No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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 Court of Appeal, Fifth Appellant District
(Case No. F085403, Honorable Mark W. Snauffer, Judge)

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provision

Court Rule

Miscellaneous

QUESTIONS PRESENTED FOR REVIEW

In March 2020, Governor Newsom proclaimed that California was in a state of emergency. And exercising authority delegated under the Emergency Services Act, the Governor issued orders shutting down all businesses that he deemed non-essential in response to COVID-19. Thereafter, the Governor decided when to allow these businesses to re-open—subject to whatever rules he deemed appropriate.

The Court of Appeal held that the Governor had authority for all of this because Gov. Code § 8627 delegates "all police power" and concluded that this "plainly includes the power to legislate—to make law." Exhibit A, Opinion at 14. Yet this Court has long affirmed that the Legislature is forbidden from delegating its lawmaking powers because Article III, § 3 of the California Constitution forbids "[p]ersons charged with the exercise of [executive] power [from] exercise[ing] [legislative powers] except as permitted by [the] Constitution."

The question presented is whether it violates the nondelegation doctrine for a statute to delegate powers coextensive with Legislatures power to make law on a given regulatory subject?

INTRODUCTION

Pursuant to California Rule of Court 8.500(a)(1), Petitioners Ghost Golf, Inc., Daryn Coleman, Sol Y Luna Mexican Cuisine, and Nieves Rubio, petition this Court to review the decision of the Court of Appeal, Fifth Appellate District, filed May 20, 2024, entitled *Ghost Golf, Inc., et al., v. Gavin Newsom et al.*, case number F085403, a copy of which is attached hereto as Exhibit A (Opinion).

REASONS FOR GRANTING REVIEW

The Court should grant this petition to settle an important question and to quash a rebellion against this Court's nondelegation doctrine. *See Kugler v. Yocum*, 69 Cal. 2d 371, 375 (1968) ("The power … to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature and cannot be delegated by it …") (quoting *Dougherty v. Austin*, 94 Cal. 601, 606–07 (1892)). The Petition asks whether the Fifth District Court of Appeal was correct in holding that the Legislature can legitimately delegate the entirety of its "police power" such that the Governor may enact law—as a one-man Legislature—in response to a proclaimed emergency. Especially given that the Third District Court of Appeal has likewise ruled

that a delegation of "all police power" passes muster, review in this Court is needed to confirm that the nondelegation doctrine still prohibits the Legislature from delegating the power to *make law*. *See Newsom v. Superior Court*, 63 Cal. App. 5th 1099, 1113–14 (2021) ("*Gallagher*") (concluding that the "police power" is the power to "enact laws[,]" but nonetheless rejecting a nondelegation challenge to the delegation of "all police power").

This is plainly a matter of immense practical importance for the 39 million Californians who lived under emergency rule between March 2020 and February 2023—during which time they could not leave their homes, run their businesses, or do anything that the Governor choose to restrict at his unbridled discretion. Both the Third and Fifth Districts have already held that this constitutional question, contesting the scope of the Governor's emergency powers, is an issue of immense public importance. *See Gallagher*, 63 Cal. App. 5th at 1111; Opinion at 11 (recognizing that this case presents an "evergreen" issue of public importance). And naturally, this Court should have the last word on such an important matter.

But still more importantly, this Court should hear this case because it concerns an issue of transcendent importance to

California's constitutional system. The Petition ultimately asks whether California still has a nondelegation doctrine—or whether the Court of Appeals has rendered the nondelegation doctrine dead letter. It is critical that this Court clarify whether California still has a viable nondelegation doctrine because the Legislature commonly delegates rulemaking authority to state agencies, and it is vital to delineate between a lawful delegation of quasi-legislative rulemaking power and an unconstitutional delegation of lawmaking power.

The nondelegation doctrine goes to the heart of what it means to have a free society, where law is made by the People's elected representatives—*i.e.*, a rule of law society. And this case presents the ideal vehicle to affirm that the nondelegation doctrine still has teeth because the "all police power" provision delegates without a limiting principle. For that matter, the facts presented provide the ideal vehicle for this Court to tease out the contours of the fundamental policy and adequate standard tests because they demonstrate the myriad of ways in which the Governor's ungoverned rulemaking powers affected the lives of ordinary Californians.

FACTUAL BACKGROUND

On March 4, 2020, Governor Newsom proclaimed a state of emergency in California in response to the COVID-19 pandemic. Opinion at 4. This enabled the Governor to exercise "all police power vested in the state" to control the spread of the disease. Gov. Code § 8627. As such, the Governor asserted a sweeping power to restrict individual liberties in whatever manner he deemed necessary for **1092 days** until he terminated the emergency proclamation in February 2023.[1]

Exercising the Legislature's "police powers," the Governor issued orders affecting all Californians. He ordered all Californians to stay in their homes, except for purposes expressly authorized by the Governor's orders. N-33-20, JA 971–73. And without any preexisting legal construct for distinguishing between essential and nonessential businesses, the Governor ordered all nonessential businesses to close their doors.[2] Opinion at 4.

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[1] *See* N-04-22, JA 1313-17 (Declaration of Luke A. Wake in Support of Plaintiffs' Motion for Summary Judgment (Wake Decl.) (Exhibit PP).

[2] Likewise, when the Governor first began to allow a "re-opening" of nonessential businesses, he did so on his terms. Without any

The Plaintiffs are two individuals, and their businesses, that suffered under the Governor's business closure orders. Opinion at 2. Plaintiff Nieves Rubio was forced to close her indoor operations at her restaurant, Sol y Luna, for weeks at a time, and was subject to everchanging occupancy restrictions for nearly 15 months.[3] But Plaintiff Daryn Coleman suffered even worse. He was forced to close his indoor minigolf facility, Ghost Golf, Inc., for ***over a year***—during which time his company had ballooning debts, without any revenue.[4] And Ghost Golf remained shuttered even as comparable businesses in nearly every other sector were allowed to reopen. JA 1291, Coleman Decl. ¶ 12. *See also* JA 1118–22, Wake Decl., Exhibit N (Archived Blueprint Tiers).

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preexisting legal framework guiding his discretion, the Governor pronounced that he would allow a four-stage re-opening process. N-60-20, JA 973-77. For example, during this "reopening" Executive Branch officials created a novel County Monitoring List that would require business closures in counties with transmission rates that Executive Branch officials deemed intolerable. Opinion at 4.

[3] *See* JA 1299-1302, Wake Decl., Exhibit NN (Declaration of Nieves Rubio in Support of Pl. Mot. for Summary Judgment ¶¶ 2, 5, 7–10, 17–20, 23).

[4] *See* JA 1292-96, Wake Decl., Exhibit MM (Declaration of Daryn Coleman in Support of Pl. Mot. for Summary Judgment ¶¶ 3, 5, 7, 11, 14, 16–19, 21, 23 [Coleman Decl.]).

Plaintiffs initiated this lawsuit in October 2020 when they were both subject to restrictions under the "Blueprint for a Safer Economy" regime, which the Governor unveiled more than six months after proclaiming an emergency. Opinion at 5. The Blueprint was formulated behind closed doors, with input only from those whom the Governor choose to consult.[5] Neither Daryn Coleman nor Nieves Rubio had opportunity to comment. They had no voice in the matter because their elected representatives did not have opportunity to vote on the Blueprint.

The Blueprint assigned each county a color (purple, red, orange, or yellow) depending on its assessed risk level. Opinion at 4-5. The Blueprint imposed corresponding restrictions for different industry sectors in each color tier. *Id*. But there was no preexisting legal construct for any of this. Executive Branch officials decided on their own accord what metrics they would use

[5] The Governor assembled a special economic task force to provide him guidance on how the State should approach the reopening of nonessential businesses during the summer and fall of 2020. *See* JA 1481-1509 (Wake Decl., Exhibit AA) (Final Report of the Co-Chairs of the Governor's Task Force on Business and Jobs Recovery). This Task Force was comprised of over 100 business leaders, union advocates, health care professionals, and others selected by the Governor.

to designate a county as subject to either purple, red, orange, or yellow tier restrictions.

Under the Blueprint indoor miniature golf was prohibited in both purple- and red-tier counties. Opinion at 4. Ghost Golf would only have been allowed to operate at 25 percent capacity had Fresno County been reclassified as an orange-tier county. *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.[6] And restaurants were allowed to open indoors at 25 percent capacity in the red-tier, even as patrons dined maskless. Opinion at 5. Moreover, the Blueprint allowed movie theaters to operate at 25 percent capacity in red-tier counties. *See* JA 1121, Archived Blueprint Tiers. This meant that a 250-seat theater

[6] JA 1117–1127, Wake Decl. (Exhibit N) ("Blueprint Archive").

could cycle in 62 patrons at a time. Yet Ghost Golf was prohibited from allowing even a single guest. *Id*. at 1122.

And because the Governor was free to exercise "all police power vested in the State," he was free to modify the restrictions imposed in the Blueprint at any point as he deemed fit. Notably, on April 1, 2021, Executive Branch officials modified Blueprint restrictions to allow amusement parks (like Disneyland) to begin admitting guests, including for indoor operations, at 15 percent capacity within the "red-tier."[7] Authorization to operate at 15 percent capacity meant that an amusement park with a capacity of 85,000 guests could host up to 12,750 individuals *each day*. *See* JA 1510, Revised Amusement Park Rules. Yet indoor family entertainment centers were categorically prohibited from allowing even a single patron inside, regardless of masking, social distancing, or any other health and safety protocols. *See* JA 1122, Blueprint Archive.

Likewise, on May 18, 2021, the Governor, and Executive Branch officials under his control, exercised discretion to ease restrictions on live performances at concert halls and indoor

[7] JA 1511-1524, Wake Decl. (Exhibit BB) ("Revised Amusement Park Rules") (allowing both outdoor and indoor attractions).

sporting events.[8] 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 family entertainment centers were prohibited from hosting even a single fully vaccinated patron in red-tier counties.

The Respondents enforced the Blueprint until June, 2021, at which point they exercised discretion to rescind the regime. Opinion at 3. And while the Governor has since terminated the COVID-19 emergency proclamation, he maintains the power to issue a new emergency order and to impose business restrictions to the extent he deems such action necessary at any point. Opinion at 7.

[8] JA 1525, Wake Decl. (Exhibit CC) ("Live Events Guidance").

PROCEDURAL BACKGROUND

Petitioners filed a Complaint for declaratory and injunctive relief in October 2020, challenging the constitutionality of the Blueprint and any other business restrictions that the Respondents might impose without statutory authority. Opinion at 2. The lawsuit alleged that the Governor lacked statutory authority to impose these business restrictions. Opinion at 2-3. But in the alternative, the Plaintiffs argued that Gov. Code § 8627 violates the nondelegation doctrine in delegating "all police power vested in the State."[9] *Id.* at 3.

On December 17, 2021, the Superior Court denied Respondents' motion for judgment on the pleadings—holding that this case could proceed to the merits under the public interest mootness exception. JA 653. The Court of Appeal affirmed that judgment because the panel concluded that epidemics are recurrent events and that it was reasonably likely that the issues presented here will arise again in the future. Opinion at 11. As

[9] The Plaintiffs also alleged claims contesting the authority of the California Department of Public Health to impose business closure orders and occupancy restrictions without a preexisting legal construct. But the Court of Appeal ruled that it did not need to address those issues after concluding the Governor had lawful authority for the Blueprint. Opinion at 7.

such, given the public significance of the issues presented, the Court affirmed that this case falls within the public interest mootness exception. *Id*.

On the merits, the Fifth District rejected the Plaintiff's argument that Gov. Code § 8627 should not be construed as literally delegating the Legislature's police power. *Id*. at 13-14. The Court ruled: "The phrase 'all police power vested in the state by the Constitution and laws of the State of California' in section 8627 plainly includes the power to legislate—to make law." *Id*. at 14. Nonetheless, the Fifth District rejected Plaintiffs' nondelegation claim on the view that when exercising "all police power" to "make law[,]" the Governor was merely exercising "quasi-legislative" powers. *Id*.

The Court of Appeal affirmed that to pass muster under the nondelegation doctrine, Gov. Code § 8627 had to satisfy both the fundamental policy test and the adequate standards test. *Id.* at 14. But the panel held that the delegation of "all police power" satisfied both tests. *Id.* at 15, 17. As to the fundamental policy test, the Fifth District ruled that it was sufficient that the Legislature had decided that it was necessary to vest "all police power" in the Governor's hands for the purpose of protecting

Californians from conditions that threaten public health and safety, and that it was not necessary for the Legislature to decide upon a policy governing when any given industry should be shuttered. *Id.* at 17. Likewise, the panel held that this legislative purpose of protecting public health and safety was, in itself, adequate direction to guide the exercise of discretion, *Id.* at 15—even though it left the Governor free to pursue any regulatory approach he deemed fit.

This Petition is timely because the Court of Appeal's decision became final on June 19, 2024.

ARGUMENT

I. THIS COURT SHOULD HAVE THE LAST WORD ON THE SCOPE OF THE GOVERNOR'S EMERGENCY POWERS

This Court should grant review because it is necessary and appropriate that the State's highest court should have the last word on the question of whether it was constitutionally permissible for the Legislate to delegate the entirety of its "police power" to enable the Governor to "make law", Opinion at 14, as he may deem fit during any emergency proclamation. As both the Third and Fifth District have recognized, this is a matter of

tremendous practical importance to the People of California. *Gallagher*, 63 Cal. App. 5th at 1111; Opinion at 11. And it is an issue that will likely recur whenever the Governor invokes his emergency powers in the future. *Cf. Madera County v. Gendron*, 59 Cal. 2d 798 (1963) (applying the public interest mootness exception to decide whether a District Attorney may engage in private practice while in office—even though there was no assurance that the precise controversy would arise again).

The Emergency Services Act gives the Governor extraordinary discretion to declare and maintain an emergency whenever he concludes that conditions exist that threaten "extreme peril to the safety of persons or property within the state ..." Gov. Code § 8558. *Cf. Los Angeles*, 61 Cal. App. 5th 478, 483 (2021) (confirming that challenges to the propriety of emergency restrictions are reviewed under an "extremely deferential" standard). And the Governor exercises this authority all the time. There are ***over 60*** open State of Emergency proclamations, including six that predate the COVID-19

emergency.[10] And the Governor has recurrently invoked his "all police power" authority to impose legal restrictions or obligations for which there were no preexisting statutory authority.[11]

Nothing prevents the Governor from invoking his emergency powers to respond to issues that the Legislature is fully capable of responding to. For that matter, the Legislature was capable of enacting legislation to address the COVID-19 crisis by the time the Governor unveiled the Blueprint—a full seven months after the Governor first declared the emergency. And looking forward, nothing prevents the Governor from invoking his "all police power" authority to make law in response to other public health and safety threats when the Legislature declines to act. So long as he can make a finding that "conditions of… extreme peril" exist that threaten public safety, the

[10] *See* Governor's Office of Emergency Management, https://www.caloes.ca.gov/office-of-the-director/policy-administration/legal-affairs/emergency-proclamations/ (last visited Jun. 26, 2024).

[11] For example, exercising his "all police power" authority, the Governor imposed conditions on approval of permits for wells when he issued EO N-7-22 (Mar. 28, 2022). Likewise, he imposed requirements of his own choosing in lieu of suspended regulations when he issued EO N-19-22 (Nov. 19, 2022). There was no apparent basis in existing statutes for these orders, aside from his authority to exercise the Legislature's police powers.

Governor can invoke "all police power vested in the state" to unilaterally make law to address concerns presented by with climate change, rampant homelessness, gun violence, or anything else.[12] Gov. Code § 8850.

But the question as to the lawful scope of the Governor's emergency powers is an issue of extraordinary public importance even when the subject is traditional emergencies like epidemics, drought, and fires because the Governor's emergency orders affect the lives of Californians in innumerable ways. As demonstrated by this case, the Governor's delegated power to unilaterally make law has real consequences for Californians.

This case presents the ideal vehicle for this Court to address the lawfulness of the ESA's "all police power" provision because the facts demonstrate the myriads of ways in which the Governor is left free to pronounce rules without any preexisting legal construct guiding his decisions. Afterall, the Governor

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[12] *See, e.g.*, Mayor Bass Signs Updated State of Emergency on Housing and Homelessness to Confront Ongoing Crisis, City of Los Angeles (Jul. 10, 2023), https://mayor.lacity.gov/news/mayor-bass-signs-updated-state-emergency-housing-and-homelessness-confront-ongoing-crisis; *See also* Jimmy Vielkind, Cuomo Declares Emergency Over Gun Violence in New York, Wall Street Journal (Jul. 6, 2021), https://www.wsj.com/articles/cuomo-declares-emergency-in-new-york-over-gun-violence-11625607820.

exercised his unfettered discretion to decide whether and to what extent the State would restrict any activity in response to COVID-19—including whether individuals could invite guests into their homes, whether they could send their children to school, whether anyone could report to work, go to church, attend a civics club meeting, or leave their house at all. *See* JA 1117, Blueprint Archive. And unlike the petition in *Newsom v. Superior Court*, No. C093006 (Nov. 16, 2020) (*Gallagher* Petition)—which asked this Court to review the ESA's delegation of "all police power"—this case concerns business closure orders representing a dramatic expansion of government control over private affairs, as opposed to orders pertaining to the operation of state elections—which was a narrow subject and a domain classically entrusted to government operation. *See Gallagher*, 63 Cal. App. 5th at 1099.

The Governor ordered 39 million Californians to stay in their homes for weeks and mandated indefinite closure of every "nonessential" business. *See* Opinion at 4. And he wields power to do the same in response to any future emergency. With every emergency proclamation, the Governor can decide on his own accord whether to bring entire industries to the brink of

destruction or leave businesses entirely unrestricted—without any direction at all from the Legislature. It is hard to imagine a case that presents an issue of greater importance than whether the Governor can act as lawmaker and law enforcer during an emergency of his own declaration.[13] Whether that level of power can be delegated to one branch of government is surely worthy of this Court's review.

II. THIS CASE PRESENTS AN ISSUE OF IMPORTANCE TO A FREE SOCIETY

While this case concerns the Governor's exercise of delegated powers under the Emergency Services Act, it is not just another COVID-19 case. The issue presented is of a much broader importance because it concerns the recurrent question of how far the Legislature can go in delegating authority for the Executive Branch to decide the rules that will govern the lives

[13] As the opinion below held this case is justiciable under the public interest mootness exception. As such, this Court can address these issues in a calm and deliberate manner that might not have been possible during the midst of the emergency. This Court can hear this case without fear of creating an emergency because the COVID-19 crisis has passed. And should this Court determine that section 8627 violates the nondelegation doctrine, the Legislature should have sufficient time fix the issue before the next epidemic.

and affairs of Californians. The Legislature is constantly enacting statutes delegating rulemaking authority. And for this reason, it is important that this Court make clear that the nondelegation doctrine still prohibits the Legislature from giving blank checks of power. *See Gaylord v. City of Pasadena*, 175 Cal. 433, 437 (1917) (affirming that delegated power cannot give "too great a play to the discretion of the [vested official].").

Review is necessary because the Fifth District's decision in this case, and the Third District's opinion in *Gallagher*, signal that the nondelegation doctrine imposes no limit at all on the Legislature. In contravention of this Court's nondelegation doctrine, both opinions hold that the Legislature can delegate the entirety of the State's police power—which is the "authority to enact laws to promote the public health, safety, morals, and general welfare." Opinion at 14 (quoting *Gallagher*, 63 Cal. App. 5th at 1113). And only this Court can right the ship.

If the decision below goes unreviewed, the Legislature will be emboldened to delegate without limits. Whereas prior case law had always said that the Legislature must at least provide some degree of guidance as to how the Executive Branch should exercise delegated rulemaking authority, the opinion below, and

Gallagher, invites the Legislature to delegate unfettered rulemaking discretion on any regulatory subject. *E.g.*, *Gerawan Farming Inc. v. Agric. Labor Relations Bd.*, 3 Cal. 5th 1118, 1148 (2017) (finding the Legislature had provided at least some direction to guide the exercise of discretion in providing a list of factors for the agency to consider). And of course, the Legislature will delegate blank checks of power whenever lawmakers find it convenient to have someone else make the difficult policy decisions of fundamental importance to the People of California. *See Kugler*, 69 Cal. 2d at 376–77 (emphasizing that the Legislature "cannot escape responsibility by explicitly delegating" its lawmaking "function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions."); *See also Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring) (recognizing that the "[legislature] has an incentive to insulate itself from the consequences of hard choices.").

The question of whether California still has a viable nondelegation doctrine is unquestionably a matter of great importance because it goes to the heart of what it means to live in a free society where laws are supposed to be made by the People's

elected representatives. *See* The Federalist No. 47, 301 (J. Cooke ed. 1961) (J. *656 Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."). As demonstrated by this case, this issue has tremendous practical implications for ordinary people like Daryn Coleman and Nieves Rubio who stand to lose their voice when the Legislature delegates its lawmaking powers. *See Clean Air Constituency v. California State Air Res. Bd.*, 11 Cal. 3d 801, 817 (1974) (explaining that the nondelegation doctrine is rooted in "the belief that the Legislature as the most representative organ of government should settle insofar as possible controverted issues of policy and that it must determine crucial issues whenever it has the time, information and competence to deal with them.").

Notwithstanding its conclusion that the Legislature had delegated the State's police power and that this entailed the power to make law, the Fifth District went on to find that there was no nondelegation problem because the Governor was merely exercising "qausi-legislative powers." Opinion at 14. As such, this Court should take this case if only to reaffirm its own precedent, which requires that courts must look past the Executive's self-

serving "quasi-legislative" label when assessing nondelegation doctrine claims. *E.g., Carson Mobilehome Park Owners' Ass'n v. City of Carson*, 35 Cal. 3d 184, 190 (1983) (applying the fundamental policy and adequate standard tests in determining whether a delegation requiring consideration of 12 nonexclusive factors was permissible). Otherwise, a delegation of authority *coextensive with the Legislature's power to make law* will inevitably survive scrutiny—simply because the reviewing court may choose to ascribe a meaningless "quasi" moniker on the exercise of lawmaking powers.

This Court has long held that reviewing courts should apply the fundamental policy and adequate standards tests to distinguish between a permissible delegation of "quasi-legislative" rulemaking authority and an impermissible delegation of lawmaking powers. *Gerawan*, 3 Cal. 5th at 1146. *See also, e.g.*, *Am. Distilling Co. v. State Bd. of Equalization*, 55 Cal. App. 2d 799, 805 (1942) (explaining the distinction). But the fundamental policy and adequate standards tests are meaningless if they can be contorted to uphold a delegation of power coextensive with the Legislature's power to enact law on

matters of public health, safety, or morals for which the Legislature is fully capable of legislating.

Only this Court can repudiate the deeply flawed notion that a generalized statutory purpose of protecting public health is enough to satisfy the fundamental policy test when the Legislature has simply directed the Executive Branch to decide all the important issues about how the State will address a given regulatory subject. *See* Opinion at 17. And only this Court can eschew the Court of Appeal's errant view that the generalize goal of protecting public health or safety is enough, on its own, to adequately channel the exercise of administrative discretion when that leaves open the entire range of legislative options available to the Legislature. *Id*. at 15.

If allowed to stand, the Fifth and Third Districts' anemic version of the fundamental policy test will uphold every conceivable delegation.[14] That is so because there is an ostensible

[14] It would even uphold a delegation authorizing the Governor to made industry codes—just like President Roosevelt was authorized to do under the National Industrial Recovery Act before the U.S. Supreme Court found a nondelegation violation in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). And, in fact, the Governor essentially did write his own code governing every different industry in California in 2020–21.

purpose in every enactment aimed at protecting public health, safety, or morals. So, if it is enough to satisfy the fundamental policy test that the Legislature has decided to delegate its police power to address those generalized subjects, it would be impossible for any delegation to fail this test.

The opinion below holds that it is permissible for the Legislature to simply decide that someone else should make the law on difficult regulatory subjects. *See* Opinion at 17 ("[T]he Legislature has determined that the state has a responsibility to mitigate the harm caused by emergencies and that the Governor should lead this effort."). That approach would contravene the very premise that the Legislature is foreclosed from delegating its lawmaking powers. Likewise, it would contravene the premise that the Legislature is forbidden from delegating fundamental policy decisions if the lower courts can deem such weighty issues as whether entire industries should be shuttered as mere administrative "details" appropriate for the Executive Branch to resolve as it deems fit. *Kugler*, 69 Cal. 2d at 376. *See also Agric. Lab. Rels. Bd. v. Superior Ct.*, 16 Cal. 3d 392, 419 (1976) (distinguishing between fundamental policy decisions and the

exercise of rulemaking discretion that "merely implements one aspect of [the Legislature's] statutory program").

Likewise, if allowed to stand, the Fifth and Third Districts' approach to the adequate standards test would obliterate the nondelegation doctrine because it infers "adequate standards" simply from the fact that the Legislature decided to delegate rulemaking authority to protect public health and safety. Such an approach will uphold every delegation—even when there is no limiting principle. For that matter, this case presents the ideal vehicle for this Court to clarify the proper application of the adequate standards test because the Respondents have been unable to point to any activity that would have been beyond the Governor's power to restrict in any way he might deem appropriate. And further, this case provides an especially compelling vehicle for clarifying the adequate standards test because the facts speak to the myriad of ways in which the Governor exercised discretion in restricting private conduct without any preexisting legal construct—and without even a list of soft factors to loosely guide the exercise of discretion. Compare with *Gerawan*, 3 Cal. 5th at 1148 (text provided factors to guide administrative discretion); *City of Carson*, 35 Cal. 3d at 190

(same); *Birkenfeld v. City of Berkley*, 17 Cal. 3d 129, 168 (1976) (same); *People v. Wright*, 30 Cal. 3d 705, 713 (1982) (same).

Relatedly, review is appropriate because, in tandem, the Third and Fifth Districts have reversed this Court's seminal nondelegation cases *sub silentio*. They have recast the fundamental policy and adequate standards tests as so ineffectual that they would uphold even those delegations that this Court found unconstitutional in *Hewitt v. Board of Medical Examiners of the State*, 148 Cal. 590 (1906), and *In re Peppers*, 189 Cal. 682 (1922).

Hewitt held unconstitutional an enactment that delegated the lawmaking power in authorizing the State Medical Board of Examiners to decide—without direction—when a physician may be stripped of her license for making "grossly improbable statements." *Id.* at 591. Because the Legislature failed to define what would constitute a "grossly improbable" statement, or to provide any textual guidance to control the exercise of discretion, this Court found the delegation unconstitutional. *Id.* at 592.

Hewitt ruled that this was an impermissible delegation because there was "no standard" to govern the Board's discretion. *Id.* at 594. But under the Fifth District's approach to the

adequate standards test below, this delegation would have survived scrutiny because the court would have inferred adequate standards from the Legislature's putative goal of protecting the public from unscrupulous doctors. And likewise, the Fifth District's approach to the fundamental policy test would uphold this delegation for the simple reason that the Legislature made a policy decision to vest discretion to the Board.

Likewise, the Fifth District's approach to the fundamental policy and adequate standards test would have dictated a different result in *In re Peppers*, wherein this Court struck down a delegation that authorized the Director of the State Department of Agriculture to "define, promulgate and enforce such rules and regulations" as he "deemed necessary" governing the sale of citrus fruit. *Peppers*, 189 Cal. at 684. The Agricultural Director had exercised that authority to define what would constitute an impermissible defect in oranges that would "endanger[] the reputation of the citrus industry[.]" *Id.* at 683. But this Court ruled that the Director could not define what would constitute a deficient orange without engaging in "an act of legislation … beyond the constitutional powers of … [a state] officer." *Peppers*, 189 Cal. at 689.

Yet in patent conflict with *In Re Peppers*, the Fifth District's anemic approach to the fundamental policy test would uphold this delegation simply because the Legislature's putative purpose was to protect the reputation of the citrus industry. And likewise, the Fifth District's toothless version of the adequate standards test would uphold this delegation even though this Court found that there was nothing in the statute governing Agricultural Director's exercise of discretion. There as well, the statute would be upheld (contrary to this Court's holding) simply because the Fifth District infers adequate standards from a statute's putative purpose. *See* Opinion at 15.

Finally, review is appropriate to resolve conflict between the Fifth District's approach and that of the Second District, which found a nondelegation violation in a provision of a statute authorizing Executive Branch officials to decide critical matters pertaining to tax deductions. *See People's Fed. Sav. & Loan Ass'n v. State Franchise Tax Bd.*, 110 Cal. App. 2d 696, 700 (1952) ("Franchise Tax Board") (affirming that the Legislature cannot delegate "uncontrolled power"). As in *Hewitt* and *In Re: Peppers*, the Second District's opinion in *Franchise Tax Board* found a nondelegation violation because there was no direction in the text

to control the exercise of administrative discretion. *Id. See also In re Application of Blanc*, 81 Cal. App. 105, 109–112 (1927) (relying on *Hewitt* in finding a municipal ordinance unconstitutional because it vested ungoverned discretion in violation of "constitutional precepts and democratic principles.").

But the Fifth District's opinion below conflicts with *Franchise Tax Board* because it would presume a fundamental policy decision and adequate standards from the mere fact the Legislature decided it appropriate to delegate rulemaking authority to advance the putative statutory purpose of enabling tax collections. And likewise, the Fifth District's approach would foreclose a nondelegation challenge on any other issue. *But see California State Automobile Ass'n v. Downey*, 96 Cal. App. 2d 876, 901 (1950) (holding that a "statute cannot delegate unlimited powers"); *Am. Distilling Co.*, 55 Cal. App. 2d at 805 ("It is a well-established principle of law that the Legislature may not delegate authority to a board or commission to adopt rules which abridge, enlarge, extend or modify the statute creating the right.")

In sum, it is hard to conceive of issues more deserving of this Court's review than the questions presented in this petition. After all, these are issues of fundamental importance to our

democratic system of government because a robust separation of powers has always been the greatest guarantee of individual liberty in an ordered society. *See Youngstown Sheet & Tube Co.*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) ("With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the executive be under the law, and that the law be made by parliamentary deliberations.").

CONCLUSION

For all of the foregoing reasons, this Court should grant review of this petition and direct the parties to submit briefing on the merits.

Dated: July 1, 2024.

Respectfully submitted,

LUKE A. WAKE
RACHEL K. PAULOSE*

By: /s/ Luke A. Wake
LUKE A. WAKE

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

**pro hac vice pending*

CERTIFICATE OF COMPLIANCE

The text of this petition consists of 5,803 words according to the word count feature of the computer program used to prepare this brief.

Dated: July 1, 2024

/s/ Luke A. Wake
LUKE A. WAKE

DECLARATION OF SERVICE

I, Kiren K. Mathews, declare:

I am a citizen of the United States and employed in Sacramento County, California. I am over the age of eighteen years and not a party to this action. My business address is 555 Capitol Mall, Suite 1290, Sacramento, California 95814.

On July 1, 2024, I caused a true copy of the Petition for Review to be electronically delivered via Truefiling upon the following:

Aaron David Jones — Via E-mail & US Mail
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Counsel for Respondents and Appellees Gavin Newsom, et al.

Clerk of the Court — Via U.S. Mail
California Court of Appeal, Fifth Appellate District
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Clerk of the Court — Via U.S. Mail
Fresno County Superior Court
B.F. Sisk Courthouse
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on July 1, 2024, at Sacramento, California.

KIREN K. MATHEWS

Exhibit A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

GHOST GOLF, INC., et al., Plaintiffs and Appellants, v. GAVIN NEWSOM, as Governor, etc., et al., Defendants and Respondents.	F085403 (Super. Ct. No. 20CECG03170) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. D. Tyler Tharpe, Judge.

Pacific Legal Foundation and Luke A. Wake for Plaintiffs and Appellants.

NFIB Small Business Legal Center, Elizabeth Milito, Rob Smith; Benbrook Law Group, Bradley A. Benbrook and Stephen M. Duvernay, for National Federation of Independent Business Small Business Center as Amicus Curiae on behalf of Plaintiffs and Appellants.

Competitive Enterprise Institute, Dan Greenberg, Devin Watkins; Scharf Norton Center for Constitutional Litigation at the Goldwater Institute and Timothy Sandefur for Competitive Enterprise Institute and Goldwater Institute as Amici Curiae on behalf of Plaintiffs and Appellants.

Dhillon Law Group, Harmeet K. Dhillon and Krista L. Baughman for Association of American Physicians and Surgeons as Amicus Curiae for Plaintiffs and Appellants.

Rob Bonta, Attorney General, Thomas S. Patterson, Assistant Attorney General, Paul Stein and Aaron Jones, Deputy Attorneys General, for Defendants and Respondents.

-ooOoo-

In August 2020, Governor Gavin Newsom and the California Department of Public Health (CDPH) introduced the Blueprint for a Safer Economy, which implemented a color-coded, risk-based framework for tightening and loosening restrictions on activities during the COVID-19 pandemic. The Governor and CDPH issued the Blueprint under the authority granted to the Governor under the Emergency Services Act (Gov. Code, § 8550 et seq.)[1] (ESA) and the authority granted to CDPH under Health and Safety Code section 120140.[2] The Blueprint regime included restrictions on business activities, including customer capacity limitations.

Plaintiffs are Central California businesses and their owners. Ghost Golf, Inc. operates an indoor mini-golf course in Fresno County and Daryn Coleman is a shareholder.[3] Sol y Luna is a Mexican restaurant in Kern County owned by Nieves Rubio.

In October 2020, plaintiffs filed suit against the Governor and three other persons they claim were each responsible in some way for creating and enforcing the Blueprint. Plaintiffs alleged causes of action for declaratory and permanent injunctive relief, contending the Blueprint's creation and enforcement are unlawful. They alleged the Governor and CDPH lacked statutory authority to implement the Blueprint, and

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[1] Undesignated statutory references are to the Government Code.

[2] Health and Safety Code section 120140 reads: "Upon being informed by a health officer of any contagious, infectious, or communicable disease the department may take measures as are necessary to ascertain the nature of the disease and prevent its spread. To that end, the department may, if it considers it proper, take possession or control of the body of any living person, or the corpse of any deceased person."

[3] The complaint identifies Coleman as the "owner" of Ghost Golf, Inc. We assume this means he is a shareholder, but we do not know if he is the only shareholder.

alternatively, that broadly interpreting the ESA and Health and Safety Code section 120140 conferred unfettered discretion on defendants to impose restrictions on businesses, violating the California Constitution's non-delegation doctrine. Their complaint included a request for nominal damages. They claimed their businesses were put in jeopardy of permanently closing because the Blueprint's restrictions prevented them from operating at profitable levels.

Shortly after suing, plaintiffs moved for a preliminary injunction seeking to enjoin the enforcement of the Blueprint, which the trial court denied. Plaintiffs appealed from the order denying their motion. On June 11, 2021, after appellate briefing was completed, the Governor issued an executive order rescinding the Blueprint. In a written opinion, we dismissed the appeal as moot because we could no longer grant plaintiffs effective relief on their motion for a preliminary injunction. (*Ghost Golf, Inc. v. Newsom* 2021 WL 3483271, at p. 1 (*Ghost Golf I*).)

After *Ghost Golf I*, the parties cross-moved for summary judgment. The trial court granted defendants' motion and denied plaintiffs' motion, holding that the Third District Court of Appeal's decision in *Newsom v. Superior Court (Gallagher)* (2021) 63 Cal.App.5th 1099, review denied (Aug. 11, 2021) (*Gallagher*), had rejected the same challenges to the Governor's emergency powers that plaintiffs assert. Finding the Blueprint was authorized by the ESA, the trial court found it did not need to address whether the Health and Safety Code independently authorized CDPH to implement the Blueprint. The court entered judgment in defendants' favor.

Before any briefs on the merits were submitted, defendants moved to dismiss this appeal as moot because the Blueprint has been rescinded. Plaintiffs opposed the motion. We deferred ruling on the motion, and the parties went on to submit briefs. We deny defendants' motion to dismiss this appeal as moot but affirm the judgment. We follow *Gallagher* and conclude it governs the outcome of this appeal.

BACKGROUND

In *Ghost Golf I*, we set forth the background of the filing of this action: "In response to the COVID-19 pandemic, Governor Newsom declared a state of emergency in California on March 4, 2020. He then issued a general stay-at-home order on March 19, 2020, that indefinitely prohibited 'non-essential businesses' from operating. All non-essential businesses remained closed until May 4, 2020, when Governor Newsom issued Executive Order N-60-20, which allowed the State of California to begin reopening non-essential businesses in phases. Executive Order N-60-20 delegated authority to the California Public Health Officer 'to take any action she deems necessary to protect public health in the face of the threat posed by COVID-19."

"On July 1, 2020, Governor Newsom ordered many businesses, including dine-in restaurants and family entertainment centers, to cease indoor operations in counties on the 'State's County Monitoring List,' which then included Fresno and Kern Counties. On July 13, 2020, Governor Newsom required closure of indoor operations for dine-in restaurants and family entertainment centers statewide, and imposed restrictions on indoor operations for various other businesses in the counties on the State's County Monitoring List."

"On August 28, 2020, the Governor and [CDPH] announced they were replacing the County Monitoring List with the Blueprint. The Blueprint created a color-coded, tiered system that assigned each California county a color (purple, red, orange, or yellow) based on its assessed risk level for COVID-19 transmission and imposed corresponding restrictions for different sectors. The color-coding for each county was updated weekly."

"Under the Blueprint regime, indoor family entertainment centers were required to remain closed completely so long as a county was classified as either 'purple' or 'red.' They could operate at 25 percent capacity in counties in the 'orange' tier and 50 percent capacity in the 'yellow' tier."

"Similarly, the Blueprint prohibited indoor dining in 'purple' counties and imposed restrictions on indoor operations in the other tiers. Restaurants in 'red' counties were limited to operating at 25 percent capacity and could not, under any condition, seat more than 100 people. Restaurants in 'orange' counties were prohibited from operating at more than 50 percent capacity and could not, under any condition, seat more than 200 people. Restaurants in 'yellow' counties were also limited to 50 percent capacity."

"On October 26, 2020, plaintiffs filed suit against defendants in Fresno County Superior Court. The complaint alleged the Governor and CDPH lacked the statutory authority to impose the type of business closure orders and other restrictions on indoor businesses derived from the Blueprint. The complaint further alleged, in the alternative, that broadly interpreting the Emergency Services Act (Gov. Code, § 8558 et seq.) and the relevant provisions of the Health and Safety Code as conferring unfettered discretion on defendants to impose restrictions on businesses would violate the California Constitution's non-delegation doctrine. The plaintiffs sought declaratory and permanent injunctive relief, as well as nominal damages."

"On November 12, 2020, plaintiffs filed a motion for preliminary injunction 'enjoining Defendants, their employees, agents, and persons acting on their behalf from enforcing Governor Newsom's Blueprint for a Safer Economy and other COVID-19 related emergency orders' against Plaintiffs' businesses. A hearing was held on December 16, 2020. On January 29, 2021, the trial court issued an order denying plaintiffs' motion, finding plaintiffs were unlikely to prevail on the merits of any of their causes of action and that the balance of equities did not favor an injunction."

"On February 4, 2021, plaintiffs filed a notice of appeal from the order denying their preliminary injunction."

"On June 11, 2021, after appellate briefing was completed, the Governor signed Executive Order N-07-21,2 which reads in part:

" 'IT IS HEREBY ORDERED THAT:

" '1) Executive Order N-33-20, issued on March 19, 2020, setting forth the Stay-at-Home Order is hereby rescinded.

" '2) Executive Order N-60-20, issued on May 4, 2020, directing the State Public Health Officer to issue a risk-based framework for reopening the economy, and all restrictions on businesses and activities deriving from that framework, including all aspects of the Blueprint for a Safer Economy, is hereby rescinded.' "

"We requested supplemental briefing from the parties on whether Executive Order N-07-21 mooted [that] appeal and, if so, whether [the] appeal should be dismissed. Both parties submitted supplemental briefs. Defendants argue [that] appeal [was] moot and should be dismissed. Plaintiffs argue[d] [the] appeal [was] not moot, and alternatively contend[ed] there [were] good reasons for us to exercise our discretion to decide [the] appeal even were it moot." (*Ghost Golf I, supra,* 2021 WL 3483271, at pp. 1–2.)

We concluded the appeal was moot and dismissed it. "With the Blueprint rescinded, there [was] no longer anything to enjoin under plaintiffs' motion for a preliminary injunction, and therefore no practical, tangible relief we [could have] grant[ed] plaintiffs in the context of [that] appeal." (*Ghost Golf I, supra,* 2021 WL 3483271, at p. 3.)

After our decision in *Ghost Golf I*, in July 2022 both parties moved for summary judgment. The trial court granted defendants' motion and denied plaintiffs', ruling that "*Newsom v. Superior Court (Gallagher)* (2021) 63 Cal.App.5th 1099 rejected the same theories and contentions raised by plaintiffs," and thus *Gallagher* controls the outcome here. Adhering to *Gallagher*, the trial court held that the ESA authorized the Governor to enact the Blueprint and that the ESA was not an unconstitutional delegation of legislative power to the Governor. The trial court also stated that since the ESA itself authorized the Governor to enact the Blueprint, the court did not need to decide whether CDPH separately had authority to implement the Blueprint.

The court entered judgment in defendants' favor from which plaintiffs appeal.

DISCUSSION

Plaintiffs advance the same arguments on appeal as they did below and maintain that *Gallagher*'s reasoning was flawed. They first contend the ESA authorizes the Governor only to enforce existing laws, not to make new laws. Thus, the Governor had no power to enact the Blueprint on his own. In the alternative, plaintiffs contend that interpreting the ESA as delegating quasi-legislative authority to the Governor in an emergency would work an unconstitutional delegation of legislative power. We endorse *Gallagher*'s holdings and reject these arguments. In light of this conclusion, we need not determine whether the Health and Safety Code independently authorized CDPH to implement the Blueprint.

But before explaining *Gallagher*'s holding and its effect here, we will address defendants' motion to dismiss this appeal as moot, which was filed before briefing on the merits. Although this appeal is moot, it raises questions of broad public interest that are likely to recur, and we therefore deny defendants' motion.

I. Relevant ESA provision

"The [ESA] endows the Governor with the power to declare a state of emergency 'in conditions of … extreme peril to life, property, and the resources of the state' so as to 'mitigate the effects of [the emergency]' in order to 'protect the health and safety and preserve the lives and property of the people of the state.' (Gov. Code, § 8550.) The Act confers upon the Governor broad powers to deal with such emergencies. (Gov. Code, § 8550.)" (*California Correctional Peace Officers Assn. v. Schwarzenegger* (2008) 163 Cal.App.4th 802, 811.)

The Governor may "proclaim a state of emergency in an area affected or likely to be affected" by a disease that causes "conditions of disaster or of extreme peril to the safety of persons[.]" (§§ 8625, 8558.) Section 8627, the statute the Governor relied on in implementing the Blueprint, reads: "During a state of emergency the Governor shall, to the extent he deems necessary, have complete authority over all agencies of the state

government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes of this chapter. In exercise thereof, he shall promulgate, issue, and enforce such orders and regulations as he deems necessary, in accordance with the provisions of Section 8567." Section 8567 provides: "The Governor may make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter. The orders and regulations shall have the force and effect of law." (§ 8567, subd. (a).) Orders and regulations issued during a state of emergency must be in writing, and they are effective immediately upon their issuance. (*Id.*, subd. (b).) When the state of emergency ends, the orders and regulations are of no further force or effect. (*Ibid.*)

The Governor must declare the end of the state of emergency "at the earliest possible date that conditions warrant." (§ 8629.) All of the Governor's powers under the ESA terminate when the state of emergency ends. (*Ibid.*) The Legislature may also terminate the state of emergency by concurrent resolution. (*Ibid.*)

II. Mootness

Defendants moved to dismiss this appeal, contending the rescission of the Blueprint renders plaintiffs' challenges to the Blueprint moot. They contend none of the exceptions to moot apply. While we agree the appeal is moot, we hold the public interest exception to mootness applies in this case.

Courts decide only justiciable issues. (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.) Justiciability means the questions litigated are based on an actual controversy. (*Ibid.*) Unripeness and mootness describe situations where there is no justiciable controversy. (*Ibid.*) Unripe cases are those in which an actual dispute or controversy has yet to emerge. (*Ibid.*) At the other end of the spectrum, mootness occurs when a once ripe actual controversy no longer exists due to a change in circumstances. (*Ibid.*)

"An appeal is moot if the appellate court cannot grant practical, effective relief." (*Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340, 362.) "The legal test for effective relief is whether there is a 'prospect of a remedy that can have a practical, tangible impact on the parties' conduct or legal status.' " (*Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1053.)

" 'Repeal or modification of a statute under attack, or subsequent legislation, may render moot the issues in a pending appeal.' " (*Jordan v. County of Los Angeles* (1968) 267 Cal.App.2d 794, 799.) Where a party brings a challenge to the validity of a law, repeal of that law before the appeal is concluded renders the appeal moot. (See, e.g., *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 79 Cal.App.4th 242, 249 [taxpayer association's claim for injunctive and declaratory relief to prevent future collection of registration fee for persons engaged in home occupations rendered moot by city's revocation of fee requirement].)

Code of Civil Procedure section 1060 provides that "[a]ny person ... who desires a declaration of his or her rights or duties with respect to another, ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties ...." "Declaratory relief is appropriate where there is a justiciable controversy, but not where the dispute is moot, or only hypothetical or academic." (*City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (2003) 113 Cal.App.4th 465, 481.) When questions presented by an action for declaratory relief are, or have become, moot, a court has no duty to proceed to determine rights and duties of the parties and the action should be dismissed. (*Pittenger v. Home Sav. & Loan Ass'n of Los Angeles* (1958) 166 Cal.App.2d 32, 36.)

With the Blueprint rescinded, there is no longer anything to enjoin under plaintiffs' request for a permanent injunction, and a judgment as to the Blueprint's validity would have no effect. It is therefore impossible for us to grant any effective

relief. Under these circumstances, the appeal, as well as the underlying action, are moot. But that does not necessarily require this appeal to be dismissed.

True, moot appeals generally should be dismissed. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 77—78; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2023) ¶ 5:22 [the general rule is that moot appeals are dismissed].) But there are three discretionary exceptions that allow an appellate court to decide an otherwise moot appeal: "(1) when the case presents an issue of broad public interest that is likely to recur [citation]; (2) when there may be a recurrence of the controversy between the parties [citation]; and (3) when a material question remains for the court's determination [citation]." (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479—480.)

We conclude the first exception applies here. Defendants contend this exception does not apply because, even if this case presented a question of public interest, "the issues presented in this appeal could not reasonably be expected to recur because the conditions that led the State to adopt the Blueprint and related health orders no longer exist." They assert that, in light of the development of COVID-19 vaccines and the end of the COVID-19 State of Emergency in early 2023, "there can be no reasonable expectation the State will re-impose the Blueprint."

We recognize that appellate courts are not inclined to invoke the public interest exception to address a moot appeal on its merits when the issues presented are essentially factual, requiring resolution case-by-case, and are unlikely to recur. (*Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 867.) However, the issues presented here are not "essentially factual." Plaintiffs' action challenges both the scope and constitutionality of the Governor's emergency police power. As to its scope, plaintiffs contend the ESA authorizes the Governor only to enforce existing laws, not to make new laws. They base this argument on a narrow interpretation of the term "police power" as used in section 8627. As to the ESA's constitutionality, plaintiffs

contend an interpretation of the ESA as authorizing the Governor to "make law" would be an unconstitutional delegation of legislative power. Answering these questions does not require us to parse the Blueprint. The question of whether the ESA allows the Governor to "make law" in a state of emergency is an evergreen question that could arise in the context of any type of emergency. The same is true with whether the ESA unconstitutionally delegates legislative power to the Governor. Thus, were we to agree with plaintiffs on either the scope or constitutionality of the ESA, such a decision could foreseeably affect the Governor's exercise of authority in other types of emergencies, not just emergencies involving diseases. For these reasons, the precise questions plaintiffs raise could be raised in the context of any state of emergency where the Governor seeks to "make law" under the ESA. We therefore conclude that this case raises questions of broad public interest that are likely to recur.

We therefore address plaintiffs' arguments as to the ESA. But as we have mentioned, we will not need to address plaintiffs' arguments as to CDPH's separate authority to implement the Blueprint.

III. ESA's scope and constitutionality

We turn now to the merits of plaintiffs' appeal. *Gallagher, supra,* 63 Cal.App.5th 1099, controls our analysis. *Gallagher* involved a challenge to Governor Newsom's executive order requiring that all voters be provided a vote-by-mail ballot for the November 2020 election. (*Id.,* at p. 1106.) Two Assembly Members, James Gallagher and Kevin Kiley, challenged the order on the ground that it either exceeded the Governor's authority or, alternatively, that the authority delegated to the Governor violated the California Constitution. (*Ibid.*) The Sutter County Superior Court ruled that the Governor had exceeded his authority under the Act, declaring that the ESA "does not authorize the Governor to make or amend statutes." (*Id.* at p. 1108.) The court enjoined the Governor from issuing any executive orders that make or amend statutory law. (*Ibid.*)

The Governor petitioned the Third District Court of Appeal for a writ of mandate challenging the superior court's ruling. (*Gallagher, supra,* 63 Cal.App.5th at pp. 1104–1105.) The Court of Appeal granted the Governor's petition and directed the superior court to dismiss as moot the Assembly Members' claim for declaratory relief that the executive order was void as an unconstitutional exercise of legislative power. (*Id.* at p. 1105.) But the court concluded the case presented matters of great public concern about the Governor's orders in the then-ongoing COVID-19 pandemic emergency and thus addressed the merits of the Governor's petition. (*Ibid.*)

As to the merits, the *Gallagher* court first held that the ESA permitted the Governor to amend or make new laws. The court explained that, by granting the Governor authority to exercise "all police power vested in the state," section 8627 of the ESA plainly authorizes the Governor to issue quasi-legislative orders because " 'police power' … is generally the power to legislate." (*Gallagher, supra,* 63 Cal.App.5th at p. 1113.)

As well, the court found no improper delegation of legislative power to the Governor. (*Gallagher, supra,* 63 Cal.App.5th at p. 1118.) The court observed that " ' "[a]n unconstitutional delegation of authority occurs only when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy." ' " (*Id.* at p. 1114.) As to sufficient guidance, the *Gallagher* court concluded that while the ESA does not impose any express standards on exercise of the emergency police power, the Act implied a requirement that the power be exercised to further the purpose of the ESA, which is to provide a coordinated response to emergencies (§ 8550). (*Id.* at pp. 1115–1116.) The court also found the ESA contained several safeguards on the exercise of the power, including that the Governor must terminate the state of emergency as soon as possible and that the Legislature may terminate the emergency by passing a concurrent resolution.

Another safeguard is that any orders made under the ESA cease to have effect when the emergency is over. (*Id.* at 1116–1118.)

Gallagher squarely addresses plaintiffs' contentions about the ESA's scope and constitutionality. Plaintiffs do not persuade us not to follow *Gallagher* on both issues. We first address plaintiffs' arguments about the ESA's scope and then turn to their arguments about ESA's constitutionality.

Plaintiffs contend *Gallagher*'s interpretation that section 8627 delegates to the Governor the power to make law during a proclaimed emergency is flawed "because it contravenes the canons of construction." Under their interpretation, section 8627 does not authorize the Governor to issue an executive order that makes statutory law. Instead, "[s]ection 8627 merely confirms that the Governor has unified and direct control over the entirely of the Executive Branch during an emergency—in a way that he does not during ordinary times." This competing interpretation is based in plaintiffs' contention that "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)[.]" Plaintiffs' construction is the same construction the trial court employed in *Gallagher*.

Plaintiffs rely on the canon of constitutional doubt, which provides that " 'statutes are to be so construed, if their language permits, as to render them valid and constitutional rather than invalid and unconstitutional.' " (*People v. Morera-Munoz* (2016) 5 Cal.App.5th 838, 846.) But as the *Gallagher* court recognized, this principle applies only where a statute is ambiguous and susceptible to two different, but still plausible, interpretations. (*Gallagher, supra,* 63 Cal.App.5th at pp. 1111–1112)

The *Gallagher* court also correctly observed that the term "police power" in section 8627 is not ambiguous. (*Gallagher, supra,* 63 Cal.App.5th at p. 1113.) Section 8627 delegates to the Governor "*all* police power vested in the state by the Constitution and laws of the State of California …." (Italics added.) The "police power"

is the general power of governing, possessed by the States but not by the Federal Government. (*National Federation of Independent Business v. Sebelius* (2012) 567 U.S. 519, 535–536; *Bond v. United States* (2014) 572 U.S. 844, 854.) As the *Gallagher* court put it, " 'police power' as exercised is generally the power to legislate." (*Gallagher,* at p. 1113.) It " ' "is the authority to enact laws to promote the public health, safety, morals, and general welfare." ' " (*Ibid.*) The phrase "all police power vested in the state by the Constitution and laws of the State of California" in section 8627 plainly includes the power to legislate—to make law. The statute is thus unambiguous. We endorse *Gallagher*'s holding that the ESA delegates quasi-legislative power to the Governor in an emergency.

We also endorse and follow *Gallagher*'s holding that section 8627 does not violate the constitutional separation of powers by delegating quasi-legislative power to the Governor in an emergency. In *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118 (*Gerawan*), the California Supreme Court said: " '[A]lthough it is charged with the formulation of policy,' the Legislature 'properly may delegate some quasi-legislative or rulemaking authority.' [Citation.] 'For the most part, delegation of quasi-legislative authority … is not considered an unconstitutional abdication of legislative power.' [Citation.] 'The doctrine prohibiting delegations of legislative power does not invalidate reasonable grants of power to an administrative agency, when suitable safeguards are established to guide the power's use and to protect against misuse.' [Citation.] Accordingly, '[a]n unconstitutional delegation of authority occurs only when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy.' " (*Id.* at pp. 1146–1147.)

The *Gallagher* court acknowledged this basic framework, and further recognized: " 'Only in the event of a total abdication of power, through failure either to render basic policy decisions or to assure that they are implemented as made, will [a] court intrude on

legislative enactment because it is an "unlawful delegation" ' …." (*Gallagher*, *supra,* 63 Cal.App.5th at p. 1114, quoting *Kugler v. Yocum* (1968) 69 Cal.2d 371, 384.) "Thus, the Legislature does not unconstitutionally delegate legislative power when the statute provides standards to direct implementation of legislative policy." (*Gallagher,* at p. 1115; citing *Gerawan, supra,* 3 Cal.5th at p. 1148.)

Plaintiffs assert the ESA's "statutory text is devoid of any direction as to how the Governor should exercise his" emergency police power. The *Gallagher* court observed that section 8627 indeed does not set forth express standards, but it also recognized that " 'standards for administrative application of a statute need not be expressly set forth; they may be implied by statutory purpose.' " (*Gallagher, supra,* 63 Cal.App.5th at p. 1115, quoting *People v. Wright* (1982) 30 Cal.3d 705, 713.)

The *Gallagher* court then acknowledged that one of the ESA's primary purposes is to ensure that all the emergency services functions of the State and local governments, the federal government, and private agencies are coordinated "to the end that the most effective use be made of all manpower, resources, and facilities for dealing with any emergency that may occur." (§ 8550.) The court then noted that section 8569 charges the Governor with coordinating the emergency plans and programs of local agencies " 'with the State Emergency Plan and the plans and programs of the federal government and of other states to the fullest possible extent.' (Gov. Code, § 8569).)" (*Gallagher,* 63 Cal.App.5th at p. 1115.) The court concluded: "Thus, in issuing orders under section 8627, the Governor is charged by the Emergency Services Act with the responsibility to provide a coordinated response to the emergency. This statutory purpose while broad gives the Governor sufficient guidance, i.e., to issue orders that further a coordinated emergency response." (*Gallagher,* at pp. 1115–1116.)

The *Gallagher* court then explained that "of greater significance than 'standards' is the requirement that legislation provide 'safeguards' against the arbitrary exercise of quasi-legislative authority." (*Gallagher, supra,* 63 Cal.App.5th at p. 1116.) The court

pointed to the "important safeguard" in section 8629 of the ESA. That section provides: "The Governor shall proclaim the termination of a state of emergency at the earliest possible date that conditions warrant. All of the powers granted the Governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the Governor or by concurrent resolution of the Legislature declaring it at an end." (§ 8629.) Another important safeguard the court noted is that " '[w]henever the state of war emergency or state of emergency has been terminated, the orders and regulations shall be of no further force or effect.' (§ 8567, subd. (b).)" (*Gallagher,* at p. 1116.) The court concluded these constituted adequate safeguards "for the delegation of quasi-legislative authority in section 8627." (*Id.,* at p. 1117.) We endorse this holding and concur that section 8627 is not unconstitutional.

In our view, the Legislature's power to end a state of emergency with a concurrent resolution is a very significant safeguard. (§ 8629.) The Legislature can exercise this power to end the state of emergency any time, even immediately after the Governor declares a state of emergency. (*Ibid.*) Thus, the Governor may exercise his emergency police powers for only as long as the Legislature allows him to. Plaintiffs argue this safeguard is weak because even if the Legislature votes to terminate a state of emergency, the Governor is free to issue a new emergency proclamation. It is true the Governor could immediately issue a new proclamation, but it is also true the Legislature could immediately counter with a new resolution to end the emergency. Another significant safeguard, not mentioned by the *Gallagher* court, is that the Governor's exercise of power under the ESA is subject to judicial review. (*California Correctional Peace Officers Assn. v. Schwarzenegger* (2008) 163 Cal.App.4th 802, 811–820 [reviewing whether emergency properly proclaimed].)

Plaintiffs, together with criticizing the ESA's lack of express standards and arguing that its safeguards are inadequate, also contend that the lower court here and the *Gallagher* court both failed to address whether the Legislature has resolved the

fundamental policy for the exercise of the Governor's emergency police power. We conclude the Legislature has resolved the fundamental policy. Section 8550 says that the state has a "responsibility to mitigate the effects of natural[…] emergencies that result in conditions of disaster or in extreme peril to life," "and generally to protect the health and safety and preserve the lives … of the people of the state." Section 8550 also states that, to ensure preparation for such emergencies, the state needed to "confer upon the Governor … the emergency powers provided" in the ESA. (*Id.*, subd. (a).) Thus, the Legislature has determined that the state has a responsibility to mitigate the harm caused by emergencies and that the Governor should lead this effort. This seems to us to be a fundamental policy resolution that satisfies what the non-delegation doctrine requires. (*Gerawan, supra,* 3 Cal.5th at pp. 1146–1147.)

Having concluded that the ESA authorizes the Blueprint, we need not determine whether the CDPH independently had the power to implement the Blueprint.

DISPOSITION

Respondents' motion to dismiss the appeal is denied. The judgment is affirmed. Respondents are awarded their costs on appeal.

SNAUFFER, J.

WE CONCUR:

MEEHAN, Acting P. J.

DE SANTOS, J.