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Re: Policy analysis of gubernatorial emergency powers

Dear Mr. Hebert and Ms. Burford:

We respectfully submit the attached policy analysis for consideration in the commission staff's research. This presents the combined efforts of a team of academic experts on executive power, who analyzed the current state of California law on emergency powers.

We hope our analysis benefits your process. Please contact us if we can provide further assistance.

Respectfully submitted,

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Emergency gubernatorial powers analysis, October 2022

Summary of conclusions

- The existing emergency powers the legislature has vested in the governor by the Emergency Services Act are lawful, having been upheld by courts in various contexts.

- General separation of powers concerns about emergency gubernatorial powers are unfounded, and courts have similarly rejected more specific concerns about excessive delegation of legislative powers.

- Arguments about individual liberty infringements from emergency powers have generally failed to find traction in the courts, with group religious worship being the lone area where courts have overturned emergency orders.

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1. Overview

During the coronavirus pandemic of 2020–22, California's governor deployed the emergency powers granted to that office by the legislature, issuing dozens of emergency orders to manage the state's crisis response. The California Law Review Commission is currently studying "emergencies" in general and emergency powers in particular:

> Whether the law should be revised to provide special rules that would apply to an area affected by a state of disaster or emergency declared by the federal government, a state of emergency proclaimed by the Governor under Section 8625 of the Government Code, or a local emergency proclaimed by a local governing body or official under Section 8630 of the Government Code. Before beginning a study under this authority, the commission shall provide notice to legislative leadership and any legislative policy committee with jurisdiction over the proposed study topic and shall consider any formal or informal feedback received in response to the notice.

This memorandum is intended to assist the commission by analyzing the California constitutional issues that arise in the emergency executive power context.

2. The Emergency Services Act vests broad powers in the governor.

California's Emergency Services Act (ESA) grants the governor broad authority and specific powers to respond to emergencies. A governor has authority to proclaim a "state of war emergency," a "state of emergency," or a "local emergency."[1] The ESA establishes statewide emergency standards in the event of natural, manmade, or state-of-war emergencies that put in peril the life, property, and resources of California citizens.[2] No preliminary findings are required

[1] Gov. Code § 8558 (definitions); Gov. Code § 8625 (proclamation guidelines).
[2] Gov. Code § 8550.

— a governor need only decide that the proclamation circumstances exist.[3] In an emergency, a governor may exercise California's sovereign authority to the fullest extent possible (consistent with individual rights and liberties) to respond to the emergency.[4]

The ESA grants the governor several express powers, including the powers to:

- Exercise the state's police power.[5]
- Suspend any regulatory statute, statutes for state business procedures, and any state agency edicts.[6]
- Commandeer private property or personnel.[7]
- Make expenditures from any available fund.[8]

The ESA makes it a crime to refuse or willfully neglect to obey emergency orders or regulations.[9] And it insulates the state from liability for any claim based on the exercise of the act's authority or based on any performance, failure, or discretionary choice made under that authority.[10] The ESA has been used many times, including responses to oil shortages in the 1970s, the Medfly infestation in the 1990s, the 2020–21 wildfires, and the COVID-19 pandemic.

3. The governor's emergency powers implicate the separation-of-powers doctrine.

The California constitution generally requires policy decisions to be made through the deliberative legislative process.[11] And in ordinary times the state's legislature wields the police power. But emergencies require swift, centralized decision-making — which in turn requires consolidating power. So in extraordinary emergencies the police power authority to make temporary policy decisions may be consolidated and exercised by one executive officer: the governor.

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[3] *Cal. Correctional Peace Officers Assn. v. Schwarzenegger* (2008) 163 Cal.App.4th 802, 820.
[4] *Macias v. State of Cal.* (1995) 10 Cal.4th 844, 854. See *Cal. Correctional Peace Officers Assn*., 163 Cal.App.4th at 811, describing the governor's power to declare a state of emergency and the broad powers that declaration confers to deal with such emergencies. Under Gov. Code § 8627, the governor may exercise the state's police power only "in order to effectuate the purposes" of the ESA, which is an important limitation and a distinction from martial law.
[5] Gov. Code § 8627.
[6] Gov. Code § 8571.
[7] Gov. Code § 8572, but news services may not be commandeered, and under § 8571.5 firearms and ammunition may not be seized.
[8] Gov. Code § 8645; *see also* Gov. Code § 8628 (authorizing state government agencies, when directed by the governor, to spend any appropriated funds "irrespective of the particular purpose for which the money was appropriated"). This overrides the legislature's otherwise-exclusive appropriation power. See *Carmel Valley Fire Prot. Dist.* (2002) 25 Cal.4th 287, 299 (core functions of the legislative branch include passing laws, levying taxes, and appropriating funds); *St. John's Well Child & Family Center v. Schwarzenegger* (2010) 50 Cal.4th 960, 965; *Super. Ct. v. County of Mendocino* (1996) 13 Cal.4th 45, 53 (executive branch ordinarily "may not disregard legislatively prescribed directives and limits pertaining to the use of such funds").
[9] Gov. Code § 8665; see also *Martin v. Municipal Court* (1983) 148 Cal.App.3d 693, rejecting a challenge to a criminal charge of disobeying an emergency order by failing to strip a garden of fruit fly host material.
[10] Gov. Code § 8655.
[11] *Carmel Valley Fire Prot. Dist.*, 25 Cal.4th at 299 (essentials of the legislative function include the determination and formulation of legislative policy).

Concentrating such legislative power in an executive branch actor raises separation-of-powers concerns.[12] California courts often address such concerns by relying on the state's flexible and creative frame of government. California's three state government branches are interdependent and may, to a degree, share their powers.[13] Because the powers of the state's three branches share common boundaries, courts have crafted a separation-of-powers doctrine that assumes significant power sharing, mutual oversight, and influence.[14] California law does not demand "a hermetic sealing off of the three branches of Government from one another."[15] Instead, from the state's inception "each branch has exercised all three kinds of powers."[16]

Thus, California's separation of powers doctrine only guards the core powers of a branch.[17] The question is whether "the statutory provisions as a whole, viewed from a realistic and practical perspective, operate to defeat or materially impair . . . [a] branch's exercise of its constitutional functions."[18] This "core powers" doctrine only bars a branch of government from entirely arrogating or defeating a core power or function of another branch — for example, by eliminating or controlling the discretion of another branch in exercising its core power.[19] Under this permissive standard the legislature may delegate many of its powers indefinitely (as to an administrative agency) or a few of its powers temporarily (as in an emergency).[20] This permits *temporarily* delegating *some* core legislative power to the executive so long as the legislature maintains ultimate control.

That ultimate control is maintained by the ESA. In the emergency context, temporarily delegating a measure of legislative power to the executive is lawful because an entire core power is not delegated and the grant is neither permanent nor irrevocable. This is consistent with the core powers doctrine, which only bars a branch from exercising the complete power of another branch.[21] For example, in an emergency the governor does not have the legislature's complete

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[12] *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 76; "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Cal. Const., art. III, § 3.

[13] For example, the governor acts in a legislative capacity when vetoing legislation. *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1084; *Carmel Valley Fire Prot. Dist.*, 25 Cal.4th at 298–99.

[14] California decisions long have recognized that the separation of powers doctrine contemplates that the three departments are in many respects mutually dependent, and that the actions of one branch may significantly affect those of another branch. *County of Mendocino*, 13 Cal.4th at 52.

[15] *Hustedt v. Workers' Comp. Appeals Bd*. (1981) 30 Cal.3d 329, 338; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48.

[16] *Davis*, 46 Cal.3d at 76; *Carmel Valley Fire Protection Dist.*, 25 Cal.4th at 298 ("the three branches of government are interdependent" and government officials frequently perform actions that "significantly affect" those of another branch); *United Auburn Indian Community of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538, 558 (one cannot "in every instance neatly disaggregate executive, legislative, and judicial power," so treating them as entirely separate spheres "contrasts with the more nuanced treatment of these powers — and their frequent overlap — under our state constitutional system").

[17] *Carmel Valley Fire Prot. Dist.*, 25 Cal.4th at 297 (separation of powers doctrine limits the authority of one of the three branches of government to seize the core functions of another branch).

[18] *Marine Forests Society v. Cal. Coastal Com*. (2005) 36 Cal.4th 1, 35.

[19] *Carmel Valley Fire Prot. Dist.*, 25 Cal.4th at 297 (separation of powers doctrine limits the authority of one of the three branches of government to seize the core functions of another branch); Carrillo & Chou, *California Constitutional Law: Separation of Powers* (2011) 45 U.S.F. L. Rev. 655, 682.

[20] *Clean Air Constituency v. Cal. State Air Resources Bd*. (1974) 11 Cal.3d 801, 817.

[21] *Laisne v. State Bd. of Optometry* (1942) 19 Cal.2d 831, 835; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 662 (core powers violated "only when the actions of a branch of government defeat or materially impair the inherent functions of another branch"); see also *Marine Forests Society*, 36 Cal.4th at 35 (violation occurs where "the statutory

police power because the legislature also retains it — the ESA does not give the governor *exclusive* police powers. And the delegation is temporary, and revocable. The ESA requires the governor to end a state of emergency "at the earliest possible date that conditions warrant," and the legislature can terminate a state of emergency by concurrent resolution.[22]

Because a limited and temporary set of emergency powers does not entirely defeat or arrogate the legislature's lawmaking power, such a time-and-circumstances-limited delegation in extreme conditions does not violate the separation of powers. If the legislature can retrieve the powers it temporarily ceded in an emergency, then those powers have not been lost. And a court can always restore them.[23]

The ultimate separation-of-powers question here is whether the governor's emergency powers, viewed from a realistic and practical perspective, defeat or materially impair the legislature's exercise of its constitutional functions.[24] By that standard, we conclude that no core legislative power is materially impaired because the governor's emergency powers are temporary: they make no lasting new law, nor any permanent modification to existing law. At most, the legislature's core lawmaking power is significantly affected, which the core powers doctrine permits.[25] The ESA powers do not defeat or materially impair the core legislative power to make laws, weigh competing interests, or determine social policy because the legislature retains all its powers to overrule or validate gubernatorial emergency 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.[26] That reality permits the ESA's limited and temporary overlap.

4. The legislature's ability to delegate its powers is broad.

Another version of the separation-of-powers analysis above concerns delegation: just as the governor cannot arrogate legislative power, neither can the legislature give away too much of its power. The delegation analysis asks whether the legislature impermissibly gave away its powers without providing standards to guide or safeguards to limit executive action.[27] Delegating legislative authority to the executive branch is proper when the legislature provides "an adequate

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provisions as a whole, viewed from a realistic and practical perspective, operate to defeat or materially impair the executive branch's exercise of its constitutional functions").

[22] Gov. Code § 8629.

[23] Note that practical reality governs in an emergency, and courts are reluctant to restrict executive flexibility and disrupt the crisis response. See, e.g, *Susman v. City of Los Angeles* (1969) 269 Cal.App.2d 803, 818–19 (holding that when and under what circumstances the National Guard should be called up to preserve the peace is a discretionary gubernatorial decision and not one subject to judicial inquiry or review).

[24] *Marine Forests Society*, 36 Cal.4th at 45.

[25] *County of Mendocino*, 13 Cal.4th at 52, 58 (a 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); *United Auburn,* 10 Cal.5th at 559 (core powers 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).

[26] *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).

[27] Delegation typically concerns administrative agencies. The rule is that while delegating some governmental authority to an administrative body is proper, delegating absolute legislative discretion is not, so courts require that a delegating statute establish "an ascertainable standard to guide the administrative body." *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436, 448.

yardstick for the guidance of the administrative body empowered to execute the law."[28] The guidance is required because the legislature cannot delegate its core policy-making responsibility.[29] But such guidance or standards "possess no sacrosanct quality," and safeguards may "obviate the need for standards" to establish the constitutionality of a delegation.[30] Consequently, safeguards may be more important than standards in delegation cases.[31]

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."[32] This standard is permissive, because California's legislature possesses plenary lawmaking power except as specifically limited by the California constitution.[33] Unlike the federal constitution — which grants only limited powers — the California constitution concentrates power in the legislature and is not designed to "balance" power among the branches of government.[34] As noted above, California's separation-of-powers doctrine recognizes that the three branches of state government are interdependent and permits branch action that "may significantly affect those of another branch."[35] Thus, outside extreme cases of a branch exercising the complete power of another branch, the California rule only bars delegations "when the actions of a branch of government defeat or materially impair the inherent functions of another branch."[36]

Examples of such extreme cases calling for invalidation are "few and far between."[37] Instead, California courts often uphold very broad direction from the legislature. For example, the general concept of "public convenience and necessity" was adequate direction to the Public Utilities Commission in ratemaking.[38] And the California Supreme Court has found adequate direction in statutes requiring agencies to follow broad goals such as promoting uniformity in sentencing,[39] treating people with addiction while protecting them and the public,[40] and taking urgent action on air pollution.[41] Indeed, Court of Appeal decisions have held that even an exhortation to promote the "general welfare" is "a sufficient guideline to enable an agency to act constitutionally."[42]

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[28] *Clean Air Constituency*, 11 Cal.3d at 817.
[29] *Id.* at 816.
[30] *Kugler v. Yocum* (1968) 69 Cal.2d 371, 381 ("The requirement for 'standards' is but one method for the effective implementation of the legislative policy decision."); *Birkenfeld v. City of Berkeley* (1983) 17 Cal.3d 129, 169 ("The need is usually not for standards but for safeguards.") (quotation omitted).
[31] *Kugler*, 69 Cal.2d at 381 ("[T]he most perceptive courts are motivated much more by the degree of protection against arbitrariness than by the doctrine about standards . . . .") (quotation omitted); *Samples v. Brown* (2007) 146 Cal.App.4th 787, 805 (same).
[32] *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 190.
[33] *State Pers. Bd. v. Dep't of Pers. Admin.* (2005) 37 Cal.4th 512, 523.
[34] *Marine Forests Society*, 36 Cal.4th at 47.
[35] *In re Rosenkrantz*, 29 Cal.4th at 662.
[36] *Laisne*, 19 Cal.2d at 835; *In re Rosenkrantz*, 29 Cal.4th at 662.
[37] *Santa Clara County Counsel Attys. Assn.* (1994) 7 Cal.4th 525, 543.
[38] *S. Pac. Transp. Co. v. Pub. Util. Comm.* (1976) 18 Cal.3d 308, 314.
[39] *People v. Wright* (1982) 30 Cal.3d 705, 713.
[40] *In re Marks* (1969) 71 Cal.2d 31, 51–52.
[41] *Clean Air Constituency*, 11 Cal.3d at 818–19.
[42] *Sacramentans for Fair Plan. v. City of Sacramento* (2019) 37 Cal.App.5th 698, 717 (quoting *Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 510); see also *Rodriguez* at 508–9 (citing cases holding a general welfare standard sufficient); *Groch v. City of Berkeley* (1981) 118 Cal.App.3d 518, 522–23 (citing additional cases).

Finally, common sense raises a question about an executive exercising the legislative police power, because the governor is not part of the legislature.[43] In California, the counterintuitive answer is that the executive may do so. It is "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."[44] California constitution article III, section 3 allows for persons charged with the exercise of one power to exercise some of the others "as permitted" elsewhere in the state constitution. And the California constitution does grant the governor 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."[45] Similarly, in vetoing legislation the governor acts in a legislative capacity.[46] And the governor can call the legislature into session.[47] Those constitutional grants of legislative powers to the executive show that the governor cannot be barred from exercising *any* legislative power.

As the next section describes, the ESA's guidance and safeguards easily meet the low bar for satisfying the delegation standard.

5. The Court of Appeal upheld the ESA's temporary and limited power delegation.

The ESA meets the permissive delegation standard, and the more general separation of powers standard. As shown above, only a total abdication of the legislature's power to make basic policy decisions is prohibited.[48] Thus, the legislature can delegate discretion, as long as it resolves fundamental policy choices and provides adequate direction to guide its exercise.[49]

Here, the legislature made the fundamental policy determination that California should be preserved from the calamities that frequently befall it. It declared that 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."[50] And, to "ensure that preparations within the state will be adequate to deal with such emergencies," the legislature organized the Office of Emergency Services under the governor's direct supervision and granted the governor and others emergency powers.[51]

The ESA provides both directions for exercising these emergency powers and safeguards against their abuse. In addition to making detailed policy findings and directions to guide the exercise of emergency powers, the legislature provides guidelines for using these emergency powers.[52] For example, although the ESA grants the governor authority to exercise the police power of the state during proclaimed emergencies, it instructs that this power should be exercised only to the extent "necessary" to "effectuate the purposes" of the ESA and to issue orders "necessary to carry out

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[43] *Brooks v. Fischer* (1889) 79 Cal. 173, 176.
[44] *Davis*, 46 Cal.3d at 76.
[45] *Lukens v. Nye* (1909) 156 Cal. 498, 501.
[46] *St. John's Well Child & Family Center*, 50 Cal.4th at 971.
[47] Cal. Const., art. IV, § 3(b).
[48] *Kugler*, 69 Cal.2d 371; *People v. Wright* (1982) 30 Cal.3d 705, 712.
[49] *People ex rel. Department of Public Works v. Superior Court of Merced County* (1968) 68 Cal.2d 206, 215.
[50] Gov. Code § 8550.
[51] *Id.*
[52] *Id.*

the provision of this chapter."[53] Similarly, the ESA grants the governor power to suspend laws when compliance would "prevent, hinder, or delay the mitigation of the effects of the emergency" (Gov. Code § 8571), authorizes the governor to direct state agencies to mobilize their personnel and expend available resources "to prevent or alleviate actual and threatened damages" from a proclaimed emergency (Gov. Code § 8628), and requires the governor to prepare for emergencies "in accordance with the State Emergency Plan" (Gov. Code § 8570).

The ESA also imposes safeguards against the abuse of the powers delegated to the governor. The ESA requires the governor to rescind a state of emergency "at the earliest possible date that conditions warrant," terminates the governor's emergency powers when the state of emergency ends, and provides that any emergency orders or regulations issued by the governor have "no further force or effect" once the state of emergency expires. And the ESA provides the legislature with an emergency brake: it may itself nullify a state of emergency whenever it wishes by concurrent resolution.[54]

These standards for emergency actions in the ESA, along with the safeguards against their abuse, provide more than sufficient direction for implementing the fundamental policies adopted by the legislature to satisfy the delegation doctrine. These provisions show that the legislature made the fundamental policy determination that California should be preserved from its frequent disasters; it delegated responsibility to the governor for taking executive action to combat emergencies; and it provided both detailed standards for emergency actions and safeguards against abuses. That is sufficient to satisfy any delegation concerns.[55]

Indeed, the Court of Appeal rejected a delegation attack on the ESA in the only appellate decision that considered a challenge to the governor's ESA powers during the pandemic.[56] The court upheld the delegation of emergency quasi-legislative power, and emphasized the ESA's safeguards: the requirement that the governor terminate a state of emergency at the "earliest possible date that conditions warrant," that all emergency powers expire when the state of emergency is over, that the legislature may itself end a state of emergency by concurrent resolution, and that any orders and regulations issued by the governor have "no further force or effect" once the state of emergency is over.[57]

Thus, the current state of the law is that the governor's existing ESA powers are lawful. And the legislature may revise this statutory scheme as it wishes. Because the governor's ESA authority is based in statute, the legislature may alter that statutory framework with another statute. The governor may also have inherent powers to deal with emergencies, but none of the authorities reviewed here directly address that question, and no court has yet ruled on this issue, so it remains an open question.

[53] Gov. Code §§ 8567(a), 8627.
[54] *Id*.
[55] *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd*. (2017) 3 Cal.5th 1118, 1150–51.
[56] *Newsom v. Superior Court* (2021) 63 Cal.App.5th 1099, 1118.
[57] *Id*. at 1116–17.

6. Individual rights

Individual liberty is always in tension with state power, and never more so than in a crisis. Inherent in the police power is the "reserved power of the state to subject individual rights to reasonable regulation for the general welfare."[58] The police power's outer boundary is marked by constitutional limitations, such as due process and equal protection. Courts apply strict scrutiny when a government act relies on a suspect classification or burdens a fundamental right.[59] Yet California courts apply rational basis review whenever strict scrutiny does not apply.[60] And although strict scrutiny is often described as "strict in theory and fatal in fact," some authorities hold that it has mellowed over time and is not inevitably fatal.[61]

Where state action affects a fundamental liberty interest, courts require a compelling state interest that cannot be accomplished by less restrictive means and is narrowly tailored to the purpose.[62] As the pandemic demonstrated, the state often can establish a compelling state interest in restricting individual liberty during a life-or-death crisis.

Emergencies present the apex of a government's need for a robust response to protect the public from a grave threat.[63] The California Supreme Court has said that under the ESA "the State may exercise its sovereign authority to the fullest extent possible consistent with individual rights and liberties."[64] Consequently, there is often a compelling government interest in taking action in the emergency context. Even in invalidating some COVID-19 emergency restrictions on religious worship services, the U.S. Supreme Court conceded that the government had a compelling interest in protecting the public by responding to the pandemic.[65] As a result, in emergencies the compelling interest requirement will often be met.[66]

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[58] *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 878.
[59] *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 568.
[60] *In re Marriages Cases* (2008) 43 Cal.4th 757, 783.
[61] Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection (1972) 86 Harv. L. Rev. 1, 8; *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 583 (Brown, J., dissenting, citing *Grutter v. Bollinger* (2003) 539 U.S. 306 (holding state law school's race-based affirmative action program survived strict scrutiny and noting that "[s]trict scrutiny is not 'strict in theory, but fatal in fact'")).
[62] 13 Cal. Jur. 3d Constitutional Law § 368.
[63] See e.g. *Zemel v. Rusk* (1965) 381 U.S. 1, 15–16 (freedom to travel constitutionally protected but "that freedom does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined" and same applies to international travel during emergency); *In re Juan C.* (1994) 28 Cal.App.4th 1093, 1100 ("Rioting, looting and burning pose a similar threat to the safety and welfare of a community, and provide a compelling reason to impose a curfew.").
[64] *Macias*, 10 Cal.4th at 854.
[65] See *Roman Cath. Diocese of Brooklyn v. Cuomo* (2020) 141 S.Ct. 63, 67 ("Stemming the spread of COVID–19 is unquestionably a compelling interest."); *S. Bay United Pentecostal Church v. Newsom* (2020) 140 S.Ct. 1613, 1614, Kavanaugh, J., dissenting ("California undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens.").
[66] But courts do not *always* agree that protecting the public is a compelling interest, even during an emergency such as a pandemic. In *U.S. Navy SEALs 1-26 v. Austin* a district court granted a preliminary injunction when it found that the government failed to show a compelling interest when it required COVID-19 vaccinations for certain military special operations personnel over their religious objections. (N.D. Tex. Mar. 28, 2022) No. 4:21-CV-01236-O, 2022 WL 1025144 at *11.

Where the compelling interest requirement is satisfied in an emergency, the strict scrutiny analysis turns on the narrow tailoring requirement. Even in an emergency, the narrow tailoring requirement is difficult to satisfy. But it is not impossible, especially when government officials are responding to new and uncertain dangers, because courts often defer to government officials on issues "fraught with medical and scientific uncertainties."[67] For example, in denying an application for injunctive relief sought early in the pandemic in *South Bay United Pentecostal Church v. Newsom*, Chief Justice Roberts stressed that courts should not be "second-guessing" public health officials "when local officials are actively shaping their response to changing facts on the ground."[68] Accordingly, in resolving subsequent preliminary injunction motions, two federal judges found that California's COVID-19 restrictions likely were narrowly tailored in light of uncertainty over whether less stringent restrictions would increase infectious disease spread and adversely impact public health.[69]

For example, in *Harvest Rock Church*, a district court found that California's Blueprint for a Safer Economy (a set of policies governing COVID-19 closures in California) likely would survive strict scrutiny.[70] Although it ruled that strict scrutiny was not required to resolve the preliminary injunction at issue, the court nonetheless addressed whether the restrictions at issue were likely to survive strict scrutiny. After finding a compelling state interest in curbing the spread of the "world's deadliest infectious disease," the court found that the capacity restrictions imposed on worship services satisfied strict scrutiny because they were "painstakingly tailored" to what was then known about the specific mechanism of disease transmission.[71] It is unclear, however, whether the U.S. Supreme Court would have upheld this ruling.

Thus, although the state faces a high bar when strict scrutiny applies, in an emergency fraught with uncertainty about the best response the state is well-positioned to convince the courts to defer to the executive branch's assessment of the best measures to take based on the information known, thereby satisfying the narrow tailoring requirement and surviving strict scrutiny.

7. Conclusion

As it stands the ESA does not risk a separation of powers violation. The governor's ESA authority is temporary and lasts only for the duration of an emergency. Meanwhile, the legislature retains its own authority to exercise the police power, to reinstate laws, and to direct appropriations. And it always holds the authority to terminate the governor's powers. The legislature's temporary grant of these limited powers is consistent with separated powers because it does not materially impair the legislature's core powers, and because the delegation has adequate direction and safeguards.

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[67] *Marshall v. United States* (1974) 414 U.S. 417, 427.
[68] *S. Bay United Pentecostal Church*, 140 S.Ct. at 1613–14, Roberts, C.J., concurring in denial of application.
[69] *Harvest Rock Church, Inc. v. Newsom* (C.D. Cal. Dec. 21, 2020) No. EDCV206414JGBKKX, 2020 WL 7639584, at *6, appeal dismissed (9th Cir. May 19, 2021); *S. Bay United Pentecostal Church v. Newsom* (S.D. Cal. 2020) 508 F.Supp.3d 756, 769–73, vacated in part, (9th Cir. 2021) 985 F.3d 1128, vacated in full (2021) 141 S. Ct. 716.
[70] *Harvest Rock Church, Inc. v. Newsom* (C.D. Cal. Dec. 21, 2020) No. EDCV206414JGBKKX, 2020 WL 7639584, at *6, appeal dismissed (9th Cir. May 19, 2021).
[71] *Id.* Note that the Ninth Circuit and the U.S. Supreme Court disagreed on this point.

For further detail on these points see:

- David A. Carrillo and Danny Y. Chou, California Constitutional Law: Separation of Powers (2011) 45 U.S.F. L. Rev. 655

- David A. Carrillo and Shane G. Smith, California Constitutional Law: The Religion Clauses (2011) 45 U.S.F. L. Rev. 689

- Daniel H. Bromberg, California Constitutional Law: The Emergency Police Power (2022) 57 U.S.F. L. Rev. 23

- For a contrary view on the delegation argument, see Luke Wake, "Does California still have a meaningful separation of powers doctrine?" SCOCAblog July 18, 2022.