Case No. F082357

IN THE CALIFORNIA COURT OF APPEAL, FIFTH DISTRICT

Ghost Golf, Inc., Daryn Coleman, Sol Y Luna Mexican Cuisine, and Nieves Rubio,

Plaintiffs 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,

Defendants and respondents.

On appeal from the Superior Court of Fresno County
Case No. 20CECG03170
The Honorable D. Tyler Tharpe, Judge

AMICUS CURIAE BRIEF OF CALIFORNIA CONSTITUTION CENTER SUPPORTING RESPONDENT GOVERNOR GAVIN NEWSOM

CALIFORNIA CONSTITUTION CENTER
David A. Carrillo (177856)
Brandon V. Stracener (314032)
University of California, Berkeley
School of Law
Law Building #7200
Berkeley, CA 94720-7200
Telephone: (510) 664-4953

Attorneys for *amicus curiae* California Constitution Center

Table of Contents

AMICUS CURIAE BRIEF 5

INTRODUCTION AND SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. California's core powers doctrine permits the limited overlap here. 6

II. The legislature can delegate emergency authority to the governor. 12

III. Enjoining police power acts like the ESA is disfavored. 17

IV. The governor holds inherent emergency powers. 21

CONCLUSION 24

CERTIFICATE OF COMPLIANCE 25

TABLE OF AUTHORITIES

Cases

Abeel v. Clark (1890) 84 Cal. 226 17
Berman v. Parker (1954) 348 U.S. 26 17
Board of Dry Cleaners v. Thrift-D-Lux Cleaners (1953) 40 Cal.2d 436 17
California Housing Finance Agency v. Patitucci (1978) 22 Cal.3d 171 20
Carmel Valley Fire Protection Dist. v. State of California (2001) 25 Cal.4th 287 6, 7, 11, 12
Carson Mobilehome Park Owners' Assn. v. City of Carson (1983) 35 Cal.3d 184 12
Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal.3d 801 14
Davis v. Municipal Court (1988) 46 Cal.3d 64 ..... 6, 9
Davis v. Scherer (1984) 468 U.S. 183 21
Ex parte Giannini (1912) 18 Cal.App. 166 10
Factor & Co. v. Kunsman (1936) 5 Cal.2d 446 18
French v. Davidson (1904) 143 Cal. 658 17
French v. Senate of State of Cal. (1905) 146 Cal. 604 ..... 18, 19
Gerawan Farming, Inc. v. Agricultural Labor Relations Bd. (2017) 3 Cal.5th 1118 14
Harpending v. Haight (1870) 39 Cal. 189 20
Hustedt v. Workers' Comp. Appeals Bd. (1981) 30 Cal.3d 329 5
Jacobson v. Massachusetts (1905) 197 U.S. 11 23
Jarvis Taxpayers Assn. v. Padilla (2016) 62 Cal.4th 486 10
Kugler v. Yocum (1968) 69 Cal.2d 371 ..... 14, 15
Laisne v. State Bd. of Optometry (1942) 19 Cal.2d 831 9
Lockard v. City of Los Angeles (1949) 33 Cal.2d 453 16
Lukens v. Nye (1909) 156 Cal. 498 8
Macias v. State of California (1995) 10 Cal.4th 844 ..... 18, 19
Mandel v. Myers (1981) 29 Cal.3d 531 11
Marine Forests Society v. Cal. Coastal Com. (2005) 36 Cal.4th 1 5
Marshall v. United States (1974) 414 U.S. 417 23
Monsanto Co. v. Office of Environmental Health Hazard Assessment (2018) 22 Cal.App.5th 534 15
Newsom v. Superior Court of Sutter County (May 5, 2021, No. C093006) 2021 WL 1779975 ..... passim
Obrien v. Jones (2000) 23 Cal.4th 40 5
People ex rel. Attorney Gen. v. Provines (1868) 34 Cal. 520 22
People ex rel. Department of Public Works v. Superior Court of Merced County (1968) 68 Cal.2d 206 14
People v. Bunn (2002) 27 Cal.4th 1 8
People v. Nash (2020) 52 Cal.App.5th 1041 8
People v. Vangelder (2013) 58 Cal.4th 1 16
People v. Wright (1982) 30 Cal.3d 705 14
Perez v. Roe 1 (2006) 146 Cal.App.4th 171 7

Professional Engineers in California Government v. Schwarzenegger (2010) 50 Cal.4th 989 22
Scheuer v. Rhodes (1974) 416 U.S. 232 21
Serve Yourself Gasoline Stations Assn. v. Brock (1952) 39 Cal.2d 813 17
Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal.4th 866 16
St. John's Well Child & Family Center v. Schwarzenegger (2010) 50 Cal.4th 960 8
State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners (1953) 40 Cal.2d 436 16
State Personnel Bd. v. Dept. of Personnel Admin. (2005) 37 Cal.4th 512 5
Steen v. Appellate Division (2014) 59 Cal.4th 1045 10
Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection (2010) 560 U.S. 702 5
Superior Court v. County of Mendocino (1996) 13 Cal.4th 45, 52 8
United Auburn Indian Community of Auburn Rancheria v. Newsom (2020) 10 Cal.5th 538 ..... passim
Yamaha Corp. v. Bd. of Equalization (1998) 19 Cal.4th 1 10
Youngstown Sheet & Tube Co. v. Sawyer (1952) 343 U.S. 579 21

Statutes

Civ. Code § 3548 16
Gov. Code § 8550 13
Gov. Code § 8567(a) 13
Gov. Code § 8570 13
Gov. Code § 8571 ..... 11, 13
Gov. Code § 8627 ..... 13, 19
Lab. Code § 6725 15

Other Authorities

David A. Carrillo and Danny Y. Chou, *California Constitutional Law: Separation of Powers* (2011) 45 USF L.Rev. 655 6

Constitutional Provisions

Cal. Const, art. V, § 1 ..... 16, 18
Cal. Const., art. III, § 3 8
Cal. Const., art. IV, § 3(b) 8
Cal. Const., art. IV, § 8 ..... 6, 18

AMICUS CURIAE BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

When the legislature and the governor cooperate to combat an emergency like the current pandemic, the courts should give the political branches maximum flexibility. California's separation of powers doctrine contemplates an adaptable government ready to solve the state's problems, where the legislature can temporarily delegate some of its authority to the executive until the crisis abates — especially in an emergency like the current pandemic. The core powers doctrine permits that procedure because judicial intervention is only required when one branch defeats or materially impairs another branch's constitutional functions. That did not occur here because the legislature's delegation was limited and temporary, guided by a standard, and subject to adequate safeguards.

The Third District Court of Appeal recently rejected the same arguments made by appellants here in a unanimous published opinion. In *Newsom v. Superior Court of Sutter County* (May 5, 2021, No. C093006) 2021 WL 1779975 at *1, 7–9, the Third District held that the Emergency Services Act (ESA) properly permits the governor to issue quasi-legislative orders in an emergency, and concluded that the legislature did not unconstitutionally delegate its power. Similarly, the trial court here correctly found no constitutional violation where California's government employs the pragmatic problem-solving the core powers doctrine permits to respond to a once-in-a-century pandemic. This Court should follow the Third District and affirm.

ARGUMENT

I. California's core powers doctrine permits the limited overlap here.

Under the California Supreme Court's standard for evaluating core powers issues, the question here is whether the governor's orders, viewed from a realistic and practical perspective, defeat or materially impair the legislature's exercise of its constitutional functions. *Marine Forests Society v. Cal. Coastal Com*. (2005) 36 Cal.4th 1, 45. By that standard, no core legislative power was materially impaired by the governor's emergency orders because those orders are temporary: they make no lasting new law, nor any permanent modification to existing law.

California's core powers doctrine is more permissive of shared powers (like those at issue here) than the analogous federal doctrine because the two governments are different. Unlike the federal constitution, the California constitution is not a grant of power — it restricts the legislature's otherwise plenary powers. *State Personnel Bd. v. Dept. of Personnel Admin*. (2005) 37 Cal.4th 512, 523. Because California is a state government with plenary powers, *Marine Forests Soc. v. Cal. Coastal Comm*. (2005) 36 Cal.4th 1, 31, the federal separation of powers doctrine does not apply to the states. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection* (2010) 560 U.S. 702, 719; *Marine Forests Society v. Cal. Coastal Com*. (2005) 36 Cal.4th 1, 28. Instead, California has its own separation of powers doctrine — one that does not demand "a hermetic sealing off of the three branches of Government from one another." *Hustedt v. Workers' Comp. Appeals Bd*. (1981) 30 Cal.3d 329, 338; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48.

That distinction explains why (unlike their federal counterparts) from the state's inception "each branch has exercised all three kinds of powers." *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 76. As a result, California Supreme Court decisions apply a flexible, functional understanding of separation of powers, where each branch has some exclusive powers that are expressly or implicitly conferred by the state constitution, and some shared powers and areas of responsibility. David A. Carrillo and Danny Y. Chou, *California Constitutional Law: Separation of Powers* (2011) 45 USF L.Rev. 655, 675. One cannot "in every instance neatly disaggregate executive, legislative, and judicial power. Treating these domains as entirely separate and independent spheres contrasts with the more nuanced treatment of these powers — and their frequent overlap — under our state constitutional system." *United Auburn Indian Community of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538, 558. Consequently, the California Supreme Court has never adopted the "strict separation of powers" view that appellants advance. Appellants' Opening Br. at 21. Instead, the California Supreme Court recognizes "that the three branches of government are interdependent," and government officials frequently perform actions that "significantly affect" those of another branch. *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 298.

The issue here is whether the legislature gave away too much of its core constitutional power to make laws by passing statutes. Cal. Const., art. IV, § 8; *Carmel Valley*, 25 Cal.4th at 299. That includes the power to weigh competing

interests and determine social policy. *Carmel Valley*, 25 Cal.4th at 299; *Perez v. Roe 1* (2006) 146 Cal.App.4th 171, 177. In judging whether that core legislative lawmaking power has been defeated or materially impaired, there are several relevant considerations:

- Does the ESA assign all lawmaking power to the governor? No, the legislature at all times remains fully vested with all its legislating power. Its core lawmaking power is not defeated.
- Does the ESA give the governor the final word on legislation? No, the legislature always retains its power to adopt new laws — to supplement, confirm, or override emergency orders. Its core lawmaking power is not materially impaired.
- Does the ESA permit a governor to make emergency orders permanent? No, the legislature can by concurrent resolution end an emergency whenever it wishes, terminating existing emergency orders and ending a governor's power to issue new orders.

At most, the legislature's core lawmaking power is significantly affected, which the core powers doctrine permits. The doctrine only prohibits one branch of government from exercising the complete power constitutionally vested in another, or exercising power in a way that undermines the authority and independence of another coordinate branch. *United Auburn*, 10 Cal.5th at 559. As a result, even if the governor's orders coincide somewhat with legislative powers — even if they significantly affected the legislature's core powers — that is permitted. One branch

can "significantly affect" the core powers of another branch, so long as it does not "defeat or materially impair" the other's core power. *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52, 58. Nothing in the orders impaired the core legislative power to make laws, weigh competing interests, or determine social policy because the legislature retained all its powers to overrule or validate those orders by statute. Courts have long understood that the branches of California's government share common boundaries, and no sharp line between their operations exists. *People v. Bunn* (2002) 27 Cal.4th 1, 14; *People v. Nash* (2020) 52 Cal.App.5th 1041, 1073–83, *review denied* (Oct. 21, 2020) (rejecting claims that a statute impermissibly encroached on core judicial or executive functions). That reality permits the limited, temporary overlap here.

Even if the governor exercised some limited legislative powers here, that too is permitted. California's constitution allows for persons charged with the exercise of one power to exercise some of the others "as permitted" elsewhere in the state constitution (Cal. Const., art. III, § 3), and the state constitution does permit the governor to exercise some legislative powers. When considering whether to sign bills that have passed both houses of the legislature, the governor "is acting in a legislative capacity, and not as an executive. He is for that purpose a part of the legislative department of the state." *Lukens v. Nye* (1909) 156 Cal. 498, 501. Similarly, in vetoing legislation the governor acts in a legislative capacity. *St. John's Well Child & Family Center v. Schwarzenegger* (2010) 50 Cal.4th 960, 971. And the governor can call the legislature into session. Cal. Const., art. IV, § 3(b). Those

constitutional grants of legislative powers to the executive show that the governor cannot be barred from exercising *any* legislative power. Instead, only the exercise of a complete power that has been expressly limited to one branch is barred to the other branches. *Laisne v. State Bd. of Optometry* (1942) 19 Cal.2d 831, 835. It is therefore "commonplace" for the executive and judicial branches to employ some legislative powers: "The exercise of such quasi-legislative authority . . . has never been thought to violate the separation-of-powers doctrine." *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 76. That standard contemplates emergency executive orders that have the temporary force of law.

Amicus NFIB Small Business Legal Center raises a straw man argument in requesting that "The Court should hold that § 8627 does not delegate power to the Governor to make, amend, or repeal statutes." NFIB Amicus Curiae Br. at 12. Neither the ESA nor the governor stand for that proposition — both the ESA and the emergency orders speak of temporarily *suspending* statutes during an emergency and making orders to state agencies to do (or not do) things as needed to combat the crisis. If the ESA purported to permanently assign all final lawmaking power to the governor, even for one subject, that would materially impair the core legislative power of making laws because the legislature would be forever barred from making any laws on that subject. But the ESA permits only temporary executive orders that make no final policy decisions and no permanent changes to any laws. That does not intrude on any core zone of legislative authority.

Indeed, the core powers doctrine itself bars the courts from interfering in the legislature's exercise of its core power to make laws. *Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 520–21. It is the legislature's prerogative to decide where to assign statutory powers. For example, the legislature can give courts the power to suspend criminal sentences without impairing executive branch functions, *Ex parte Giannini* (1912) 18 Cal.App. 166, 170, and may even give court staff authority to file accusatory pleadings, *Steen v. Appellate Division* (2014) 59 Cal.4th 1045, 1048–49. The legislature could have used the ESA to grant emergency powers to the courts, the 58 county sheriffs, or the attorney general, or created a new pandemic response agency and vested it with those powers. None of those scenarios calls for judicial intervention in the legislative policy process.

Reversing here has grave consequences. Assume for example that California law requires jury trials to be held inside county courthouses and that a deadly airborne virus is prevalent in the community. The legislature may, as it did here, empower the executive to enact quasi-legislative rules with "the dignity of statutes," thereby "truly 'making law.'" *Yamaha Corp. v. Bd. of Equalization* (1998) 19 Cal.4th 1, 10. The ESA permits a governor to declare a state of emergency and suspend the jury-trials-inside statute so courts could try cases either outdoors or in suitably large covered stadiums, or anywhere else that might be safe and convenient. It is proper for the legislature to delegate the emergency discretion necessary to make that decision — otherwise, county courts would face the dilemma of violating

the law by using common sense and holding trials outside, or by not trying cases at all. Yet invalidating the ESA would force the courts into exactly that predicament.

Accepting appellants' argument that the governor's emergency order powers invade core legislative functions would also require invalidating other powers granted by the ESA. For example, Government Code section 8645 permits the governor to spend available state funds in an emergency. But by appellants' reasoning, that statute overrides the legislature's otherwise-exclusive appropriation power. Appropriating state money is a core legislative power, and legislative determinations on expenditures are binding on the executive. *Carmel Valley,* 25 Cal.4th at 299. But if the legislature cannot temporarily delegate limited power to suspend statutes (Gov. Code § 8571) because that materially impairs a core legislative power, then neither can the legislature temporarily delegate power to rearrange appropriations. That conclusion would be contrary to the California Supreme Court's decision in *Mandel v. Myers* (1981) 29 Cal.3d 531, 547–50, that the legislature's appropriation authority is not so exclusive that the other branches can never make spending decisions. Surely the courts will not bar the governor from using available state funds to purchase lifesaving COVID-19 vaccines — forcing the state's residents to wait for a legislative appropriation — when the legislature has already delegated that discretion by statute.

II. The legislature can delegate emergency authority to the governor.

The governor's emergency powers are consistent with the delegation principle, which is an aspect of the core powers doctrine. Courts use the delegation

principle to preserve core branch powers against excessive dilution — even when a branch dilutes its own power. Just as a branch cannot submit to its core powers being stolen, neither may a branch give its core powers away. But the delegation principle is a limit, not a bar: although it is charged with policy formulation, the legislature "properly may delegate some quasi-legislative or rulemaking authority." *Carmel Valley*, 25 Cal.4th at 299. Doing so "is not considered an unconstitutional abdication of legislative power." *Ibid.* An 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." *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 190.

The Third District Court of Appeal held that the ESA meets that lenient standard because the legislature made the fundamental policy decisions and gave adequate direction. By Government Code section 8627, the legislature delegated to the governor power in an emergency to "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 . . . ." The Third District interpreted that as a grant of authority to the governor to issue quasi-legislative orders because the "police power" referenced in section 8627 is the power to legislate. *Newsom*, 2021 WL 1779975 at *7.

That is a proper delegation of quasi-legislative powers because the ESA provides a standard for their exercise. The legislature declared the ESA's purpose is to "mitigate the effects of natural, manmade, or war-caused emergencies" and "generally to protect the health and safety and preserve the lives and property of the people of the state." Gov. Code § 8550. It provided detailed policy findings and declarations to guide the exercise of emergency powers to "ensure that preparations within the state will be adequate to deal with such emergencies." Gov. Code § 8550. The legislature required that the governor act "in accordance with the State Emergency Plan" (Gov. Code § 8570), and to suspend laws only when compliance would "prevent, hinder, or delay the mitigation of the effects of the emergency." Gov. Code § 8571. And the legislature provided adequate direction: ESA powers are to be exercised to the extent "necessary" to "effectuate the purposes" of the ESA and to issue orders "necessary to carry out the provision of this chapter." Gov. Code §§ 8627, 8567(a).

Even absent those express statutory standards, the ESA's purpose alone is an adequate guideline. The standard need not be express; indeed, the Third District upheld section 8627 because a standard may be implied from the statutory purpose. *Newsom*, 2021 WL 1779975 at *8. The ESA's purpose provides standards to guide implementing 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." *Newsom*, 2021 WL 1779975

at *8. Requiring more would be "antithetical to the purpose of the Emergency Services Act to empower the Governor to deal with the exigencies of widely differing emergencies in California from wildfires to floods to a pandemic." *Ibid.*

Those legislative declarations, findings, and direction satisfy the delegation principle because only a total abdication of the legislature's power to make basic policy decisions is prohibited. *Kugler v. Yocum* (1968) 69 Cal.2d 371; *People v. Wright* (1982) 30 Cal.3d 705, 712; *Clean Air Constituency v. California State Air Resources Bd*. (1974) 11 Cal.3d 801, 816 (legislature only barred from conferring "unrestricted authority to make fundamental policy determinations"). The key term is *unrestricted* discretion — the legislature need only provide some standard to guide its exercise. *People ex rel. Department of Public Works v. Superior Court of Merced County* (1968) 68 Cal.2d 206, 215. Here, the legislature made the fundamental policy determination that California should be preserved from the calamities that frequently befall it; it delegated responsibility to the governor for taking executive action to combat emergencies; and the legislature provided detailed standards and an overarching purpose to guide emergency actions. That is a sufficiently clear guide to adequately safeguard against abuse, *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd*. (2017) 3 Cal.5th 1118, 1150–51, which satisfies any delegation concerns. And the Third District so held: "The purpose of the Emergency Services Act does furnish standards to guide implementation of section 8627." *Newsom*, 2021 WL 1779975 at *8.

Finally, the legislature created a safeguard strong enough to match the degree of emergency discretion conferred. The Third District noted that "of greater significance than 'standards' is the requirement that legislation provide 'safeguards' against the arbitrary exercise of quasi-legislative authority." *Newsom*, 2021 WL 1779975 at *9. The legislature provided an emergency brake in the ESA that is unique in all of California law: the legislature can immediately terminate a governor's emergency powers by concurrent resolution. Gov. Code § 8629. *See also* Lab. Code § 6725. Adequate safeguards can justify even a delegation with weak standards, *Kugler v. Yocum* (1968) 69 Cal.2d 371, 384, and such safeguards may "derive from the statutory scheme itself," *Monsanto Co. v. Office of Environmental Health Hazard Assessment* (2018) 22 Cal.App.5th 534, 558. Reserving the extraordinary power to undo the delegation at will is the best possible safeguard. This reserved power satisfies any concern about the governor vetoing a legislative response to the governor's emergency acts. *See* Appellants' Opening Br. at 46–47. The legislature can scuttle any tactical veto threat by ending the emergency and terminating all emergency orders — and there is no veto for that.

The legislature could have been more specific in the ESA; it could have predicted the COVID-19 pandemic and devised specific means for that scenario. But no one can foresee what disasters might befall us, and attempting specificity will handicap the emergency response: "the requirement of particularized standards delimiting the specific orders that the Governor may issue is antithetical to the purpose of the Emergency Services Act to empower the Governor to deal with the

exigencies of widely differing emergencies in California from wildfires to floods to a pandemic." *Newsom*, 2021 WL 1779975 at *8. Instead, the legislature rationally chose to grant the governor general authority to sort out whatever needs sorting in a disaster. Courts will not second-guess such policy choices or inquire into their wisdom. *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461. Instead, the well-settled principle that the legislative branch is entitled to judicial deference applies here. *People v. Vangelder* (2013) 58 Cal.4th 1, 34. And absent designation by the legislature of a specific course of action, it was the governor's constitutional duty to see that the laws were carried out — by emergency executive order. Cal. Const, art. V, § 1. We must assume that those laws have been obeyed. Civ. Code § 3548. The political branches, in those exercises of their core constitutional powers to combat a crisis, deserve judicial deference.

The ESA contains adequate standards and safeguards to guide and protect the delegation of legislative authority to the governor.

III. Enjoining police power acts like the ESA is disfavored.

The legislature properly exercised its police power when it enacted the ESA. The police power is "the power of sovereignty or power to govern — the inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare." *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 878. It extends to "legislation enacted to promote the public health, safety, morals and general welfare." *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436, 440. But it is not limited to those subjects: "Public

safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it." *Berman v. Parker* (1954) 348 U.S. 26, 32. Police power acts are proper when they constitute "a reasonable exertion of governmental authority for the public good." *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436, 440. The broad extent of the police power (and the caution required by separation of powers concerns) explains the strong judicial deference to legislative policymaking decisions like the ESA.

This deference compels courts to review police power acts on a lenient standard, which favors upholding the legislative action here. The police power is limited by just a few broad principles that resemble rational basis review. "The Legislature, in the first instance, is the judge of what is necessary for the public welfare, and, in the absence of a showing of arbitrary interference with property rights or of the lack of a substantial relation between means and a legitimate subject for regulation," a court will not declare legislation invalid. *Serve Yourself Gasoline Stations Assn. v. Brock* (1952) 39 Cal.2d 813, 820. For example, the California Supreme Court decided over a century ago that that the legislature can use the police power to mandate vaccinations. *French v. Davidson* (1904) 143 Cal. 658, 662 (it is within the lawmaking power's discretion to exercise the state's police power to require all school children to be vaccinated); *Abeel v. Clark* (1890) 84 Cal. 226, 230

(it was for the legislature to determine whether public school students should be vaccinated). The ESA meets that low bar for reviewing police power acts.

Indeed, the California Supreme Court rejected a police power challenge to the ESA because it is the legislature's prerogative to make the policy decision to empower the governor in the emergency context. Making the governor the locus of power and responsibility in a disaster "is a task for which the Legislature is peculiarly well suited." *Macias v. State of California* (1995) 10 Cal.4th 844, 858. Nor is that unwise — the governor "is the natural and logical repository of such power and responsibility." *Ibid.* "As the state progresses, the police power, within reason, develops to meet the changing conditions," and courts will not second-guess policy decisions underlying police power acts. *Max Factor & Co. v. Kunsman* (1936) 5 Cal.2d 446, 460. That should be especially true in a pandemic.

Relying on separation of powers to overturn this police power act would itself invade another branch's domain. The "judicial department has no power to revise even the most arbitrary and unfair action of the legislative department, . . . taken in pursuance of the power committed exclusively to that department by the constitution." *French v. Senate of State of Cal.* (1905) 146 Cal. 604, 606. The emergency powers at issue here are political branch functions, and in the exercise of the powers committed to them they are supreme. Cal. Const., art. IV, § 8 (state's lawmaking power is vested in the legislature); *id.* art. V, § 1 (state's supreme executive power is vested in the governor). An attempt by a court to direct or control the legislature or the executive in exercising their respective lawmaking and

executive powers would be an attempt to exercise legislative and executive functions, which a court "is expressly forbidden to do." *French*, 146 Cal. at 607. Yet appellants ask exactly that: to substitute judicial judgment for the legislature's policy decision about where and how to vest emergency powers, and for the governor's executive discretion about how best to exercise those powers. Those are not judicial functions.

Instead, the California Supreme Court held that the ESA requires courts to view the governor's emergency powers broadly. In situations of "extreme peril" to the public welfare the state "may exercise its sovereign authority to the fullest extent possible consistent with individual rights and liberties." *Macias*, 10 Cal.4th at 854; Gov. Code § 8627 (governor shall exercise all police power vested in the state). The ESA "recognizes and responds to a fundamental role of government to provide broad state services in the event of emergencies resulting from conditions of disaster or of extreme peril to life, property, and the resources of the state." *Macias*, 10 Cal.4th at 854. Given its purpose to protect and preserve health, safety, life, and property, "the act makes equally evident the overriding necessity of a broadly coordinated effort to deal with emergencies, and places the primary responsibility, and the means for carrying out such efforts, with the State." *Ibid*. Appellants would have this Court ignore that precedent and thwart the broadly coordinated emergency response effort between the legislature and the governor.

That would be error. The well-founded traditional deference courts show to ordinary police power acts means that closely scrutinizing those acts in an

emergency is the last thing a court should contemplate. Two consequences flow from the California legislature's authority to do all things not barred by the state constitution: any constitutional limitations on legislative power are to be narrowly construed, and a strong presumption of constitutionality supports the legislature's acts. *California Housing Finance Agency v. Patitucci* (1978) 22 Cal.3d 171, 175. The imperatives for deferring to legislative policy decisions are even greater in an emergency, and courts are similarly less well-suited to evaluating executive actions taken in an ongoing crisis than in calmer times. A once-in-a-century pandemic is the classic case for judicial deference to the political branches, and the power to protect must be commensurate with the threatened danger.

IV. The governor holds inherent emergency powers.

The governor has inherent emergency powers. Even in the absence of an express grant of authority, each branch of government possesses certain inherent and implied powers. *United Auburn,* 10 Cal.5th at 550–51. The governor's power is rooted in our state constitution and expanded by the legislature in statutes. *Id.* at 549. The governor's duties are executive in their nature, and upon that office rests "the great obligation to see that the laws are faithfully executed." *Harpending v. Haight* (1870) 39 Cal. 189, 212. Some executive powers arise by implication: it is well settled that an executive officer "may exercise . . . powers as are necessary for the due and efficient administration of powers expressly granted by statute" or as may fairly be implied from the statute granting the powers. *United Auburn,* 10 Cal.5th at 551. Nor does anything in the California constitution bar the governor

from exercising emergency powers, which leaves space for implied emergency executive powers.

The governor's emergency authority has the characteristics of an executive, rather than a legislative act, and so the governor's emergency power does not depend on legislative delegation. Responding to emergencies is a proper exercise of the legislature's police power; emergency response is also a proper exercise of the "supreme executive power" that Article V, section 1 vests in the governor. That grant of supreme power to take executive action implicitly includes the inherent power to make emergency orders because swift action is the nature of the executive. *United Auburn,* 10 Cal.5th at 551 (each branch of government possesses certain inherent and implied powers); *Scheuer v. Rhodes* (1974) 416 U.S. 232, 246–47 (executive crisis decisions must have a broad range of discretion), *overruled on other grounds by Davis v. Scherer* (1984) 468 U.S. 183. And nothing in the California constitution restricts the governor's power to declare emergencies and take emergency action. Because the California constitution is a restriction, not a grant of power, the governor — like the legislature — has all necessarily implied powers of the branch. That includes the executive power to act in an emergency.

Yet because the governor's constitutional emergency powers are inherent and implicit, rather than textual, they fall within a "zone of twilight" in which the governor and the legislature may have concurrent authority, and where legislative "inertia, indifference or quiescence" invites the exercise of executive power. See *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579, 637 (conc. opn. of

Jackson, J.). For example, in *United Auburn Indian Community of Auburn Rancheria v. Newsom*, the California Supreme Court held that the governor has an inherent power to confer and concur with the federal government. But because neither the California constitution nor other state law speaks directly to the governor's concurrence power, the legislature may restrict or eliminate the governor's implicit power to concur. *United Auburn*, 10 Cal.5th at 564. That explains the situation here: the legislature codified and regulated the governor's inherent emergency powers in the ESA. And this codification, in the context of a global pandemic, renders inapposite decisions about the legislature's authority "to establish or revise the terms and conditions of state employment." See *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1015. This case concerns a pandemic, not paychecks.

Finally, this Court need not resolve questions about which branch has exclusive emergency powers. The lines between the three branches of government are not always clearly defined, and some powers may not strictly belong to any one branch. *People ex rel. Attorney Gen. v. Provines* (1868) 34 Cal. 520, 540–41 (conc. opn. of Sawyer, C.J.). It is enough here to hold that the governor has some emergency powers under the ESA and those powers were properly exercised. Neither the governor nor the legislature claims to be the sole source of California's emergency powers, and with both branches acting in concert to exercise those powers, this Court need not decide who owns the big red ball.

CONCLUSION

The California legislature and governor hold all necessary emergency powers, and they may share them. California's core powers doctrine is flexible enough that the branches have wide latitude to cooperate and share their powers in mundane circumstances. In emergency situations such as the ongoing COVID-19 pandemic, the state's courts must view this cooperation with even greater deference.

Both the state and federal constitutions principally entrust "[t]he safety and the health of the people" to the politically accountable officials of the states "to guard and protect." *Jacobson v. Massachusetts* (1905) 197 U.S. 11, 38. When those officials act "in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States* (1974) 414 U.S. 417, 427. Within those broad limits, the legislature and the governor should not be subject to second-guessing by the judiciary, which lacks the background, resources, and expertise to make public health policy decisions in a pandemic.

This Court should affirm the trial court's order denying an injunction.

Dated: May 10, 2021

Respectfully submitted,
California Constitution Center
By: /s/ David A. Carrillo
David A. Carrillo
By: /s/ Brandon V. Stracener
Brandon V. Stracener

Attorneys for *Amicus Curiae*
California Constitution Center

CERTIFICATE OF COMPLIANCE

I certify that the attached brief uses a 13-point Times New Roman font and contains 5159 words as counted by the Microsoft Word software program used to prepare this brief.

Dated: May 10, 2021

California Constitution Center
By: /s/ David A. Carrillo
David A. Carrillo

Attorneys for *Amicus Curiae*
California Constitution Center

CERTIFICATE OF SERVICE

Ghost Golf Inc. v. Governor Gavin Newsom
Fifth Appellate District Case No. F082357
Fresno Superior Court Case No. 20CECG03170

The undersigned hereby certifies as follows:

I am an employee of the University of California, Berkeley, School of Law, 215 Law Building, Berkeley, California. I am over 18 years of age and am not a party to the within action. On May 11, 2021 I served a true copy of the following document:

AMICUS CURIAE BRIEF OF CALIFORNIA CONSTITUTION CENTER SUPPORTING RESPONDENTS

on the parties in this action as described on the attached service list as follows.

BY MAIL: The envelope was mailed with postage thereon fully prepaid. I personally placed it in the mail at the post office on the date below. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on the service list on the date below, from the court authorized efiling service at TrueFiling.com. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

I declare under penalty of perjury by the laws of the State of California that the foregoing is true and correct.

Executed on May 11, 2021 at El Cerrito, California.

By: /s/ Alexander Burr
Alexander Burr

SERVICE LIST

Ghost Golf, Inc.: plaintiff and appellant Daryn Coleman: plaintiff and appellant Sol y Luna Mexican Cuisine: plaintiff and appellant Nieves Rubio: plaintiff and appellant Daniel Moshe Ortner Luke A. Wake Pacific Legal Foundation 930 G Street Sacramento, CA 95814	Via TrueFiling
Gavin Newsom: defendant and respondent Aaron David Jones CA Dept of Justice 455 Golden Gate Ave Ste 11000 San Francisco, CA 94102	Via TrueFiling
Amicus curiae for appellants Ghost Golf, Inc., Daryn Coleman, Sol y Luna Mexican Cuisine, Nieves Rubio Timothy Sandefur Goldwater Institute 500 East Coronado Road Phoenix, AZ 85004 Bradley A. Benbrook Stephen Michael Duvernay Benbrook Law Group, PC 400 Capitol Mall Ste 2530 Sacramento, CA 95814-4421	Via TrueFiling
COURT CLERK Fresno County Superior Court B.F. Sisk Courthouse 1130 O Street Fresno, CA 93721-2220	BY MAIL