha[s] no authority to confer on [a]
15 officer or board the power of declaring what acts shall constitute a misdemeanor.”
16 *Ex parte McNulty*, 77 Cal. 164, 170, 19 P. 237 (1888) (quoting *Ex parte Cox*, 63 Cal.
17 21, 21 (1883)). And even if *Hewitt* is read as merely a void for vagueness case, though
18 it is not, the case nonetheless shows what an unlawful delegation looks like and
19 confirms that the Legislature cannot delegate law-making power. Indeed, “[t]he void-
20 for-vagueness and non-delegation doctrines are closely related variants of the same
21 fundamental principle: that legislative power may not be re-delegated from the
22 legislature to any other government actor or third party.”⁹ See *Gundy v. United States*,
23 139 S. Ct. 2116, 2142 (Gorsuch, J., dissenting) (“[M]ost any challenge to a legislative
24 delegation can be reframed as a vagueness complaint.”).

25 Third, *Hewitt* and *In re: Peppers* were both cited as authority in early non-

26 ⁹ Todd Gaziano and Ethan Blevins, *The Nondelgation Test Hiding in Plain Sight: The*
27 *Void for Vagueness Standard Gets the Job Done*, in *THE ADMINISTRATIVE STATE*
28 *BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NON-DELEGATION DOCTRINE*
(Peter Wallison and John Yoo, eds., 2021).

1 delegation doctrine cases. For example, the Second District acknowledged *Hewitt* and
2 *In re Peppers* as non-delegation cases in *Mitchell v. Morris*, 94 Cal. App. 2d 446, 448
3 (1949).¹⁰ Similarly, in *Am. Distilling Co.*, the Third District affirmed that “the
4 legislative body must declare the policy of the law and fix some kind of legal principles
5 which are to control in given cases[.]” 55 Cal. App. 2d 799, 805–06 (1942), by citing
6 *People v. Kuder*, 93 Cal.App. 42, 51(Cal. Ct. App. 1928), which cited to *Hewitt* in
7 delineated between permissible and impermissible delegations.

8 **B. The ESA and HSA Fail California’s Non-Delegation Tests**

9 **1. The Legislature Failed to Decide Fundamental Policy**

10 The Defendants argue that the Legislature set fundamental policy when it
11 decided that the State should seek to protect public health and safety during an
12 emergency or in response to contagious disease. But they have no answer to Plaintiffs’
13 argument that such a generalized purpose is insufficient when the Executive Branch
14 asserts power to decide what actions are unlawful. *See* Pl. MSJ Br. at 7–9 (arguing
15 that *Hewitt* forecloses this argument); Pl. Opp. Br. at 7-9 (same). Nor do they respond
16 to Plaintiffs’ argument that such a lax standard would uphold every delegation.

17 The Defendants fall back on the proposition that the non-delegation doctrine
18 does not require the Legislature to resolve every policy issue. That is true enough. But
19 the fundamental policy test requires the Legislature to resolve the truly “momentous”
20 issues. *See Sims v. Kernan*, 30 Cal. App. 5th 105, 111 (affirming that fundamental
21 policy decisions are the consequential decisions). And they cite no authority for their
22 contention that the power to decide whether and for how long industries should be
23 shuttered is a *mere detail* that the Legislature may legitimately delegate.¹¹

24
25 ¹⁰ *Hewitt* and *In re: Peppers* were long understood as important non-delegation cases,
26 even within the line of authority on which the Defendants rely. For example,
27 *Rodriguez v. Solis*, 1 Cal. App. 495 (1991), cites *Southern Pac. Co. v. City of Los*
28 *Angeles*, 242 Cal.App.2d 38, 41 (1966), as authority in discussing the non-delegation
doctrine. And in turn, *Southern Pac. Co.* cites *Mitchell*.

¹¹ Neither *Rodriguez*, 1 Cal. App. 495, nor *Sacramentans for Fair Planning v. City of*

1 **2. The Legislature Failed to Provide Adequate Standards**

2 Likewise, the Defendants argue that the Legislature has provided adequate
3 standards merely by deciding that the State should strive to protect public health. But
4 while they assert that this legislative purpose provides a “yardstick” for assessing
5 whether the Governor and CDPH have appropriately carried out the Legislature’s
6 goals, they fail to explain how anything in either the ESA or the HSC provides criteria
7 to determine whether the Executive Branch has appropriately weighed competing
8 policy concerns in deciding whether or when any given activity represents an
9 intolerable public health risk. *See also* Opp. Br. at 14–15 (explaining that *Hewitt* and
10 *In Re: Peppers* foreclose the assertion that an appeal to the general legislative purpose
11 is enough).

12 As Plaintiffs argued in their principal brief, every in-person activity presents
13 some degree of risk in the context of a pandemic. Yet the Defendants have failed to
14 point to anything in either statute giving a modicum of direction as to how the
15 Governor or CDPH should go about deciding that family entertainment businesses
16 should be shuttered while allowing amusement parks, theaters, in-door sporting
17 events, and other public gathering spaces to remain open.¹² Indeed, Defendants do not
18 deny that they were perfectly free to establish their own criterion for deciding what
19 would be deemed an intolerable public health risk. *See* Def. Opp. Br. at 17-18, 25-26
20 (arguing that the Governor is authorized to act as deemed necessary). This admission
21 is fatal to their defense.¹³

22 *Sacramento*, 37 Cal. App. 5th 698 (2019), addresses whether power to shutter
23 industries entails fundamental policy decisions. *See* Pl. Opp. Br. at 13–14
(distinguishing land-use permitting cases).

24 ¹² It matters little whether Defendants, in fact, treated similarly situated businesses
25 differently, or even what restrictions the Defendants imposed on any given industry.
26 What matters is that nothing in either the ESA or the HSC prevent the Defendants
27 from imposing restrictions in whatever manner they may deem appropriate without
28 any guidelines or standards. *See infra* at 1–2.

¹³ The Defendants maintain that nothing in our case law requires the Legislature to
provide factors to guide the exercise of discretion. But the Supreme Court has never
upheld a delegation that did not at least clear this low bar. For example, in *Gerawan*

1 Finally, neither *Rodriguez* nor *Sacramentans for Fair Planning* is relevant to a
2 delegation of the great magnitude presented here (especially one involving criminal
3 penalties). *See* Pl. Opp. Br. at 16–17 (distinguishing parochial permitting cases from
4 sweeping delegations of power). Defendants do not dispute that the weight of
5 persuasive authority holds that the scope of the delegation matters. *E.g.*, *Synar v.*
6 *United States*, 626 F. Supp. 1374, 1386 (D.C. Cir. 1986) (employing a sliding scale
7 analysis). They merely assert, without authority, that California does not endorse this
8 approach. But the sliding scale analysis is consistent with the Supreme Court’s
9 repeated admonition that delegations are permissible only in so far as they are
10 “channeled by a *sufficient* standard.” *Kugler*, 69 Cal. 2d at 376 (emphasis added). What
11 is more, California’s express prohibition on the executive branch’s exercising
12 legislative powers demands a *more rigorous non-delegation standard* than that
13 employed in jurisdictions that only inferentially disallow delegations of lawmaking
14 powers. *See* Cal. Const. Art. III, Sec. 3.

15 **3. The Legislature Failed to Provide Adequate Safeguards**

16 The Defendants have failed to identify any “effective mechanism” that imposes
17 objective restraints either on the substance, duration, or formulation process of
18 Defendants’ regulatory orders. *Kugler*, 69 Cal. 2d at 376. Each of their supposed
19 safeguards leaves absolute discretion to the Executive Branch. For example, they
20 maintain that the ESA imposes temporal limits, and yet the Governor has total
21 discretion to decide whether conditions warrant a continuing emergency
22 proclamation. Likewise, they maintain that the requirement to issue emergency
23 orders in writing is a safeguard, even though this requirement does not inhibit the
24 Governor from making arbitrary rules. And they maintain that the *possibility* of
25 legislative intervention is itself a sufficient safeguard, even though it is always

26 _____
27 *Farming Inc. v. ALRB*, 3 Cal.5th 1118, 1148 (2017), the Court found it critical that the
28 Legislature provided guiding factors. There was no suggestion that the contested
delegation would have been upheld otherwise.

1 possible for the Legislature to intervene.¹⁴ See Pl. Opp. Br. at 17–19. Finally, the
2 Defendants fail to cite a single case to dispute the persuasive conclusion of several
3 sister courts that the safeguard test requires opportunity for public comment where
4 practicable.¹⁵

5 **C. Defendants’ Cannot Rely on *Gallagher***

6 While the Defendants rely heavily on *Gallagher*, that case is inapposite because
7 it did not concern emergency orders dictating “what acts or omissions ... are unlawful.”
8 *In Re: Peppers*, 189 Cal. 682 at 688. Context matters in assessing any non-delegation
9 claim. Pl. Opp. Br. at 19–20. And in a case concerning delegation of powers to
10 criminalize otherwise lawful private conduct, *In Re: Peppers* is the controlling
11 authority.

12 **CONCLUSION**

13 For the reasons stated herein, this Court should grant Plaintiffs’ motion for
14 summary judgment.

15 DATED: September 13, 2022.

16 Respectfully submitted,

17 LUKE WAKE
18 DANIEL M. ORTNER
19 Pacific Legal Foundation

20 By 

21 LUKE WAKE

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

24 _____
25 ¹⁴ The Defendants reliance on *Golightly v. Molina*, 229 Cal.App.4th 1501 (2014), is
26 misplaced. That opinion did not contemplate legislative intervention in its discussion
27 of the adequate safeguards test. See Pl. Opp. Br. at 19.

28 ¹⁵ Defendants balk at the suggestion that the Blueprint was designed behind closed
doors, insisting that it was developed with public feedback. But without notice-and-
comment rulemaking, small businesses like Ghost Golf and Sol y Luna had no
mechanism to voice their concerns.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2022, I served the foregoing **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** on counsel for the Defendants via electronic mail, per the agreement among counsel to accept service via email.



LUKE WAKE
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Accepted Documents

- Reply to Opposition to Defs.' Motion for Summary J...
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