THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

No. F085403

GHOST GOLF, INC., DARYN COLEMAN,
SOL Y LUNA MEXICAN CUISINE, and NIEVES RUBIO,
Petitioners and Appellants,

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,
Respondents and Appellees.

On Appeal from the Superior Court of Fresno County
(Case No. 20CECG03170, Honorable D. Tyler Tharpe, Judge)

APPELLANTS' OPENING BRIEF

LUKE A. WAKE, No. 264647
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: LWake@pacificlegal.org

Attorney for Petitioners & Appellants Ghost Golf, Inc., et al.

TO BE FILED IN THE COURT OF APPEAL

State of California, Court of Appeal, Fifth Appellate District

Court of Appeal Case Number: **F085403**

Superior Court Case Number: **20CECG03170**

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State bar number, and address)*:

Luke A. Wake, No. 264647, Pacific Legal Foundation, 555 Capitol Mall, Suite 1290, Sacramento, CA 95814

TELEPHONE NO.: **(916) 419-7111** FAX NO. (*Optional*): **(916) 419-7747**

E-MAIL ADDRESS (*Optional*): **LWake@pacificlegal.org**

ATTORNEY FOR (*Name*): **Petitioners & Appellants Golf Ghost, et al.**

APPELLANT/PETITIONER: **Ghost Golf, Inc., et al.**

RESPONDENT/REAL PARTY IN INTEREST: **Gavin Newsom, et al.**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [**X**] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*):

Petitioners & Appellants Ghost Golf, Inc., et al.

2.a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b. [**X**] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of Interest (*Explain*):	
(1) Janice Yang Coleman	Ms. Coleman owns a 50 percent share in Ghost Golf, Inc.	
(2)		
(3)		
(4)		

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

/s/ Luke A. Wake Date: **June 20, 2023.**

LUKE A. WAKE

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulation

California Constitution

Miscellaneous

INTRODUCTION

For 1,092 days the Governor asserted a sweeping power to *make law* restricting individual liberties in whatever manner he deemed necessary to respond to COVID-19. And the Governor maintains extraordinary discretion to reassert these "emergency powers" in response to any future public health threat. At the same time, the State Health Officer and the California Department of Public Health ("CDPH") assert an ungoverned power to *make law*, with command-and-control orders, in whatever manner they deem necessary to respond to the evergreen threat of disease.[1]

Under Respondents' expansive interpretations of the Emergency Services Act (ESA) and the Health and Safety Code (HSC), the Governor and CDPH have limitless power because the risk of spreading contagious disease is ever-present in virtually any human interaction—whether inviting a guest into one's home, going to school or work, eating out, shopping, or partaking in any aspect of community life. But the Legislature did not delegate boundless rulemaking powers. Nor could it.

The ESA and HSC are unconstitutional if construed as delegating a power coextensive with the Legislature's police power to protect public health *through legislation*. That is so because law must be made by the Legislature. The Constitution prohibits the Legislature from giving away its lawmaking powers. And therefore, courts must distinguish between legitimate delegations of authority to fill in minor details and unconstitutional

[1] Appellants refer to the Officer and the Department interchangeably as "CDPH."

delegations that confer unfettered rulemaking powers.

The nondelegation doctrine requires that the Legislature must decide the consequential issues and provide objective standards and safeguards to control the exercise of discretion. Yet the Superior Court held that it was permissible for the Legislature to delegate the entirety of its power to make law relating to COVID-19, or any other public health concern. Judge Tharpe relied on the Third District's decision in *Newsom v. Superior Court*, 63 Cal. App. 5th 1099 (2021) ("*Gallagher*"), which errantly concluded that the Legislature can delegate its police power—*i.e.*, the power to make law.[2] But this Court must reject *Gallagher*'s rationale because the California Supreme Court has repeatedly affirmed that a completely open-ended delegation is unconstitutional. And further, *Gallagher*'s approach is untenable because it would render the nondelegation doctrine dead.

The facts illustrate why the nondelegation doctrine matters. Left to decide the state's policy response without guiding standards or safeguards controlling their discretion, the Respondents acted with an ever-changing and capricious hand. They exercised their (supposedly) unfettered rulemaking authority to shutter Ghost Golf for a year, and to impose continuing restrictions on Sol y Luna for 15 months. The Appellants lost their livelihood for extended periods—as did many other families—through this turbulent period of near autocratic rule.

---

[2] JA 1756 [Ruling, Ghost Golf v. Newsom Superior Court Case No. 20CECG03170] ("*Gallagher* found that the Governor [has] … the power under the ESA to create new rules and laws[,]" and that this delegation was permissible).

FACTUAL BACKGROUND

On March 4, 2020, Governor Newsom proclaimed a state of emergency in response to COVID-19.[3] Thereafter, the Governor asserted that Gov't Code § 8627 authorized him to exercise "all police powers of the state" to control the spread of the disease. Separately, CDPH asserted an independent authority to respond to COVID-19 under HSC § 120140.

For the next fifteen months, the Respondents imposed a myriad of business closure orders and prohibitions—culminating in a system known as the Blueprint for a Safer Economy. These orders compelled Appellants, and many other businesses, to close or to operate under severe restrictions because they risked both civil penalties and criminal conviction if they did not comply. *See* Gov't Code § 8665 (imposing up to six months in prison).

Ghost Golf and Sol y Luna Suffer Closure Orders and Restrictions

Ghost Golf is an indoor mini-golf facility in Fresno, and Sol y Luna is a Mexican restaurant in Bakersfield.[4] When they filed their complaint, both were under orders to close indoor operations. JA 1294, Coleman Decl. ¶ 11; JA 1300–01, Rubio Decl. ¶¶ 8, 17. If permitted to reopen the owners would have required guests to

---

[3] *See* JA 965 (Declaration of Luke A. Wake in Support of Plaintiffs' Motion for Summary Judgment (Wake Decl.), Exhibit A (Proclamation of Emergency)).

[4] *See* JA 1293 (Wake Decl., Exhibit MM (Declaration of Daryn Coleman in Support of Pl. Mot. for Summary Judgment ¶¶ 3, 5, 7 [Coleman Decl.])); JA 1300 (Wake Decl., Exhibit NN (Declaration of Nieves Rubio in Support of Pl. Mot. for Summary Judgment ¶¶ 2 [Rubio Decl.])).

wear masks, to follow social distancing protocols and would have implemented other measures to protect patrons. *See* JA 1294, Coleman Decl. ¶ 10; JA 1300, Rubio Decl. ¶¶ 11-13. Coleman Decl. ¶ 10; *Id.*, Rubio Decl. ¶¶ 12, 13. Nonetheless, they were shuttered. And Ghost Golf remained shuttered even as comparable businesses in nearly every other sector were allowed to re-open. JA 1294, Coleman Decl. ¶ 12. *See also* JA 1118–24, Wake Decl., Exhibit N (Archived Blueprint Tiers).

Ghost Golf was forcibly closed for more than a year, except for only four days. *See* JA 1293, Coleman Decl. ¶ 9. During this time the company suffered a total loss of revenue and faced mounting financial liabilities. JA 1294–96 ¶¶ 14, 16–19, 21, 23. With each passing month the debt on Ghost Golf's commercial lease ballooned. JA 1295 ¶¶ 18–19. In Daryn Coleman's words, "Ghost Golf barely survived..." JA 1294 ¶ 14.

Likewise, Sol y Luna was subjected to ever-changing occupancy restrictions. JA 1300–01, Rubio Decl. ¶¶ 4–5, 7–10, 18–20. The company struggled to turn a profit with occupancy restrictions that continued through June, 2021. *See* JA 1301 ¶¶ 16, 18. Sol y Luna survived only because the company obtained federal financial assistance. JA 1302 ¶ 23.

Respondents' Exercised Discretion in Ordering Business Closures (March-April, 2020)

On March 19, 2020, CDPH and the Governor issued dual orders requiring Californians to stay in their homes; no one could leave except "as needed to maintain the continuity of … critical infrastructure sectors[.]" E.O. N-33-20, JA 9772. But Respondents

cited no preexisting legal construct in California for delineating between critical and non-critical sectors (or essential and non-essential businesses). The Respondents said that they were borrowing from a federal framework that had identified 16 sectors deemed critical to the United States. At the same time, the Governor's Order (N-33-20) stated that the Respondents could "designate additional sectors as critical," as might be deemed necessary to protect public health. *Id*. at 972.

Respondents Exercised Discretionary Command-and-Control Powers (May-July, 2020)

On May 4, 2020, the Governor issued a new order (N-60-20), which pronounced a plan to re-open the State's economy in stages. JA 975. There was no preexisting legal framework. Instead, the Respondents were exercising discretion in making decisions as to when and under what conditions they would allow businesses to re-open. For example, E.O. N-60-20 provided that CDPH could make "any … revision to the four-stage framework[,]" as may be deemed necessary. JA 977. And the Order left it to the discretion of the CDPH to decide what businesses would be allowed to open and when, with a running charge "to take any action [] deem[ed] necessary to protect public health..." *Id*. Likewise, the Governor exercised discretion in authorizing the CDPH to "establish criteria and procedures" that might allow local health officers to implement public health measures less restrictive than the otherwise applicable statewide directives coming from the Governor and CDPH. JA 976.

For a short period, many non-essential businesses were allowed to re-open; however, the Respondents backtracked on July 1, 2020. Without a preexisting legal framework, they created a County Monitoring List and required select industries to cease indoor operations within counties that were placed on the list.[5] As a result of this reversal, Ghost Golf was forced to close after re-opening for only four days (at 25 percent capacity). JA 1294, Coleman Decl. ¶ 14. And Sol y Luna was relegated to serving customers outside in the scorching summer heat. JA 1300, Rubio Decl. ¶¶ 8–9.

Respondents Exercised Discretion in Crafting the Blueprint Regime (August-December, 2020)

More than six months after proclaiming an emergency, the Respondents abandoned the County Monitoring List for a new and more complex regulatory system of their own devising.[6] Without opportunity for public input, they unveiled the Blueprint for a Safer Economy ("Blueprint") on August 28, 2020. JA 741 (Jones Decl., Exhibit I).

The Blueprint assigned each county a color (purple, red, orange, or yellow) depending on its assessed risk level. *Id*. at 742. And the regime imposed corresponding restrictions for different industry sectors in each color tier. Under this system "CDPH []

---

[5] *See* JA 1059 (Wake Decl., Exhibit G (CDPH's Guidance of July 1, 2020)). *See also* JA 1112 (Wake Decl., Exhibit M (Order July 13, 2020) (ordering statewide closures)).

[6] JA 737 (Declaration of Aaron Jones in Support of Defendants' Motion for Summary Judgment (Jones Decl.), Exhibit H (California Department of Public Health, Statewide Public Health Officer Order of Aug. 28, 2020)).

assess[ed] indicators weekly on Mondays and release[d] updated tier assignments on Tuesday." *Id*. at 745. Therefore, businesses had little certainty as to what rules would apply in their locality from one week to the next. *See* JA 1301, Rubio Decl. ¶ 20.

In creating this regime, CDPH decided what metrics it would use to designate a county as subject to either purple, red, orange, or yellow-tier restrictions. Respondents pointed to no preexisting legal construct for drawing these distinctions. Instead, CDPH decided for itself when case and test positivity rates warranted downgrading a country from one restrictive color-tier to the next. *See* JA 743 (Jones Decl. Exhibit I).

CDPH later decided to modify the relevant metrics. *See* JA 1138 (Wake Decl., Exhibit P); JA 741-42, (Jones Decl., Exhibit I). Beginning in October 2020, CDPH began considering the impact that COVID-19 was having within "disproportionally impacted communities." JA 1139 (Wake Decl., Exhibit P). But Respondents pointed to no preexisting legal construct for imposing different restrictions based on such considerations.[7]

Under the Blueprint indoor miniature golf was prohibited in both purple and red tier counties. *See* JA 1122, Archived Blueprint Tiers. Ghost Golf would only have been allowed to operate at

[7] This "equity metric" was adopted at the urging of a special economic task force ("Task Force") that the Governor assembled to provide guidance on how the State should approach the re-opening of non-essential businesses. *See* JA 1482 (Wake Decl., Exhibit AA) (Final Report of the Co-Chairs of the Governor's Task Force on Business and Jobs Recovery). This Task Force—comprising over 100 business leaders, union advocates, health care professionals and others selected by the Governor—likely influenced the Respondents' development of other features in the Blueprint.

25 percent capacity had Fresno County been reclassified to the orange tier. *Id*. And even under the most permissive color tier, Ghost Golf would have been limited to operating at 50 percent capacity. *Id*.

By comparison, many businesses that had been deemed to pose significant health risks were allowed to operate indoors (at least to some extent) within the red-tier. For example, gyms and fitness centers could operate at 10 percent capacity; places of worship could operate at 25 percent capacity, and hair salons and personal care businesses could operate without any occupancy restrictions. *Id*. at 1120–21. And restaurants were allowed to open indoors at 25 percent capacity in the red-tier, even as patrons dined maskless. *Id*.

Moreover, the Blueprint allowed movie theaters to operate at 25 percent capacity in red-tier counties. *See* JA 1121. This meant that a 250-seat theater could cycle in 62 patrons at a time. Yet Ghost Golf was prohibited from allowing even a single guest. *Id*. at 1122.

Respondents Selectively Lift Restrictions for Favored Industries (January-June, 2021)

The Respondents continued to make significant changes to the Blueprint without any opportunity for public input during the spring of 2021—even as other states had entirely lifted business restrictions.[8] Notably, on April 1, 2021, CDPH allowed amusement

[8] *See* JA 1511 (Wake Decl., Exhibit BB (CDPH Amusement Park Industry Guidance [Mar. 26, 2021])); JA 1526 (Exhibit CC (CDPH Indoor Seated Live Events Industry Guidance [Apr. 14, 2021]). *See* JA 1276 (Exhibit JJ (Az. E.O. 2021-06)).

parks (like Disneyland) to begin admitting guests, including for indoors operations, at 15 percent capacity within the "red-tier." This meant that an amusement park with a capacity of 85,000 guests could host up to 12,750 individuals *each day*. *See* JA 1511, CDPH Amusement Park Industry Guidance. Yet Ghost Golf was categorically prohibited from allowing even a single patron inside, regardless of masking, social distancing, vaccination status or any other health and safety protocol. *See* JA 1122, Blueprint Archive.

Likewise, on May 18, 2021, the Governor and CDPH exercised discretion to ease restrictions on live performances at concert halls and indoor sporting events. JA 1526, CDPH Indoor Seated Live Events Industry Guidance. Such venues were allowed to begin operating at 10 percent capacity, or 100 guests in red-tier counties; however, these venues were allowed to raise their permissible occupancy rate to 25 percent (without any cap on total attendees) if requiring guests to show proof of vaccination or negative test results. JA 1119, Blueprint Archive. Accordingly, an indoor basketball arena with a total occupancy of 20,000 could allow 5,000 (fully vaccinated) spectators. Yet Ghost Golf was prohibited from hosting even a single fully vaccinated patron.

As of May 18, 2021, CDPH continued to restrict other activities. For example, zoos and museums were restricted to operating at 25 percent capacity, and malls and retail stores were generally limited to operating at 50 percent capacity in red-tier counties. *Id*. at 1120. Indoor social gatherings were limited to a max 25 percent capacity. *Id*. at 1118. And still, these restrictions were less onerous than those applicable to Ghost Golf.

Respondents' Continuing Assertion of Lawmaking Powers

The Respondents enforced the Blueprint until June 15, 2021, at which point they exercised discretion to rescind the regime. JA 1099 (Wake Decl., Exhibit K [E.O. N-07-21]). But even as the Respondents lifted restrictions, they claimed a continuing discretionary power to reimpose restrictions.[9] To this day CDPH claims an evergreen power to issue any order it may deem necessary to respond to contagious disease.

PROCEDURAL BACKGROUND

Appellants filed a complaint, October 26, 2020, challenging the constitutionality of the Blueprint and any other business restrictions that the Respondents might impose without statutory authority. JA 8. The parties filed cross-motions for summary judgment in July, 2022. JA 659, 855, 1573, 1667. On November 9, 2022, the Superior Court entered judgment for the Respondents. JA 1752–59.

The Superior Court concluded that it was bound to dismiss Plaintiffs' claims under the Third District's decision in *Gallagher*. JA 1752. But Judge Tharpe addressed only the Governor's authority under Gov't Code § 8627. He declined to address Appellants' claims against CDPH. JA 1756 n.1. Appellants appealed this judgment on December 15, 2022. JA 1769.

SUMMARY OF ARGUMENT

The Governor and CDPH maintain that, when facing the threat of a contagious disease, they have a freehand to decide the

[9] *See* JA 1098 (Wake Decl., Exhibit K (E.O. N-07-21)); JA 1107 (Exhibit L (Minute Order and Tentative Ruling, at 6 [Dec. 20, 2021]).

State's policy response on such weighty subjects as whether and under what conditions individuals may leave their homes, when businesses may open their doors, and anything else. Under their elastic construction of Gov't Code § 8627 and HSC § 120140, the Respondents can dictate rules governing every aspect of civil society without direction in the statutory text. But a delegation of such unfettered power violates Article III, Section 1 of the California Constitution.

The nondelegation doctrine requires that when delegating rulemaking authority, the Legislature must: (1) make the fundamental policy decisions; (2) provide adequate standards guiding the exercise of discretion; *and* (3) provide adequate safeguards against arbitrary or unduly oppressive decisions. But if Respondents maintain open-ended powers to issue ***any orders they may deem necessary*** to control the spread of contagious disease, then Gov't Code § 8627 and HSC § 120140 violate all three tests.

So construed, the ESA and HSC violate the fundamental policy test because they leave every important decision about the State's policy response to Respondents' idiosyncratic judgment. Such an expansive interpretation would also violate the adequate standards test because nothing in the text guides the exercise of the Respondents' discretion in deciding such critical issues as what metrics matter when deciding whether any given activity should be restricted, what sort of conditions warrant business closure orders or occupancy restrictions, the criteria for deciding what businesses should be allowed to remain open, or how long

restrictions should remain in place to protect public health. Likewise, Gov't Code § 8627 and HSC § 120140 violate the adequate safeguards test because they impose no substantive restraints, objective temporal limitations, or procedural safeguards to minimize the risks of arbitrary or unduly oppressive orders.

In granting summary judgment to Respondents, the Superior Court applied the deeply flawed reasoning of the *Gallagher* opinion—which upheld Gov't Code § 8627 against a nondelegation challenge, but which did not address HSC § 120140. *Gallagher* wrongly concluded that it was sufficient that the Legislature had decided that the Executive Branch should be enabled to exercise the State's police powers to respond to a public health emergency. But this Court must reject that approach because it would invite wholesale delegations of the Legislature's lawmaking powers.

In the same way, the *Gallagher* opinion's approach to the adequate standards test would render the nondelegation doctrine wholly impotent. If it were sufficient simply to say that the Respondents' orders must bear a nexus to the goal of mitigating an emergency or controlling the spread of contagious disease, every delegation would pass muster simply because the Legislature has decided to create a regulatory czar. And it is impossible to square the *Gallagher* decision with *Hewitt v. Bd. of Med. Examiners of the State*, 148 Cal. 590 (1906), and *In re Peppers*, 189 Cal. 682 (1922)—where the Supreme Court found non-delegation violations in the past.

Likewise, *Gallagher* misconceived the adequate safeguards test in assuming that it is sufficient that the Governor must eventually terminate an emergency proclamation. That approach ignores the fact the Governor maintains extreme discretion to decide when to invoke emergency powers, and that the Legislature required no procedure to ensure transparency—or any measure of democratic accountability—for orders imposing heavy-handed restrictions months into a continuing emergency. And, in any event, *Gallagher* did not speak to whether HSC § 120140 entails adequate safeguards in delegating an evergreen power for CDPH to impose Blueprint-like orders without notice-and-comment procedures.

For all these reasons, Respondents' construction of Gov't Code § 8627 and HSC § 120140 raises grave constitutional concerns. Yet Appellants have advanced reasonable alternative interpretations that avoid these constitutional pitfalls. Applying the traditional canons of construction—and mindful of separation of powers—it is reasonable to construe the ESA as conferring only that portion of the police power that may appropriately be exercised by the Executive Branch (*i.e.*, the power to *enforce* existing law). Likewise, Section 120140 must be construed as delegating a limited authority for CDPH to take *actions* as may be necessary to respond to contagious disease, but as denying power to create regulatory regimes from whole cloth.

ARGUMENT

I. Standard of Review

An appellate court performs *de novo* review of a trial court's decision on questions of law in a summary judgment motion. *State Dep't of Health Servs. v. Superior Ct.*, 31 Cal. 4th 1026, 1035, 79 P.3d 556 (2003).

II. The CDPH Lacks Statutory Authority to Impose Sweeping Orders Restricting Lawful Business Activities

Respondents claim that the Legislature delegated an extraordinary power for CDPH to issue sweeping regulatory orders under HSC § 120140. Under this expansive interpretation, CDPH wields an unqualified power to force selective closures for any industry, to confine the entire population at home, or to restrict any manner of activity as deemed "necessary" to prevent the spread of contagious disease. *See* JA 676–77. But this is not an appropriate interpretation.[10]

The authority to take "necessary" measures to control disease should be construed only as authorizing CDPH to issue regulatory orders as may be needed in pursuing conventional disease control measures that are complementary to CDPH's

[10] The Superior Court declined to address Appellants' argument that CDPH lacks statutory authority to impose Blueprint-like restrictions on the mistaken view that the Third District's decision in *Gallagher* disposes of this case. *See* JA 1766. It does not. *Gallagher* does not even offer persuasive authority on this issue because that case concerned the scope of the Governor's emergency powers—not CDPH's independent authority under Section 120140.

quarantine and isolation power.[11] *See Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 672 (6th Cir. 2021) (invoking the canons of construction in narrowly construing delegated authority to the Centers for Disease Control and Prevention (CDC) to issue regulatory orders deemed "necessary to prevent the … spread of communicable diseases"). For example, Section 120140 might authorize temporary restrictions for on-site gatherings when there has been an exposure, or orders requiring treatments to sanitize exposed places. But Section 120140 does not give authority for CDPH to craft a statewide system of business regulation.

The canons of construction support a narrow interpretation. First, general statutory language should be given a limiting construction, consistent with the examples of delegated power expressly provided in the text. *See People v. Arias*, 45 Cal. 4th 169, 180 (2008) (restricting general language "to those things that are similar to those which are enumerated specifically"). Here, the Legislature provided a very specific example of what sort of "measures" it was authorizing; the text says that CDPH can take control of the "body of any living person, or the corpse of any deceased person." HSC § 120140. Therefore, the general authorization to take "necessary" measures must be construed only as authorizing *actions* of the same kind or class.

---

[11] The HSC imposes criminal penalties for violating orders issued under CDPH's quarantine and isolation authority, and other specific authorities—but, not for violation of orders issued under Section 120140. *See* HSC § 120275. This confirms that the Legislature understood these more specific delegations would serve as CDPH's primary tools.

Section 120140 may be construed as allowing CDPH some latitude in dealing with cases where an individual or a premises has been infected or likely exposed. But it cannot be construed as a roving power to make any public health rule the Department might think appropriate. *See Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488 (2021) (rejecting an expansive interpretation of near identical language). Like CDPH, the CDC claimed it held delegated authority to "do anything it [could] conceive of to prevent the spread of disease" during the pandemic. *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..." *Id.* Instead, looking to the canons of construction, the Court held that the statute authorized only "measures that are similar to inspection, fumigation, destruction of animals, and the like." *Id.*

Likewise, the Supreme Court rejected the CDC's expansive interpretation of its statutory authority. *Ala. Ass'n of Realtors*, 141 S. Ct. 2485, 2488. The Court emphasized that CDC's enumerated powers "directly relate to preventing the … spread of disease by identifying, isolating, and destroying the disease itself," and that, by contrast, the CDC (improperly) claimed the power to control the disease "far more indirectly" by targeting the incidental spread of disease as individuals move through society. *Id.*

In the same way, CDPH claims authority to regulate any activity that even indirectly contributes to the spread of disease. Under Respondents' construction, CDPH could require employers to provide greater sick leave than is required by state law, or could

impose an eviction moratorium, if deemed necessary to control contagious disease. But like CDPH's Blueprint regime, these sorts of rules are different in kind than the conventional disease control measures expressly authorized in Section 120140.

Second, when construing statutes, "specific provision[s] prevail[] over a general one relating to the same subject." *Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 71 Cal. App. 4th 1518, 1524 (1999). Here CDPH claims that Section 120140 authorizes the agency to issue orders confining individuals to their homes and prohibiting public access to businesses; however, that is precisely the power that the Legislature delegated in giving CDPH authority to issue quarantine and isolation orders under other (more specific) provisions of the Health and Safety Code. *See* HSC §§ 120130, 120145. As such, CDPH's expansive view of its powers under Section 120140 would improperly subsume the more specific authority to issue quarantine and isolation orders.

Yet CDPH's quarantine and isolation powers are subject to important constraints that the agency could avoid by issuing sweeping orders under the more general authority of Section 120140. For one, quarantine and isolation orders require a specific finding that an individual or place is infected or has been exposed to contagious disease. *E.g.*, *Ex parte Dillon*, 44 Cal. App. 239, 243 (1919) (granting habeas relief where health authorities failed to "furnish tangible ground for the belief that the person was afflicted as claimed"). And CDPH is prohibited from enforcing quarantine and isolation orders beyond the limited period of

communicability. *See* 17 Cal. Code Regs. §§ 2515, 2520. By contrast, the Blueprint required Ghost Golf (and entire industries) to remain closed for months without any finding of an exposure.

Third, a narrow interpretation is necessary to avoid surplusages. If Section 120140 is interpreted expansively enough to allow *any regulation* deemed helpful in combatting contagious disease, every other power granted to CDPH would be superfluous. For instance, there would have been no need to separately delegate authority to "inspect" and "disinfect" property in Section 120145. And it would not be necessary for the Legislature to authorize CDPH to establish places of quarantine. *See* HSC § 120135.

Fourth, this Court should narrowly construe CDPH's authority under Section 120140 "to avoid serious constitutional questions…" *See People v. Buza*, 4 Cal. 5th 658, 682 (2018). Here Appellants have offered a reasonable narrowing construction, consistent with federal precedent, that avoids constitutional doubt. *See Tiger Lily, LLC*, 5 F.4th at 672 (rejecting CDC's interpretation, in part, because it raised thorny constitutional questions); *Skyworks, Ltd. v. Centers for Disease Control & Prevention*, 524 F. Supp. 3d 745, 757–58 (N.D. Ohio 2021) (same). Mindful of separation of powers, a narrowing construction is especially appropriate because it is unlikely that the Legislature would have granted CDPH power to shutter entire industries without providing any semblance of direction as to what sort of conditions should warrant such extreme orders, or what factors the agency should consider when imposing business restrictions. *See Mendoza v. Fonseca McElroy Grinding Co.*, 11 Cal. 5th 1118, 1135

(2021) ("The Legislature does not … hide elephants in mouseholes") (internal quotation marks omitted). *See also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (explaining that courts "must be guided to a degree by common sense as to the manner in which [a legislature] is likely to delegate a policy decision of such economic and political magnitude…").

III. The Governor Lacks Independent Authority to Impose Sweeping Restrictions on Business Activities

Notwithstanding the fact that the California Constitution expressly prohibits the Legislature from delegating its lawmaking powers, Cal. Const. art. III, § 3, the Superior Court held that the Legislature delegated power to the Governor to *make law* during a proclaimed emergency. JA 1753 (concluding that Gov't Code § 8627 delegates the entirety of the Legislature's police power, while acknowledging that "'[t]he police power is the authority to enact laws…'") (quoting *Gallagher*, 63 Cal. App. 5th at 1113). This Court should reject this flawed interpretation of Section 8627 because it contravenes the canons of construction and raises grave constitutional concerns. *See infra* at Section V. Instead, this Court should reasonably construe the ambiguous language in Section 8627 as delegating only that dimension of the "police power" that the Executive Branch may lawfully wield—*i.e.*, discretion in the enforcement of previously enacted statutes.

Respondents maintain that the ESA delegates authority for the Governor to issue *any order* that he might deem necessary to protect public health during an emergency because the statute

gives the Governor "all police power vested in the state..." JA 674–76. But this is not a blank check. Read in context, Section 8627 merely confirms that the Governor has unified and direct control over the entirety of the Executive Branch during an emergency—in a way that he does not during ordinary times.

To ensure a unified state response to fires, flood, epidemics, and other emergencies, Section 8627 delegates emergency powers as may be necessary to exercise "complete authority over all agencies of the state government" by directing state agencies to exercise police powers already properly vested in the Executive Branch. *See* Cal. Gov't Code § 8550 (explaining that the goal of the ESA was "that all emergency services functions of this state be coordinated…"). Simply put, if any component of the Executive Branch is empowered to take an action by exercising the "police power" lawfully delegated to it by the Legislature, the Governor can take that action on his own.[12] For example, Section 8627 enables the Governor to issue orders on subjects that only independent agencies could regulate during ordinary times.

This construction appropriately harmonizes the various provisions of the ESA but does not grant unbounded power. Each piece works together to ensure that the Governor may consolidate the State's resources in a unified and efficacious disaster response. *See* Gov't Code §§ 8628; 8628.5; 8665; 8567. For instance, the Governor could shut down a particular business that is violating lawfully established health and safety laws, even if ordinarily

[12] *E.g.*, JA 1465–76 (COVID-19 Industry Guidance: Hair Salon and Barbershop Services Provided Outdoors).

some other agency or officer would be responsible for taking this action. Likewise, if an agency retains gap-filling authority to promulgate regulations under an organic statute, the Governor might direct that agency to issue temporary emergency regulations or might issue such orders himself. Relatedly he may suspend regulatory statutes that inhibit the state's emergency response. Gov't Code § 8571. Overall, Appellants' interpretation recognizes 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—while avoiding surplusage and non-delegation concerns.

By comparison Respondents' expansive interpretation is problematic because it would render every other provision of the ESA superfluous. A total and unqualified conferral of "all police powers" would authorize the Governor to do anything he thinks appropriate. He could suspend regulatory statutes, or exercise control over state agencies—notwithstanding the fact that the ESA confers those specific powers under Gov't Code § 8571, and elsewhere within Section 8627. Accordingly, this Court should adopt a narrowing construction under the canon against surplusage. *See Pac. Legal Found. v. Unemployment Ins. Appeals Bd.*, 29 Cal. 3d 101, 114 (1981) (construing statutes to avoid redundancy and to promote internal harmony).

More fundamentally, the Court must reject the Governor's expansive construction under the constitutional doubt canon, which requires courts to adopt a reasonable alternative

interpretation where possible to avoid raising serious constitutional issues. *See California Chamber of Commerce v. State Air Resources Bd.*, 10 Cal. App. 5th 604, 631 (2017). Here there are two plausible interpretations of the term "police power." The 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) (explaining "[t]he police power … refer[s] … [to the State's prerogative] to provide *and enforce* reasonable regulations.") (emphasis added). In this context, it is appropriate to adopt the narrow interpretation because it would violate separation of powers to construe Section 8627 as delegating the Legislature's lawmaking powers. *See infra* Section V.

The *Gallagher* opinion held that Section 8627 confers ***both*** *legislative and executive police powers*. But the Third District had no occasion to consider Appellants' 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. [13] In that context there simply was no

[13] For that matter, *Gallagher* did not begin to grapple with other weaknesses of the Governor's interpretation—such as the problem that the Governor's expansive construction renders every other provision of the ESA redundant.

opportunity to delineate between the legislative and the law enforcement dimensions of the state's police powers.

The better interpretation is to construe Section 8627 as delegating only that aspect of the police power that may be appropriately vested in the Executive Branch—*i.e.*, the power to enforce and execute the law, within the bounds of previously enacted statutes. This more modest construction is consistent with the Supreme Court's decision in *Farmers Ins. Exch. v. California*, which affirmed that the Governor may direct state personnel and resources—at least where the State's emergency actions are "taken pursuant to statutory authority…" 175 Cal. App. 3d 494, 500–01 (1985). And this construction is preferred because it is more consistent with democratic norms and separation of powers. *Cf. Tiger Lily, LLC*, 5 F.4th at 672 (rejecting an interpretation that would allow "near dictatorial powers").

Vitally, Appellants' construction would still allow the Governor to efficiently respond to emergencies. For example, the Governor can legitimately respond to an epidemic by exercising gap-filling authority delegated to Cal/OSHA to require masks within the workplace. *See* Cal. Lab. Code § 6401 (delegating authority to require employers to provide "safety devices"). Or the Governor might legitimately exercise authority delegated to another agency to change regulatory standards where the governing statutes allow for discretion in rulemaking. For example, the Governor might issue regulatory orders to allow hair

and nail salons to operate outdoors, even if such establishments must typically operate indoors.[14]

By contrast, there was no preexisting legal construct for shutting down businesses like Ghost Golf and Sol y Luna. No statute authorized CDPH or any agency to impose Blueprint-like restrictions. Therefore, the Governor could not rely on Section 8627.

IV. An Unqualified Delegation of Power for CDPH to Issue Any Order Deemed Necessary Violates Separation of Powers

To survive constitutional scrutiny a delegation conferring discretionary rulemaking authority must satisfy three nondelegation tests. *See Gerawan Farming, Inc. v. ALRB*, 3 Cal. 5th 1118, 1146–47 (2017) (affirming the State must prevail under each). Respondents must show that the Legislature: (1) resolved fundamental policy issues; (2) provided "an adequate yardstick for the guidance of [CDPH] … to execute the law[,]" and; (3) gave adequate safeguards to avoid arbitrary or unduly oppressive orders. *Id*. at 1146–47. *See also Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 168–69 (1976) (safeguards are needed "to assure the proper implementation of [legislative] policies"). But under CDPH's construction, HSC § 120140 fails all three tests.[15]

---

[14] *E.g.*, JA 1465–76 (COVID-19 Industry Guidance: Hair Salon and Barbershop Services Provided Outdoors).

[15] The Superior Court choose not to consider Appellants' nondelegation arguments against CDPH's authority because Judge Tharpe errantly concluded that the *Gallagher* opinion disposed of Appellants' claims. Yet *Gallagher* addressed only the Governor's emergency powers. JA 1753–56.

A. The Legislature Failed to Decide Fundamental Policy in Authorizing CDPH to Issue Any Necessary Health Orders

The fundamental policy test requires that the Legislature must decide the truly important matters. *See Sims v. Kernan*, 30 Cal. App. 5th 105, 111 (2018) (affirming the question is whether the Legislature has decided the "momentous decision[s]"). This means that the Legislature may confer authority only to color-in less consequential details of a regulatory scheme of the Legislature's creation—as opposed to authorizing Executive officers to paint on a blank canvas. *See In re Peppers*, 189 Cal. 682 (1922) (holding the Legislature failed to set fundamental policy in delegating authority to decide what constitutes a defect in citrus). For that matter, the nondelegation doctrine prohibits the Legislature from delegating authority to decide critical issues of public policy that requiring a weighing of competing public interests because it is the exclusive purview of the Legislature—representing the diverse interests of the full political community—to decide what serves the public good. *See Clean Air Constituency v. California State Air Res. Bd.*, 11 Cal. 3d 801, 817 (1974) (emphasizing that the Legislature is "the most representative organ of government [and that it] should settle insofar as possible controverted issues of policy"); *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (stating that the weighing of competing values is "the very essence of legislative choice…").

The Respondents maintain the fundamental policy test is satisfied simply because the Legislature decided that Californians

should be protected against contagious disease; however, such a generalized purpose is insufficient. It is a given that the Legislature wants to protect public health. *See Ex parte Junqua*, 10 Cal. App. 602 (1909) (observing that the very purpose of the police power is to protect public health, safety and morals). But the Legislature also, presumably, wants to ensure that society can continue to function. After all, "no legislation pursues [a] [single] purpose[] at all costs." *Rodriguez*, 480 U.S. at 525–26. As such, the act of legislating on public health requires "[d]eciding what competing values will or will not be sacrificed to the achievement of [that] objective…" *Id.*

The Legislature can establish fundamental policy only by making (sometimes difficult) decisions about ***how*** the State should respond to public health threats. And while it is true that the Legislature need not resolve every policy issue, our case law emphatically requires that the Legislature must at least paint in broad strokes to resolve the important issues. *Sims*, 30 Cal. App. 5th at 111. There is room for the Executive Branch to exercise "gap-filling" authority to shore-up the details of the regime. But the nondelegation doctrine prohibits blank checks of discretionary authority that might enable the Executive to create a regulatory framework from the bottom up. *See Kugler v. Yocum*, 69 Cal. 2d 371, 376–77 (1968) (stressing that the Legislature "cannot escape responsibility" to resolve truly fundamental issues "by failing to establish an effective mechanism to assure the proper implementation of its policy decisions.").

If the Respondents' expansive construction of HSC § 120140 is correct, the Legislature has decided only that CDPH should decide all the important aspects of the state's response to contagious disease. The Legislature left unanswered such critical questions as whether, and under what conditions, California industries should be shuttered or restricted. For instance, ***without any preexisting legal construct***, the CDPH asserted authority to decide: (a) that only "essential" businesses would remain open during the Spring of 2020; (b) which industries would be deemed "essential," and (c) for how long "non-essential" businesses would remain shuttered.[16]

But the Legislature cannot simply punt to CDPH to decide how to weigh competing, and vitally important, public health and economic concerns. *See Hewitt*, 148 Cal. at 593 (invalidating a licensing statute where the Legislature failed to define what it was prohibiting). Setting policy on such matters requires the exercise of *legislative judgment*. On one side of the ledger is the goal of protecting the public from infectious diseases that pose threats with every human interaction. But on the other side, one must necessarily weigh the risk of spreading contagious disease against the need to ensure a functioning economy in deciding whether any given activity presents intolerable public health risks. *See New York Statewide Coal. of Hispanic Chambers of Com. v. New York City Dep't of Health & Mental Hygiene*, 16 N.E. 3d 538, 547 (N.Y. 2014) (finding that a regulation exceeded the scope of authority

[16] JA 972–73 (Wake Decl., Exhibit B (E.O. N-33-20)); JA 975–77 (Wake Decl., Exhibit C (E.O. N-60-20)).

delegated to a municipal health department because "it involved more than simply balancing costs and benefits according to preexisting guidelines; the value judgments entailed difficult and complex choices between broad policy goals—choices reserved to the legislative branch.").

Plainly, CDPH was deciding fundamental policy of the highest order. In no case can one say that CDPH was merely filling in "details" of the Legislature's regulatory scheme when it manufactured the Blueprint from top to bottom.[17] For that matter, a decision ordering 39 million Californians to stay in their homes for weeks and mandating indefinite closure of every "non-essential" business is anything but a minor administrative issue.

What is more, this Court must reject Respondents' anemic view of the fundamental policy test because such a lax standard would uphold every conceivable delegation. There is always an ostensible purpose for every grant of rulemaking authority if viewed at a high enough level of abstraction. For example, the Legislature was acting (vaguely) to protect public health when it authorized the State Medical Board of Medical Examiners (State Board) to decide what would constitute a "grossly improbable statement" that should warrant revocation of a medical license in

[17] Respondents rely on two cases concerning municipal delegations to land use authorities. JA 679–81, 684 (Defs' Mot. for Summ. J.) (invoking *Rodriguez v. Solis*, 1 Cal. App. 4th 495 (1991), and *Sacramentans for Fair Planning v. City of Sacramento*, 37 Cal. App. 5th 698 (2019)). But nothing in these zoning cases speaks whether power to shutter industries entails fundamental policy decisions.

Hewitt. Yet the Supreme Court found that delegation unconstitutional. 148 Cal. 590, 593.[18]

B. The Legislature Failed to Provide Adequate Standards Governing CDPH's Public Health Orders

The adequate standards test requires that the Legislature must provide meaningful direction channeling the exercise of discretionary powers. *See Gerawan Farming, Inc.*, 3 Cal. 5th at 1146–47 (affirming the need for meaningful guidance as to how the Executive Branch should carry out the Legislature's goals); *see also Blatz Brewing Co. v. Collins*, 69 Cal. App. 2d 639, 645–46 (1945) (affirming that the Legislature must provide direction).[19] But, under Respondents' construction, HSC § 120140 is utterly devoid of any direction as to how CDPH should decide whether to shutter or otherwise impose restrictions on California industries. The text provides no guidance as to what sort of restrictions should

[18] *Hewitt* has long been cited as California's seminal nondelegation case. *E.g.*, *Mitchell v. Morris*, 94 Cal. App. 2d 446, 448 (1949) (acknowledging *Hewitt* as the earliest in a string of nondelegation cases).

[19] The degree of legislative direction required depends on the nature of the Legislature's objectives and the practical scope of the delegation—meaning that more definite standards are required when it is feasible for the Legislature to provide such direction, and that more precise standards are needed to govern delegations of particularly broad and sweeping powers. *E.g.*, *Synar v. United States*, 626 F. Supp. 1374, 1386 (D.D.C. 1986) (as the "scope" of a law increases, "the standards must be correspondingly more precise"); *Alaska v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1143-45 (Alaska 1987) (same). *See also B.H. v. State*, 645 So. 2d 987, 993 (Fla. 1994) (reasoning that separation of powers requires more stringent scrutiny for delegations to define criminal conduct).

be imposed, or for how long those restrictions should remain in place. Everything is left to CDPH's judgment as to what it deems "necessary" to respond to contagious disease.

Because there is a degree of risk in any human interaction when dealing with COVID-19, or any similar disease (*e.g.*, Respiratory Syncytial Virus, Norovirus, Influenza, *etc.*), it is insufficient for the Legislature to simply give a general charge to protect public health. The nondelegation doctrine requires that the Legislature should have provided at least some barebones direction as to how the agency should decide what public health risks will be deemed tolerable or intolerable. Yet there is nothing. And in the absence of guiding standards, the CDPH is free to decide for itself whether and to what extent to permit any social or economic activity—or whether, and under what conditions, Californians will be confined to their homes.

CDPH exercised absolute discretion throughout the COVID-19 pandemic. In March 2020, CDPH exercised unguided discretion in choosing to require closure of nonessential businesses and in deciding what businesses would be deemed essential. *See* JA 1053, Wake Decl., Exhibit E (Order of the California State Public Health Officer, March 19, 2020). Likewise, CDPH exercised unguided discretion in deciding whether, when and under what conditions to allow nonessential businesses to reopen, and in choosing to backtrack on reopening plans during the summer of 2020. S*ee id.* at 1054 (Exhibit F), 1058 (Exhibit G), 1063 (Exhibit H).

CDPH then created a novel regulatory scheme to govern every facet of life, including even youth sports, private civic

meetings, religious worship, and familial gatherings. *See id.* at 1117, Exhibit N (Archived Blueprint Archive Tiers). CDPH devised the Blueprint framework without any legislative guidance or criteria—including in deciding such foundational matters as: (a) whether to impose statewide or regional rules; (b) what criteria should guide the agency in assigning color-tiers; (c) in what way (if any) should the regime take into account social equity concerns; (d) what sort of restrictions (if any) should apply to each industry or social activity under each color-tier; and (e) how long the Blueprint should continue in force.[20]

CDPH exercised unguided discretion even as it continued to tinker with the Blueprint into 2021. Unrestrained by governing standards, CDPH was free to allow Disneyland (including its indoor attractions) to reopen, even as it exercised discretion to continue a total prohibition on patrons visiting indoor family entertainment centers. *Id.* at 1122–23, Exhibit N (Archived Blueprint Archive Tiers). Likewise, CDPH was free to allow reopening of indoor concerts and sporting events, movie theaters and virtually every other industry within red-tier counties—while still prohibiting Ghost Golf from opening under similar conditions. *See id.* at 1118–24.

[20] CDPH might have exercised its discretion in other ways. CDPH could have chosen to follow South Dakota's lead, which never required closure of non-essential businesses. JA 1223, Exhibit DD (S.D. E.O. 2020-06). CDPH could have also chosen to follow the lead of public health authorities in other states that allowed businesses to re-open well before CDPH dismantled the Blueprint. JA 1275, Exhibit JJ (Az. E.O. 2021-06).

Even to this day CDPH remains free to reimpose restrictions of any sort based exclusively on its unguided assessment as to what shall be deemed tolerable and intolerable public health risks. In response to a new COVID variant, or any contagious disease, CDPH could bring any industry to the brink of collapse or could leave businesses entirely unrestricted. Such, "unfettered discretion" is the hallmark of a nondelegation violation. *See People's Fed. Sav. & Loan Ass'n v. State Franchise Tax Bd.*, 110 Cal. App. 2d 696, 700 (1952) (invalidating a statute that gave the State Franchise Tax Board "uncontrolled power" to set rates). *See also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 536 (1935) (finding no intelligible principle governing a sweeping delegation of power, notwithstanding a general legislative goal of improving economic conditions); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 406, 418 (1935) (invalidating a provision of the National Recovery Act (NRA) that left the President discretion to decide whether or not to prohibit transport of a commodity as he deemed fit—notwithstanding Congress' general goal of eliminating "unfair competition").

And it is no answer to say that an unqualified delegation of rulemaking authority is necessary to protect public health. The Legislature obviously anticipated the need for the State to respond to contagious disease. And the Legislature was (and remains) capable of drawing from public health expertise in anticipating a range of potentially necessary state responses, which may include restrictions on businesses. *See, e.g.*, Alaska Stat. Ann. § 18.15.390 (enumerating powers for Alaska's health department). But the

Legislature cannot simply give CDPH a blank check. *See California State Auto Ass'n Inter-Ins. Bureau v. Downey*, 96 Cal. App. 2d 876, 900–01 (1950) (affirming that the Legislature "Cannot delegate unlimited powers to an administrative officer [or body]"). *See also In re Certified Questions from United States Dist. Court, W. Dist. of Michigan, S. Div.*, 958 N.W.2d 1, 20–25 (Mich. 2020) (holding that an open-ended delegation of authority to restrict private conduct as deemed necessary to respond to contagious disease unconstitutionally gave away legislative police powers).

Nor does the putative purpose of the HSC supply adequate standards. *See Panama Refining*, 293 U.S. at 417–18 (looking to the broad goals of the NRA and finding that there was no "policy" speaking to "the circumstances or conditions in which the transportation of [excess oil] … should be prohibited…"); *Schechter*, 295 U.S. at 538–39 (finding no intelligible principle in the directive to adopt codes of fair competition that "will tend to effectuate the policy" of the NRA). Respondents rely on *Gallagher* in arguing that it is sufficient that CDPH's orders must bear a nexus to the goal of controlling contagious disease. But *Gallagher*'s approach to the adequate standards test, 63 Cal. App. 5th 1099, 1115–16, is incompatible with the nondelegation doctrine because it would uphold *every delegation*—including delegations conferring rulemaking powers coextensive with the Legislature's power to enact law on any given subject.

Gallagher conflicts with those California Supreme Court decisions that found nondelegation violations for insufficient

standards cabining the exercise of discretion. For example, *In re Peppers* held that it would violate separation of powers for the Legislature "to attempt to confer … the power" to decide what should constitute a defect in citrus that should prohibit shipment. 189 Cal. 682, 688. The Legislature had pronounced a general goal of protecting the "reputation of the citrus industry," and had delegated an open-ended authority for the Director of Agriculture to decide when to prohibit shipment of citrus products. *Id*. at 676. Plainly then the Secretary was authorized to make rules bearing a loose nexus to the top-level goal of protecting the reputation of the citrus industry. Nonetheless, the Supreme Court held that the Legislature had failed to establish an adequate governing standard to control the exercise of administrative discretion. The Court was left asking: "By what standard is the complainant to reach the conclusion that the provisions of this clause of the act are being violated by one shipper and not by another." *Id*. *See also Hewitt*, 148 Cal. 590, 594 (finding a constitutional violation where a statute "furnish[ed] no standard" because it left a licensing board free to apply standards of their own creation: "[T]he members of one board might conclude that [an advertisement] contained 'grossly improbable statements,' while another board might reach an entirely opposite conclusion.").

What is more, the cases cited in support of the Third District's toothless view of the adequate standards test are readily distinguishable. For example, in *Sims*, 30 Cal. App. 5th 105, the legislative history was much more instructive in channeling the exercise of administrative discretion because the Legislature made

clear an intent to align California law governing lethal injections with a well-developed body of preexisting case law. Likewise, there was significantly greater legislative guidance in *Solis*, 1 Cal. App. 4th 495, 503, because the zoning ordinance at issue directed the City Director of Development to take into account specific considerations in deciding whether to approve a proposed highway bill-board—including the "size, design, colors, character and location of the proposed sign[]". The same was true in *Birkenfeld*, 17 Cal. 3d 129, 169, as the Berkley Rent Control Board was directed to consider specific factors in deciding whether to allow adjustments for rent-controlled properties. *See Gerawan Farming, Inc.*, 3 Cal. 5th 1118, 1148 (observing that there was significant legislative guidance in *Birkenfeld* because the ordinance listed factors for consideration). And likewise, in *People v. Wright*, 30 Cal. 3d 705 (1982), the Legislature had provided factors (and established default rules) guiding the exercise of the Judicial Council's discretion in developing sentencing guidelines. By contrast, there is not so much as a hint as to the sort of considerations that the Legislature thought should guide CDPH's exercise of discretionary rulemaking authority under HSC § 120140—much less any statement of factors to consider.

C. The Legislature Failed to Provide Adequate Safeguards Against Arbitrary or Unduly Oppressive Health Orders

With any delegation of rulemaking authority, the Legislature must provide some mechanism to meaningfully safeguard against arbitrary or unduly oppressive decisions. *See*

Hewitt, 148 Cal. 590, 594–95 (emphasizing the risk inherent in a regime that vests open-ended discretionary authority in a body comprised of self-interested parties). What is required depends on the context. But a statute delegating authority is constitutionally deficient where it fails to include basic protections that "*can easily be provided*." *Birkenfeld*, 17 Cal. 3d at 169 (emphasis in original) (quoting the Davis Administrative Law Treatise § 2.15). And greater safeguards are required when the scope and duration of the delegated authority grows to immense proportions. *Cf. Wisconsin Legislature v. Palm*, 942 N.W.2d 900, 914 (Wis. 2020) (affirming that the Legislature cannot delegate authority to create a crime).

The Superior Court failed to consider Plaintiffs' adequate safeguards arguments against CDPH's authority. Nor did the *Gallagher* opinion begin to address the question of whether the HSC § 120140 provides adequate safeguards. *Gallagher* concluded merely that the ESA passed muster because the Governor's delegated powers were limited to the duration of a proclaimed emergency. But that rationale has no bearing here because CDPH's maintains *an evergreen authority* to impose any regulatory order it deems necessary to respond to contagious disease—even during ordinary times.

But while the Legislature understandably wanted CDPH to maintain a continuing authority to respond to contagious disease, it could have easily provided safeguards by requiring the agency to abide by notice-and-comment procedures, or to engage a cost-benefit analysis, where practicable. Such a basic safeguard would

at least minimize the risk of CDPH formulating regulatory orders behind closed doors with input only from powerful interests. For that matter, other courts have applied the adequate safeguards test to hold that statutes delegating rulemaking authority must ensure opportunity for public input. *See Matter of Powell*, 602 P.2d 711, 716–17 (Wash. 1979) (holding a defendant could not be convicted for violating *emergency regulations* promulgated by the Washington State Board of Pharmacy because the governing statute provided no opportunity for notice and comment); *Protz v. Workers' Comp. Appeal Bd.*, 161 A.3d 827, 834–35 (Pa. 2017) (adequate safeguards test requires opportunity for comment).

Of course, in some situations there may not be time for notice-and-comment procedures. But CDPH imposed the Blueprint regime ***seven months*** after the first confirmed case of COVID-19 in California—and during a period when other states were lifting COVID restrictions. *See* JA 1227, Exhibit EE (Tex. E.O. GA-18); JA 1260, Exhibit GG (Fla. EO-20-244). In that time, it would have been feasible to have sought public input. Indeed, there was time enough for CDPH to seek counsel from select interest groups when formulating the Blueprint behind closed doors in the summer of 2020. JA 1482-84, Exhibit AA (Final Report of Taskforce on Business and Jobs Recovery).

V. An Unqualified Delegation of "All Police Powers" Violates Separation of Powers

A. The Legislature Failed to Decide Fundamental Policy in Vesting "All Police Power of the State" in the Governor

The Superior Court and the Third District's decision in *Gallagher* both acknowledged that the nondelegation doctrine requires the Legislature to resolve fundamental policy issues. Nonetheless, they upheld the ESA without any analysis on the fundamental policy test. At best the Superior Court and Third District assumed that it was sufficient for the Legislature to decide upon a policy that the State should seek to protect public health and safety during an emergency. But *Gallagher* had no occasion to consider whether there was a fundamental policy decision on the "momentous" question of social and economic import at issue here—*i.e.*, whether and under what conditions the Governor should issue business closure orders or other such restrictions. And, in any event, an abstract decision that the State should seek to protect public health says nothing about how the state should approach fundamental issues like whether and under what circumstances to force California's to remain confined in their homes, or how to determine that any given business may remain open while others are forcibly shuttered.

If Respondents' construction is correct, the Legislature has resolved none of these fundamental policy matters. The Legislature has decided nothing except that the Governor should decide *everything*. *See Michigan*, 958 N.W.2d 1, 24 (holding that a

delegation to issue emergency orders deemed "necessary to protect life and property," provided no standard to control the exercise of discretion). Indeed, there can be no more sweeping delegation than Section 8627's conferral of "all police powers of the state." *See Ex parte Junqua*, 10 Cal. App. 602 (1909) (stating the "police power" is the Legislature's power to make law as may be necessary in its judgment, to promote public "health, peace, comfort, and welfare."). *See also* Luke A. Wake, *Taking Non-Delegation Doctrine Seriously,* 15 N.Y.U. J. L. & Liberty 751, 780 (2022) (observing that the Governor claimed to possess powers coextensive with the Legislature such that he might well have borrowed from King Louis XIV's quip: "*L'etat c'est moi*" ("I am the State.")).

B. The Legislature Failed to Provide Adequate Standards in Vesting "All Police Power of the State" in the Governor

Section 8627 fails the adequate standards test for the same reason that HSC § 120140 violates the nondelegation doctrine. Under Respondents' construction, the statutory text is devoid of any direction as to how the Governor should exercise his discretion when confronting a threat that presents public health risks in every human interaction. Whereas all statutes that have withstood constitutional scrutiny have provided at least some text-based indication as to how the Executive should exercise administrative discretion, the ESA fails even to provide a list of soft factors to consider.

The fact that the Legislature was delegating lawmaking authority to respond to an emergency is beside the point because

we do not suspend the Constitution, even in times of crisis. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652 (1952) (Jackson, J., concurring) ("[E]mergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them."); *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (affirming that "the Constitution cannot be put away and forgotten" in an emergency). For that matter, the U.S. Supreme Court's opinions in *Panama Refining* and *Schechter* are instructive; in those cases, the Court found that the NRA violated the federal nondelegation doctrine in delegating a roving authority for President Roosevelt to impose restrictions on industry as he deemed fit in responding to a *national economic emergency*. *See Panama Ref. Co.*, 293 U.S. at 416–17; *Schechter*, 295 U.S. at 531, n.9. And here, the delegation of "all police powers" is every bit as capacious as the emergency powers delegated to the President under the NRA.

The *Gallagher* opinion upheld Section 8627 on the assumption that it would have been impracticable for the Legislature to have provided direction beyond the general charge to protect public health during a proclaimed emergency. 63 Cal. App. 5th 1099, 1116. But this is wrong. "[E]mergencies tend to follow patterns and present recognizable risks—which enables legal and policy experts to plan for future emergencies." *Taking Nondelegation Doctrine Seriously*, 15 NYU J.L. & Liberty 751, 783–85. *E.g.*, Cal. Gov't Code § 8568 (requiring planning for future emergencies). And the Legislature certainly anticipated that contagious disease might serve as the basis for a public health

emergency. *See* Cal. Gov't Code § 8558 (listing epidemics as a basis for proclaiming an emergency).

"History is replete with epidemics, and we have an entire field of research dedicated to the study of epidemics." 15 NYU J.L. & Liberty 751, 783–85. Drawing from this expertise, the Legislature could easily have "anticipated that under certain exigent conditions it might be necessary to shut-down or restrict business operations even before the COVID-19 pandemic." *Id*. Therefore the Legislature could have tailored the ESA to give at least some direction as "to what sort of establishments must be closed, what sort of restrictions may be imposed, and what sort of predicate facts the governor" should find before issuing such consequential orders. *Id*. For that matter, the Legislature could amend the ESA to provide such direction while still ensuring that the Governor has maximum flexibility to respond to evolving conditions simply by providing a list of factors that should inform the Governor's judgment in future emergencies.

Finally, the fact that the ESA imposes criminal liability for violating orders issued under Section 8627 only underscores the need for more concrete direction. *See People v. Martin*, 211 Cal. App. 3d 699, 710 (Ct. App. 1989) (stressing that "[t]he Legislature, not the [Executive Branch], created the criminal sanction and fixed the penalties" after providing clear governing standards). Defining the elements of a crime is a fundamental policy decision that cannot be delegated—at least not without very clear standards and guard rails. *See State v. Rodriguez*, 379 So. 2d 1084 (La. 1980) (holding "the legislative power to create and define offenses cannot

be delegated."); *People v. Baker*, 45 P.3d 753, 755 (Colo. App. 2001) (same); *B.H. v. State*, 645 So. 2d 987, 993 (Fla. 1994) (same). The ESA provides neither.

C. The Legislature Failed to Provide Adequate Safeguards Against Arbitrary or Unduly Oppressive Emergency Orders

The Superior Court, and *Gallagher*, concluded that the ESA entails sufficient safeguards because the Governor is directed to terminate an emergency proclamation "at the earliest possible date that conditions warrant." 63 Cal. App. 5th at 1116 (quoting Gov't Code § 8629). But this leaves everything to the Governor's subjective judgment. Therefore, during a proclaimed emergency, all liberty rests on the *assumption* that the Governor will gracefully surrender his delegated powers in a reasonable timeframe. *Cf. Panama Refining*, 293 U.S. at 420 (rejecting the suggestion that a delegation is permissible simply because the Executive is presumed to act "for what he believes to be the public good."). And even after surrendering emergency powers, the ESA gives the Governor unfettered discretion to decide when changed conditions may warrant a new emergency proclamation.

What is more, the Superior Court, and *Gallagher*, erred in assuming that the ESA entails a sufficient safeguard merely in the possibility of legislative intervention. For one, even if the Legislature should muster the votes to terminate a standing emergency, nothing would prevent the Governor from issuing a new emergency proclamation. *See Fabick v. Evers*, 396 Wis. 2d 231, 256–57 (2021) (holding Wisconsin's Governor could not issue a new

COVID-19 emergency because—unlike the ESA—Wisconsin law required legislative approval for a continuing emergency declaration). And in any event, the possibility of a legislative resolution to terminate an emergency is *not an adequate safeguard* against the Governor exercising his delegated powers in any specific way. Because the ESA entails no mechanism to allow for the Legislature to override any specific emergency order, the Legislature is left with a Hobson's Choice between forcing termination of all emergency orders (including those the Legislature may still think important) or allowing the Governor to continue enforcing objectionable orders unabated. *See* JA 1427, 1460 Exhibit X (Amicus Curiae Brief in Support of Appellants) (raising concern that the Legislature could not terminate the emergency proclamation without cutting off vital funding).

In any event, the adequate safeguard test requires basic safeguards that "*can easily be provided*." *Birkenfeld*, 17 Cal. 3d at 169 (emphasis in original). Here it would be simple for the Legislature to impose meaningful safeguards. As other states have done, the ESA could have easily limited an emergency proclamation to a set number of days, while allowing for an extension with consent of the Legislature.[21] And even in the absence of some objective temporal limitation on the Governor's emergency powers, the Legislature could easily require compliance with basic procedural formalities like notice-and-comment requirements *where practicable*. That would at least ensure

[21] *E.g.*, Alaska Stat. Ann. § 26.23.020(c); Kan. Stat. Ann. § 48-924; Minn. Stat. Ann. § 12.31; S.C. Code Ann. § 25-1-440(a)(2).

transparency and some semblance of democratic accountability during an extended emergency. But the ESA entails no safeguards at all.

CONCLUSION

For the reasons set forth here, this Court should reverse the Superior Court's decision granting summary judgment to Respondents and denying judgment to Appellants.

DATED: June 20, 2023.

LUKE A. WAKE
Pacific Legal Foundation

By _____/s/ Luke A. Wake_____

Attorneys for Petitioners & Appellants Ghost Golf Inc., et al.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPELLANTS' OPENING BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 10,777 words.

DATED: June 20, 2023.

/s/ Luke A. Wake
LUKE A. WAKE

DECLARATION OF SERVICE

I, Luke A. Wake, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 555 Capitol Mall, Suite 1290, Sacramento, California 95814.

On June 20, 2023, a true copy of APPELLANTS' OPENING BRIEF was electronically filed with the Court through truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

AARON JONES
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

COURT CLERK
Fresno County Superior Court
B. F. Sisk Courthouse
1130 O Street
Fresno, CA 93721-2220

COURT CLERK
State of California
Court of Appeal
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 20th day of June, 2023, at Sacramento, California.

/s/ Luke A. Wake
LUKE A. WAKE