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VIA OVERNIGHT DELIVERY

Chief Justice Patricia Guerrero
and Associate Justices
Supreme Court of California
350 McAllister Street | Suite 1295
San Francisco, California 94102

Re: *Ghost Golf, Inc., et. al v. Newsom, et. al.*
Supreme Court Case No. S285746
Court of Appeal Case No. F08403
***Amicus* Letter Supporting Petition for Review**

To the Honorable Chief Justice and Associate Justices of the Supreme Court of California:

This letter submitted pursuant to Rule 8.500(g) supports Ghost Golf, Inc. and Sol y Luna in their petition for review in the above referenced case. Dhillon Law Group, Inc. and its former clients, Ron Givens and Pineapple Hill Saloon & Grill, respectfully request permission to file this *amicus curie* letter in support of the petition for review, because the case raises fundamental issues affecting the integrity of California's constitutional doctrine of non-delegation, and by consequence, has significant potential future ramifications on California residents and businesses when the next emergency strikes the State.

As briefed by the Petitioners, *Ghost Golf* raises a vital question about California's constitutional separation of powers system: does the State still have a nondelegation doctrine, which prohibits law-making by the Executive branch, or – as the Fifth District has held – may the Legislature legitimately delegate the entirety of its "police power" such that the Governor may enact law him- or herself in response to a proclaimed emergency? Review is necessary to clarify the framework for judicial review of the Legislature's delegation of power to the Executive, and to provide guidance regarding how involved the Legislature must be on the front end of its delegation, how general its standards for the Executive's implementation of power may be, and how robust its safeguards to protect against the Executive's abuse of power must be. Without these clarifications, the economic and civil liberty interests of California citizens – including but not limited to the small business owners, church-goers, activists, and vulnerable families who were irreparably affected by the Governor's lawmaking in 2020 and 2021, and who this firm represented – remain hanging in the balance.

ABOUT OUR ORGANIZATION

Dhillon Law Group, Inc. is a national law firm with a robust civil rights and civil liberties practice. In 2020 and 2021, our firm represented numerous clients who were affected by the Governor's unilateral

pandemic response laws, including companies in the furniture, wedding, winery, beauty, commercial real estate, entertainment, restaurant, and hospitality industries; public protestors; school students; pastors; employees; residents of adult care facilities; and other Californians affected by Governor's exercise of police power during this time.

REVIEW IS NECESSARY TO CLARIFY THE CONSTITUTIONALITY OF THE LEGISLATURE'S DELEGATION OF POLICE POWER TO THE EXECUTIVE DURING STATE EMERGENCIES

The federal separation of powers guards the democratic process in the United States. It ensures the will of the people is represented by an elected and populous Legislature tasked with working together to make the laws which govern the people. This concept is supposed to disable any possibility that a *singular* elected figure or *unelected* group, such as the President or others in the Executive, hijack the will of the people as represented in the Legislature. Although not explicitly stated in the United States Constitution, the document's designations of each branch's duties make it clear that this nation has functioned under a separation of powers reality. U.S. CONST., Art. 1, § 7; Art. 2, § 1; Art. 2, § 2; Art. 3, § 1; Art. 3, § 2.

And California's Constitution *explicitly* establishes this concept, going as far to also declare that one branch's powers may not be exercised by another outside the limited bounds of the Constitution. CAL. CONST. Art. 3, § 3. This is the nondelegation doctrine, a necessity for the very preservation of the separation of powers. *See Golightly v. Molina*, 229 Cal.App.4th 1501, 1516 (Cal. Dist. Ct. App. 2014) ("The nondelegation doctrine serves to assure that truly fundamental issues [will] be resolved by the Legislature and that a grant of authority [is] ... accompanied by safeguards adequate to prevent its abuse.") (internal citations omitted).

"The legislative branch of government, although it is charged with the formulation of policy, properly may delegate some quasi-legislative or rulemaking authority to administrative agencies" and the Executive. *Carmel Valley Fire Protection Dist. v. State*, 20 P.3d 533, 539 (Cal. 2001). But this is subject to a critical qualification: "'[t]he true distinction . . . is between the delegation of power to *make the law* . . . and conferring authority or discretion as to its *execution*. . . . The first cannot be done'" by the Legislature. *Id.* at 539-40 (quoting *Loving v. U.S.*, 517 U.S. 748, 758-59 (1996)).

For these two statements to reconcile, "quasi-legislative or rulemaking authority" must not be synonymous with lawmaking. Yet this is exactly how the Court of Appeals viewed the Legislature's passage of the open-ended Emergency Services Act (ESA), which empowered Governor Gavin Newsom to design his own legislation, the "Blueprint for a Safer Economy," during the COVID-19 epidemic. As a result, Governor Newsom exercised his unfettered discretion to decide whether and to what extent the State would restrict any activity in response to COVID-19, with irreparably harmful effects on countless California citizens and businesses, as discussed next

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Review is Necessary Because the ESA-Backed "Blueprint for a Safer Economy" Eroded the Economic and Civil Liberties of Countless Californians

This Court should grant the Petitioners' petition because if the ESA is allowed to remain a blank check that the Governor can cash in for broad legislative power, then the next time an emergency occurs, small businesses and citizens will endure irreparable harm to their economic and civil liberties, just as they did in 2020 and 2021. Ghost Golf, Inc. and Sol y Luna are two examples of businesses harmed by the Governor's improper law-making. Additional examples of harm caused to businesses and individual citizens are provided below.

The Blueprint's Erosion of Economic Liberties

Under Governor Newsom's Blueprint, some large corporations and industries (e.g. Disneyland, Home Depot, Hollywood) were allowed to operate during the pandemic, while smaller businesses that sought to operate in a functionally identical manner vis a vis public health concerns were shuttered, in a seemingly arbitrary fashion. Big box stores like Costco could sell televisions but the local small business that sold televisions could not operate. The local grocery store was allowed to sell flowers, but the local small business florist was prohibited from operating. While retail giants like Home Depot were allowed to sell patio furniture, the local small business that only sold patio furniture was not permitted to be open.

Our firm represented Angela Marsden, who owns a small restaurant in Sherman Oaks called Pineapple Hill Saloon & Grill. Despite proactively ensuring a CDC-compliant workplace, Ms. Marsden was forced to endure shutdowns and mandatory losses of business for almost all of 2020, due to Governor Newsom's *selective* demands. Indeed, in an almost-cinematic "Rules for thee, but not for me" arrangement, Ms. Marsden witnessed that directly next door to her restaurant, an NBC Universal film set with outdoor dining was allowed to operate—while she had just learned her own meticulous outdoor dining set-up would be shut down. This juxtaposition came on the heels of Governor Newsom providing a "special exemption to television and film production companies" and attending an *indoor* dinner with a Netflix lobbyist.

In short: the impact of the Blueprint landed most destructively on the livelihoods of small business owners, and often in ways that were seemingly arbitrary. In some instances, malls and other retail stores could operate at 25 percent capacity—regardless of how many people that meant – while smaller businesses that could operate within that range remained closed. *Gateway City Church v. Newsom*, 516 F.Supp.3d 1004, 1010 (N.D. C.A. 2021). The Governor's laws requiring certain businesses to remain closed while others flourished do not pass scrutiny under any of the three tests this Court has established to check unconstitutional delegations of power, as discussed below.

The Blueprint's Erosion of Civil Liberties

The ESA-backed Blueprint also resulted in the erosion of civil liberties to Californians across the board. Below are some examples.

Ron Givens, a firearms instructor / seller and a client of Dhillon Law Group, resides in Sacramento County. Mr. Givens saw firsthand the Blueprint's erosion of Californians' Second Amendment rights when the

State unnecessarily delayed processing the required background checks of gun purchasers "under the guise of a public health emergency." Moved by his concern for the right of Californians to protect themselves and their families that was especially imperative during uncertain times, he planned a protest on the State Capitol grounds. Despite making it clear he would ensure he and his fellow activists would adhere to CDC guidelines for masking and social distancing, Governor Newsom ordered the state entity charged with granting protest permits to cease granting *any*.

Many other Californians also experienced a loss in their civil liberties, including but not limited to High School seniors who were denied the opportunity to march down the aisle for their graduation ceremony, families unable to see their loved ones as they were about to pass away in the hospitals, brides and grooms who had to put off their weddings for over a year, individuals who were prohibited from going to church, pastors who were prohibited from leading prayer services for the nation on public property, and individuals who were prohibited from obtaining routine medical care. In addition, day-schools/ camps were allowed to operate on school property – but that same school property could not be used for formal education of California students.

"[T]he right to free religious expression embodies a precious heritage of [California's] history." *People v. Woody*, 394 P.2d 813, 821 (Cal. 1964). Also cherished in California is the right to express one's speech in the form of publicly protesting the government or other entity. Indeed, California's "legal tradition recognizes the importance of speech or other expressive activity even when – perhaps especially when – it is uncomfortable or *inconvenient*." *Geiser v. Kuhns*, 515 P.3d 623, 635 (Cal. 2022) (holding evicted homeowners and non-profit organization members protesting outside of real estate developer's home engaged in protected speech) (emphasis added). Yet Governor Newsom's laws disturbed this long-held tradition in California – and as it stands, he has judicial approval to repeat this conduct in the next emergency.

Review is Necessary to Demonstrate the Correct Way to Apply the Three Tests this Court has Established to Check Unconstitutional Delegations of Power

The above are examples of the very real harms that will likely be repeated in the next emergency should this Court not clarify the requirements of California's non-delegation doctrine. As briefed by Petitioners, this Court has historically employed three tests to ensure that the Legislature's delegation of power to the Executive does not cross constitutional boundaries: the fundamental policy test, the adequate standards test, and the adequate safeguards test. *See Gerawan Farming, Inc. v. ALRB*, 405 P.3d 1087, 1100-1101 (Cal. 2017) ("'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.'") (quoting *Carson Mobilehome Park Owners' Assn. v. City of Carson*, 672 P.2d 1297, 1299 (Cal. 1983); *see also id.* at 1103 ("In addition to sufficiently clear standards, a statute delegating legislative power must be accompanied by 'safeguards adequate to prevent its abuse.'") (quoting *Kugler v. Yocum*, 445 P.2d 303, 306 (Cal. 1968) (en banc)) (internal citations omitted). Had the Court of Appeal correctly applied any of these tests, the Governor's laws would have been found unconstitutional.

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Review is Necessary of the Court of Appeals' Application of the Fundamental Policy Test

The Court of Appeals allowed the Legislature to remain silent on an issue of fundamental policy: that of the Governor's police power. The court itself has explained the Legislature's obligation to decide on fundamental policy before delegating power to the Executive. *See Sims v. Kernan*, 30 Cal.App.5th 105, 111-12 (Cal. Dist. Ct. App. 2018). The Legislature is tasked with making the "momentous" decisions "in the first instance" to set the specific confines within which an Executive agent or body will then "implement" more meticulous, but adherent actions. *Id.*

Sims v. Kernan is instructive. *Id.* In that case, the Court of Appeals ruled that the Legislature properly determined fundamental death penalty policy when delegating more meticulous implementation standards to California's Department of Corrections and Rehabilitation (CDCR). *Id.* at 112. The Legislature did so by not only having established the death penalty in California and specifying which crimes warranted execution, but also requiring that executions be performed by either lethal gas or lethal injection. *Id.* at 109. Moreover, the Legislature went as far in its particularity as mandating that condemned inmates be given the choice out of these two methods—as well as which method to default to, should the inmate refuse election. *Id.* These specific determinations established an appropriate foundation for the CDCR to determine more precise details, such as which types of gas or chemicals to administer in the executions. *See id.* at 115.

For the ESA, on the other hand, the Legislature set no specific foundation. It did not, for example, make the "momentous" decision to establish the Governor's ability to shut down businesses at all "in the first instance." And despite being fundamental to the way Governor Newsom implemented the ESA, the Legislature did not even begin to define which businesses were essential and which were not. What is more, the ESA's missing policy decision demonstrated an imminent and often destructive implication on the livelihoods of all 39 million Californians—while the CDCR's implementation of the death penalty affects a select few. Given the expansive consequences of this incomplete statute, the ESA cannot have so little Legislative input on the front end.

Review is Necessary of the Court of Appeals' Application of The Adequate Standards Test

The Legislature failed the adequate standards test because it used only the ESA's general purpose of protecting public health and safety as the standard to direct Governor Newsom's acts. This is far from adequate. This Court has exemplified repeatedly that adequate standards entail explicit considerations, even if implied from stated statutory purpose, to ensure powers delegated to the Executive are carried out constitutionally. *See Gerawan* 405 P.3d at 1101-1102 (holding that the Legislature's delegation of collective bargaining policy to an executive agency "does *not* 'fail[] to provide adequate direction for [its] implementation'" because the relevant statute included "a nonexclusive list of factors" *in tandem* with its stated purpose) (internal citations omitted) (emphasis added); *see also Birkenfeld v. City of Berkeley*, 550 P.2d 1001, 1029 (Cal. 1976) (stating "statutory purpose" can constitute sufficient guidance but ultimately affirming the charter amendment at issue's adequacy because it also provided "a nonexclusive illustrative list of relevant factors to be considered[.]").

The ESA bore no derivative factors for consideration. This is to be expected considering the statute did not explicitly permit business shutdowns or define the essential nature of certain establishments. An ESA with adequate standards, however, would have perhaps drafted "a nonexclusive list of factors" for the Executive to consider in designating certain businesses as non-essential or high-risk for COVID-19 transmission. Since it did no such thing, this Court must reconsider the Court of Appeal's decision.

Review is Necessary of the Court of Appeals' Application of The Adequate Safeguards Test

The Court of Appeal's acceptance of the ESA's abstract purpose as a placeholder for "adequate standards" resulted in inadequate safeguards for businesses and individuals. "'[R]easonable grants of power'" are valid if "'suitable safeguards are established to guide the power's use and to protect against misuse.'" *Gerawan*, 405 P.3d at 1100 (quoting *People v. Wright*, 639 P.2d 267, 271 (Cal. 1982) (en banc)). But if the power at issue is not defined with adequate standards, what is considered proper "use" to be guided and "misuse" to be protected against? For one, misuse may be corporate favoritism, including in the several examples discussed above pertaining to Disneyland, Home Depot, and others.

Adequate safeguards have been exemplified by built-in incentive structures for those *subject* to the legislation at issue, or opportunities for *them* to challenge the Executive's implementation of the Legislature's delegated power. *See Kugler*, 445 P.2d at 310 (finding that the inherent motivations of employers to not overpay their employees constituted "built-in and automatic protections"); *see also Gerawan*, 405 P.3d at 1104 (finding that the requirement that employers and employees agree upon a mediator during collective bargaining processes, in conjunction with their ability to petition for a second mediation and judicial review, were "constitutionally adequate" safeguards). The ESA provides no such safeguards. The Court of Appeals looked no further than to the *Legislature's* ability to disable the Blueprint by ending a state of emergency, but this is insufficient under the adequate safeguards test, and must be reviewed.

CONCLUSION

Dhillon Law Group, Inc. and its former clients, Ron Givens and Pineapple Hill Saloon & Grill, respectfully request permission to file this *amicus curie* letter in support of the petition for review, to decide whether it violates the nondelegation doctrine for a statute to delegate powers coextensive with the Legislature's power to make law on a given regulatory subject.

Respectfully Submitted,

Krista L. Baughman

PROOF OF SERVICE

I declare the following: I am over the age of eighteen years, and not a party to the within entitled cause. My business address is 177 Post Street, Suite 700, San Francisco, California 94108. On July 12, 2024, I served the following document(s):

- **AMICUS LETTER IN SUPPORT OF PETITION FOR REVIEW**

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

X **BY FIRST CLASS MAIL:** I placed the envelopes for collection and mailing on the date stated above, at Newport Beach, CA, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in sealed envelopes with postage fully prepaid.

X **BY E-MAIL**: I caused the documents to be sent to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. I am readily familiar with my firm's business practice of processing and transmitting documents via e-mail or electronic transmission(s) and any such documents would be transmitted in the ordinary course of business.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this declaration was executed on July 12, 2024, at Newport Beach, California.

Rania Fahim

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