

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

---

No. F082357

---

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, Honorable D. Tyler Tharpe, Judge)

---

**APPLICATION OF THE COUNTIES OF FRESNO,  
PLACER, AND SAN JOAQUIN COUNTY FOR LEAVE TO  
FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF  
APPELLANTS; PROPOSED *AMICUS CURIAE* BRIEF**

---

PAUL J. BEARD II  
SBN 210563  
FisherBroyles LLP  
4470 W. Sunset Blvd.,  
Suite 93165  
Los Angeles, California 90027  
Telephone: (818) 216-3988  
paul.beard@fisherbroyles.com

*Counsel for Amici Curiae*

<b>COURT OF APPEAL</b> <b>FIFTH APPELLATE DISTRICT, DIVISION</b>	COURT OF APPEAL CASE NUMBER: F082357
ATTORNEY OR PARTY WITHOUT ATTORNEY:                      STATE BAR NUMBER: 210563 NAME: Paul Beard II FIRM NAME: FisherBroyles LLP STREET ADDRESS: 4470 W. Sunset Blvd., Suite 93165 CITY: Los Angeles                      STATE: CA                      ZIP CODE: 90027 TELEPHONE NO.: 818-216-3988                      FAX NO.: E-MAIL ADDRESS: paul.beard@fisherbroyles.com ATTORNEY FOR (name): Fresno County, Placer County, San Joaquin County	SUPERIOR COURT CASE NUMBER: 20CECG03170
APPELLANT/ Ghost Golf, Inc., et al. PETITIONER:  RESPONDENT/ Gavin Newsom, et al. REAL PARTY IN INTEREST:	
<b>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</b>	
(Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
<b>Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.</b>	

1. This form is being submitted on behalf of the following party (name): Fresno County, Placer County, and San Joaquin County
2. a.  There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b.  Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
--	-------------------------------

- (1)
- (2)
- (3)
- (4)
- (5)

Continued on attachment 2.

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

Date: 5/7/21

Paul Beard II  
(TYPE OR PRINT NAME)

  
 \_\_\_\_\_  
(SIGNATURE OF APPELLANT OR ATTORNEY)

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... 4

APPLICATION TO FILE *AMICUS CURIAE* BRIEF ..... 7

    I.    INTRODUCTION ..... 7

    II.   IDENTITY AND INTEREST OF *AMICI CURIAE*..... 7

    III.  CONCLUSION ..... 10

BRIEF *AMICUS CURIAE*..... 12

    I.    INTRODUCTION ..... 12

    II.   ARGUMENT ..... 13

        A.    Counties Have Broad Emergency Police Powers  
            Reserved to Them by the California Constitution ..... 13

        B.    Counties Have Broad Emergency Powers Conferred on  
            Them by Statute, Which *Amici* Have Readily Invoked To  
            Address COVID-19 Within Their Jurisdictions..... 16

        C.    Respondents’ Actions Have Impaired Counties’  
            Constitutional and Statutory Police Powers, at a Devastating  
            Cost To Their Residents and Businesses ..... 22

        D.    The Third Appellate District’s Recent Decision in  
            *Newsom v. Superior Court* Should Not Be Followed ..... 27

    III.  CONCLUSION ..... 33

## TABLE OF AUTHORITIES

### CASES

<i>Birkenfeld v. Berkeley</i> (1976) 17 Cal.3d 129-----	14
<i>Candid Enterprises, Inc. v. Grossmont Union High School Dist.</i> (1985) 39 Cal.3d 878-----	14-15
<i>County of Marin v. Superior Court</i> (1960) 53 Cal.2d 633-----	13
<i>Farmers Ins. Exch. v. California</i> (1985) 175 Cal.App.3d 494-----	28
<i>Gerawan Farming, Inc. v. Agric. Labor Rel. Bd.</i> (2017) 3 Cal.5th 1118-----	30-32, 34
<i>In re Application of Pedrosian</i> (1932) 124 Cal.App. 692-----	16
<i>In re Application of Peppers</i> (1922) 189 Cal. 682-----	31
<i>Lancaster v. Municipal Court</i> (1972) 6 Cal.3d 805-----	14
<i>Newsom v. Superior Court</i> 2021 Cal.App. LEXIS 383 (May 5, 2021)-----	28-32
<i>Patrick v. Riley</i> (1930) 209 Cal. 350-----	15-16
<i>People ex rel. Deukmejian v. County of Mendocino</i> (1984) 36 Cal.3d 476-----	14
<i>Personal Watercraft Coalition v. Marin County Bd. of Supervisors</i> (2002) 100 Cal.App.4th 129-----	14
<i>San Francisco Police Officers' Ass'n v. San Francisco Police Com.</i> (2018) 27 Cal.App.5th 676-----	29

<i>Sims v. Kernan</i> (2018) 30 Cal.App.5th 105 .....	31
<i>Wilkinson v. Lund</i> (1929) 102 Cal.App. 767 .....	13

CONSTITUTIONAL PROVISIONS

Cal. Const., art. IX .....	13-14, 29
----------------------------	-----------

STATE STATUTES AND CODES

Gov. Code § 8550.....	18, 30
Gov. Code § 8558.....	20
Gov. Code § 8567.....	33
Gov. Code § 8569.....	18, 30
Gov. Code § 8627.....	19, 27-29
Gov. Code § 8629.....	32
Gov. Code § 8630.....	20
Gov. Code § 23002 .....	23002
Health & Safety Code § 101000 .....	16
Health & Safety Code § 101025 .....	16
Health & Safety Code § 101028 .....	16-17
Health & Safety Code § 101030 .....	17
Health & Safety Code § 101040 .....	17
Health & Safety Code § 101080 .....	17-18, 20

Health & Safety Code § 101085 ----- 17

Health & Safety Code § 120140 ----- 19, 27-28

RULES AND REGULATIONS

Cal. R. Ct., R. 8.200(c) ----- 7, 10

SECONDARY SOURCES

Erwin Chemerinsky, *To: President Barack Obama,*  
*Subject: Restoring Separation of Powers,*  
 35 Human Rights 6 (2008) ----- 32

Jared Eigerman, *California Counties: Second-Rate*  
*Localities or Ready-Made Regional Governments?,*  
 26 Hastings Const. L.Q. 621 (1999)----- 14

Albert C. Lin, *Public Trust and Public Nuisance:*  
*Common Law Peas in a Pod?,*  
 45 U.C. Davis L. Rev. 1075 (2012)----- 29

## **APPLICATION TO FILE *AMICUS CURIAE* BRIEF**

### **I. INTRODUCTION**

Pursuant to California Rules of Court, Rule 8.200(c), the Counties of Fresno, Placer, and San Joaquin (“*Amici*”) respectfully request leave to file the brief submitted herewith in support of Appellants Ghost Golf, Inc., Daryn Coleman, Sol Y Luna Mexican Cuisine, and Nieves Rubio.

Appellants’ Opening Brief was filed on March 9, 2021. Respondents’ Brief was filed on April 9, 2021. Appellants’ Reply Brief was filed on April 29, 2021. This Application is timely made within 14 days after the filing of Appellants’ Reply Brief.

### **II. IDENTITY AND INTEREST OF *AMICI CURIAE***

*Amici* are counties whose residents and businesses have been (and continue to be) severely impacted by the Respondents’ unfettered and indefinite regulation of their residents and businesses, as currently embodied in Respondents’ Blueprint for a Safer Economy. The Blueprint assigns one of four tiers to each county, depending on Respondents’ view of the county’s positivity rate, adjusted case rate, and “health equity” metric. Counties must remain in a tier for at least 3 weeks before moving to a less restrictive tier. Counties must meet the next tier’s criteria for two consecutive weeks to move to a less restrictive tier. If a county’s

metrics worsen for two consecutive weeks, the county will be assigned to a more restrictive tier.<sup>1</sup>

The purple tier means that many so-called “non-essential” indoor business operations are closed. The red tier means that “some” non-essential indoor business operations are closed. The orange tier means that “some” indoor business operations are open with modifications. And the yellow tier means that “most” indoor business operations are open with modifications. At present, Respondents do not assign a “green” tier that would allow a county’s residents and businesses to return to normal life and activities.

The County of Fresno is the tenth largest county in the State of California in terms of population, which approaches 1,000,000. The county seat is Fresno, the fifth most populous city in California. Under the Blueprint, the County spent many months in the most restrictive tier (purple). The County was recently assigned to the orange tier, which still means many businesses operate under severe restrictions.

The County of Placer encompasses over 1,500 square miles, stretching roughly 65 miles from the suburbs of Sacramento at Roseville to the Nevada border, including the northern portion of tourism-rich Lake Tahoe. The County’s tourism sector has been

---

<sup>1</sup> Details about the Blueprint can be found at Respondents’ page at: <https://covid19.ca.gov/safer-economy/> (last visited on May 4, 2021).



devastated by Respondents' actions under the Blueprint. The County currently is in the second most severe tier—the red tier—which means that some non-essential businesses remain entirely closed.

The County of San Joaquin encompasses 1,426 square miles and is home to an estimated 769,000 residents. It, too, has been impacted—in terms of business closures and revenue loss—by Respondents and their Blueprint. Like Placer, San Joaquin remains in the red tier, to the detriment of countless residents and businesses.

*Amici* are familiar with the issues in this case and have reviewed the challenged decision of the Superior Court, as well as the parties' briefs. As counties with considerable experience concerning public health and safety matters, *Amici* believe they can provide an important perspective on the issues before this Court.

Specifically, *Amici* support Appellants' claim that the Emergency Services Act cannot be constitutionally interpreted to confer on Respondents the power to indefinitely control—and even suspend—the lives and livelihoods of California's residents and business, even during a pandemic. This brief supplements Appellants' arguments with a discussion of the ways in which Respondents have impaired the ability of counties to exercise their constitutionally and statutorily conferred powers to address public

health emergencies such as COVID-19. *Amici* also discuss a recent decision of the Third Appellate District that Respondents doubtless will urge the Court to follow, but whose analysis is flawed. *Amici* request that the Court reverse the lower court's denial of a preliminary injunction and remand for further proceedings consistent with the principles of the separation of powers and nondelegation, as explained in Appellants' briefs and in this brief.

Pursuant to Rule 8.200(c)(3) of the Rules of Court, *Amici* certify that no party or counsel for a party in this appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. Further, *Amici* certify that no one other than *Amici* made a monetary contribution intended to fund the preparation or submission of the brief.

### **III. CONCLUSION**

Counties such as *Amici*, and the millions of Californian they represent locally, have been substantially affected by the challenged actions of Respondents. They bring a unique perspective to this appeal. They therefore respectfully request the Court's leave to file the accompanying brief in support of Appellants.

Dated: May 7, 2021

Respectfully submitted,

/s/ Paul Beard II

---

Counsel for *Amici Curiae*  
COUNTY OF FRESNO  
COUNTY OF PLACER  
COUNTY OF SAN JOAQUIN

## BRIEF *AMICUS CURIAE*

### I. INTRODUCTION

For fourteen months—and with no clear end in sight—the California Governor and the California Department of Public Health Director (collectively, “Respondents”) have single-handedly ruled the residents, businesses, and local officials of this State through unpredictable and often-arbitrary orders aimed at addressing the COVID-19 pandemic. They have done so without substantive guidance or input from the people’s representatives in the Legislature or in county boards of supervisors.

Yet both the California Constitution and state statutes confer on counties broad police powers to handle public health emergencies, including pandemics. Conversely, nothing in the Constitution or any statute permits Respondents to effectively suspend—arbitrarily and indefinitely—counties’ broad authority to tailor a public-emergency response to the specific conditions and circumstances of their localities. Quite the contrary, in a state of emergency, the law mandates respect for separation of powers—and, most relevant to *Amici*, intergovernmental cooperation.

Even as pandemic conditions seem to be improving, no one knows for sure when Respondents’ orders will end. The linchpin of the Blueprint and associated orders—the Governor’s state-of-emergency declaration (JA 164)—has no expiration date, and the

Governor has not indicated when he will lift it.<sup>2</sup> Thus, the only certainty is the uncertainty that will continue to plague counties and their constituents for months and perhaps even years to come.

The Court should reverse the trial court's denial of a preliminary injunction and remand the matter for further proceedings, including entry of a preliminary injunction enjoining enforcement of the Blueprint and associated orders.

## II. ARGUMENT

### A. Counties Have Broad Emergency Police Powers Reserved to Them by the California Constitution

Under the California Constitution, counties are “legal subdivisions of the State.” (Cal. Const., art. XI, § 1; Gov. Code § 23002 (“The several existing counties of the State and such other counties as are hereafter organized are legal subdivisions of the State.”)). A major function of counties is to assist the state in administering state programs. (*County of Marin v. Superior Court* (1960) 53 Cal.2d 633, 638; *Wilkinson v. Lund* (1929) 102 Cal.App. 767, 772 (noting county is governmental agency of state exercising some functions of state government)). As such, “a California county

---

<sup>2</sup> Respondents observe that, on April 6, Governor Newsom announced that the State will “fully reopen,” and the Blueprint will end, on June 15—as long as hospitalizations remain “stable and low” and all state residents 16 or older have access to a vaccine.” (Res. Br. at 18). In other words, it is up to Respondents. Besides being speculative, that presupposes the legality of the Blueprint and Respondents’ actions, and ignores the reality that Respondents may reinstate sweeping and indefinite shut-down orders again in the future and at their discretion.

conducts the State's political affairs on a local level.” (Jared Eigerman, *California Counties: Second-Rate Localities or Ready-Made Regional Governments?*, 26 *Hastings Const. L.Q.* 621, 663 (1999)).

Specifically, the California Constitution confers on counties the power to “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” (Cal. Const. art. XI, § 7). “Under the police power granted by the Constitution, counties . . . have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law.” (*Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885 (citing Cal. Const., art. XI, § 7)). As the California Supreme Court has made clear, “[a]part from this limitation, the police power . . . under this provision . . . is as broad as the police power exercisable by the Legislature itself.” (*Id.* (quoting *Birkenfeld v. Berkeley* (1976) 17 Cal.3d 129, 140) (internal quotation marks omitted)). “[C]ounties have, within their allotted sphere, the same array of constitutional regulatory police powers as does the State.” (*Personal Watercraft Coalition v. Marin County Bd. of Supervisors* (2002) 100 Cal.App.4th 129, 146).<sup>3</sup>

---

<sup>3</sup> Of course, local exercise of the police power cannot conflict with the State's general law; if it does, it “is void.” (*People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 484; *Lancaster v. Municipal Court* (1972) 6 Cal.3d 805, 807). But a conflict exists only if local action “duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by

The courts have long understood the police power to include the authority to address “public health” emergencies, such as the spread of contagious disease. (See e.g., *Patrick v. Riley* (1930) 209 Cal. 350, 354). In *Patrick*, the Supreme Court considered a statute aimed at controlling the transmission of tuberculosis in cattle. The Court made clear that such a legislative objective is well within the State’s—and, by constitutional extension, the counties’—police power:

It is a well-recognized principle that it is one of the first duties of a state to take all necessary steps for the promotion and protection of the health and comfort of its inhabitants. The preservation of the public health is universally conceded to be one of the duties devolving upon the state as a sovereignty, and whatever reasonably tends to preserve the public health is a subject upon which the legislature, within its police power, may take action. . . . It cannot be doubted, therefore, that the primal object of the statute here involved is to promote and preserve the public health by providing a means for the control and suppression of this disease among cattle. In providing measures for the protection of public health, the destruction or summary abatement of public nuisances inimical to the public health may be ordered, for all property is held in subordination to the right of its reasonable regulation by the government clearly necessary to preserve the health, safety or morals of the people.

---

legislative implication.” (*Candid Enterprises*, 39 Cal.3d at 885 (citation and internal quotation marks omitted)). Absent the enactment of such a state law, counties are free to exercise their plenary police power as they deem necessary for preservation of public health and safety. There is no general law that precludes counties from exercising their constitutionally conferred police power to address the COVID-19 pandemic, as many have.

(*Patrick*, 209 Cal. at 354; see also *In re Application of Pedrosian* (1932) 124 Cal.App. 692, 700-701 (upholding local ordinance concerning rubbish collection as a proper exercise of the police power, in part, to “prevent[] the spread of disease”)).

**B. Counties Have Broad Emergency Powers Conferred on Them by Statute, Which *Amici* Have Readily Invoked To Address COVID-19 Within Their Jurisdictions**

As explained above, the California Constitution clearly gives counties broad police powers to address public health and safety issues—powers largely on par with State legislative authority in that area. However, in addition to that *constitutional* grant of authority, at least two *statutory* schemes confer on counties the specific power to address public health emergencies within their jurisdictions. That includes the authority to control and contain the spread of communicable disease.

Consider, for example, counties’ authority under Division 101 of the Health and Safety Code, which provides for the “Administration of Public Health.” Under that statute, “[t]he board of supervisors of each county shall take measures as may be necessary to preserve and protect the public health in the unincorporated territory of the county, including, if indicated, the adoption of ordinances, regulations and orders not in conflict with general laws.” (Health & Safety Code § 101025). Further, “[e]ach board of supervisors shall appoint a health officer who is a county officer.” (*Id.* § 101000). That health officer has substantial power



to take “any preventative measure” and make “orders” to contain and stop the spread of communicable diseases. (*Id.* §§ 101030, 101040; *see also id.* § 101028 (“[A]ll orders of the local health officer issued for the purpose of preventing the spread of any contagious, infectious, or communicable disease” are enforceable by the “sheriff” and “[e]very peace officer of every political subdivision of the county”)).

In addition, “the local health officer” may “declare a local health emergency” whenever, among other circumstances, “there is an imminent and proximate threat of the introduction of contagious, infectious, or communicable disease.” (*Id.* § 101080). That declaration allows a county to use special investigatory and enforcement tools, as well as to secure “mutual aid” and financial assistance, to fully address the crisis. (*Id.* § 101085). However, the law incorporates important procedural safeguards to ensure that a county-declared emergency does not take on a life of its own and persists indefinitely:

Whenever a local health emergency is declared by a local health officer pursuant to this section, ***the local health emergency shall not remain in effect for a period in excess of seven days unless it has been ratified by the board of supervisors***, or city council, whichever is applicable to the jurisdiction. The board of supervisors, or city council, if applicable, shall review, ***at least every 30 days*** until the local health emergency is terminated, the need for continuing the local health emergency and shall proclaim the termination of the local health emergency at the earliest possible date that conditions warrant the termination.

(*Id.* § 101080 (emphasis added)).

Another statutory scheme that confers emergency powers on counties is the Emergency Services Act. One purpose of the Act is to confer certain “emergency powers,” not just upon the Governor, but on “the chief executives and governing bodies of ***political subdivisions of this state***” as well. (Gov. Code § 8550(a) (emphasis added)). Importantly, another purpose of the Act is to ensure that “all emergency services functions of this state be coordinated as far as possible with the comparable functions of its political subdivisions, of the federal government . . . , of other states, and of private agencies of every type, to the end that the most effective use may be made of all manpower, resources, and facilities for dealing with any emergency that may occur.” (*Id.* § 8550). Significantly, a “political subdivision” is defined to include “any . . . county.” (*Id.* § 8557). Thus, the Emergency Services Act unequivocally establishes a system of coordination and power-sharing among State and local actors, including counties, to efficiently address statewide emergencies. The Act does not come close to setting up a system of one-person, indefinite rule in the office of the Governor or of the CDPH Director.<sup>4</sup> (*Id.* § 8569 (requiring Governor to “coordinate the preparation of plans and

---

<sup>4</sup> Of course, if Respondents’ expansive interpretation of the statutes has any merit (which it does not), then such interpretation raises serious nondelegation concerns, as explained in Appellants’ briefs. (AOB 32, 60).

programs for the mitigation of the effects of an emergency by the political subdivisions of this state,” such as counties)).

The Act does provide the Governor with seemingly broad powers during a state of emergency, under section 8627 of the Government Code. That provision states that the Governor “shall, to the extent he deems necessary, have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes of this chapter.” (*Id.* § 8627). Section 8627 further states that, in exercising said police power, the Governor “shall promulgate, issue, and enforce such orders and regulations as he deems necessary, in accordance with the provisions of Section 8567.” (*Id.*). Similarly, the Health and Safety Code confers seemingly broad powers on the Director of the California Department of Public Health (CDPH). The Director may “take measures as are necessary to ascertain the nature of the disease and prevent its spread” such as taking control of “the body of any living person, or the corpse of any deceased person.” (Health & Safety Code § 120140).

But neither section 8627 of the Government Code nor section 120140 of the Health and Safety Code can be read in isolation. Instead, the provision must be understood and applied in the context, not just of the nondelegation doctrine (AOB at 47), but

counties’ authority under the Constitution and the above statutory schemes to manage emergencies within their jurisdictions. Simply put, nothing in the Constitution, any statute, or any case has abrogated counties’ full authority to address public health crises within their jurisdiction—even when the Governor and the CDPH Director invoke their authority to do the same.

It is important to note that *Amici* and other counties diligently and quickly invoked the powers reserved to them by statute. For example, on March 2, 2020, Placer County Public Health reported the first confirmed case of COVID-19 in the County. The County took immediate action to avail itself of its emergency powers. The next day, the County’s Public Health Officer issued a Declaration of Local Health Emergency, pursuant to section 101080 of the Health and Safety Code, and the County Executive Officer issued a proclamation of the existence of a county-wide local emergency, pursuant to sections 8630 and 8558 of the Government Code.<sup>5</sup> On March 19, the County issued a “shelter-in-place” directive to its residents in an effort to contain transmission of COVID-19.<sup>6</sup>

Similarly, the San Joaquin County Public Health Services declared a Local Public Health Emergency on March 12, 2020,

---

<sup>5</sup> See press release at: <https://www.placer.ca.gov/6437/Placer-County-confirms-second-case-of-CO> (last visited on May 4, 2021).

<sup>6</sup> See press release at: <https://www.placer.ca.gov/DocumentCenter/View/43269/PlacerCounty-COVID-19-Directive> (last visited on May 4, 2021).

after identifying only three cases of COVID-19 in its jurisdiction.<sup>7</sup> And, on March 17, 2020, the Fresno County Board of Supervisors formally adopted a Local Emergency resolution and activated its Emergency Operations Center (EOC) to coordinate the County’s ongoing response to the evolving COVID-19 pandemic.<sup>8</sup> *Amici* did not delay in taking appropriate action to address the pandemic within their jurisdictions, as appropriate to their circumstances, pursuant to the powers conferred on them by the Constitution and state statutes.

In sum, the Constitution and statutes provide counties with substantial powers and tools to manage public emergencies occurring within their jurisdictions, including pandemics such as COVID-19. As *Amici* have shown, counties are able—and willing—to exercise that authority to meet the most pressing public-health challenges. Indeed, given their unique circumstances (including denser populations), some counties, such as San Francisco, have exercised their police powers to enact and enforce even *stricter*

---

<sup>7</sup> See press release at: [http://www.sjcphs.org/assets/20200312\\_PR\\_Declaration%20of%20Local%20Health%20Emergency%20-%20COVID-19.pdf](http://www.sjcphs.org/assets/20200312_PR_Declaration%20of%20Local%20Health%20Emergency%20-%20COVID-19.pdf) (last visited on May 4, 2021).

<sup>8</sup> See press release at: <https://www.co.fresno.ca.us/Home/Components/News/News/545/1556> (last visited on May 4, 2021).

rules on residents and businesses than the Blueprint contemplates.<sup>9</sup>

**C. Respondents' Actions Have Impaired Counties' Constitutional and Statutory Police Powers, at a Devastating Cost To Their Residents and Businesses**

It is easy to see how Respondents' top-down approach to addressing the pandemic—as currently reflected in the Blueprint—has invaded the robust police and emergency powers conferred on counties by the Constitution, the Health and Safety Code, and the Government Code. Significantly, a county is expected to enforce Respondents' orders, and in no case may it pursue a more *flexible* strategy that may be justified by the specific facts and unique circumstances of the locality, its resources, its geography, or its demographics.

In addition to the legal concerns that *Amici* have with Respondents' orders, Respondents' actions have visited upon *Amici's* residents and businesses untold devastation. *Amici* consider it important to share with the Court the harm that Respondents' Blueprint and associated shut-down orders have caused within their jurisdictions.

---

<sup>9</sup> See Order of the Health Officer No. C19-07v (City and County of San Francisco) at the following site: <https://www.sfdph.org/dph/alerts/files/C19-07-Shelter-in-Place-Health-Order.pdf> (last visited on May 4, 2021). The Blueprint allows counties to be more, but not less, restrictive than State rules promulgated by Respondents.

**Placer County.** As recounted above, Placer County includes the northern portion of Lake Tahoe. Placer's Lake Tahoe region relies almost exclusively on tourism for its economy. The tourism economy is based on two seasons: a very short summer season and the winter ski season. Most, if not all, businesses in the Tahoe region rely on tourism for their livelihood.

Respondents' original shutdown closed down the 2020 summer season, and the subsequent shutdown closed down the peak Christmas holiday. This, coupled with the move to the Blueprint model and the fact that Placer remained in the purple tier for an extended period of time, caused many restaurants and small businesses to shut down *permanently*. Even now, as the County struggles to reach the orange tier, Respondents' restrictions on existing businesses, lodging and the ski resorts has significantly reduced the amount of revenue the businesses are able to collect. In addition to the shuttering of lodging, the Transient Occupancy Tax (TOT) that the County collects from the Tahoe Region (10%, 2% higher than in the remainder of the county) has fallen significantly. TOT revenues are used by the County to fund affordable housing and roadway improvement projects in Tahoe. The lower TOT revenue jeopardizes the ability of the County to take on important infrastructure improvements and affordable housing projects that were slated for this fiscal year and will likely cause an impact on the ability to move forward with

these or other projects in the next fiscal year. With no “green tier” in the Blueprint, it is unclear when the County might be able to recover its TOT revenue, or when the County’s businesses that remain partially open may be able to recover lost revenues.

The unincorporated area of Placer County had numerous small, locally owned businesses, agricultural businesses (such as wineries and tasting rooms), and restaurants before the pandemic. The constant moving back and forth amongst the tiers in the Blueprint has been more devastating than the initial shutdown or subsequent Christmas holiday shutdown. These businesses invested thousands of dollars to implement the CDC reopening requirements. With every move backwards on the tier system these businesses were (and are) forced to significantly reduce activities, layoff staff and/or temporarily close. Then, with any expected reopening, businesses have to spend more money reopening. Although the County finally received \$41 million in federal funding, it was not received until September and November. While the County elected to grant a significant portion of the federal funding to keep small, locally owned businesses open, the fact is that the final move back to the purple tier earlier this year caused many of the businesses to close permanently. The County and these business owners and residents will not recover in the near term. With no prospect of a full reopening in the



Blueprint—because there is no “green” tier—Placer County’s local economy will continue to suffer.

**San Joaquin County.** The crossroads of the State’s logistic enterprises are: Interstates 5 and 99, 120, 205 and 580; the Stockton Deep water port; the Union Pacific Railroad intermodal facility; and the Stockton Regional airport. Enabling the transfer of goods from aircraft, ship, rail and truck through the 700 logistic businesses in San Joaquin County are the over-20,000 “essential workers” whose ability to work was negatively impacted by the Blueprint. Despite being a transportation hub, the County’s sales tax revenue for fuel fell by 20%.

Outside of the seven cities in the County, 3,400 farms consisting of 772,762 acres produce the wine, nuts, vegetables, fruits and dairy consumed by the residents of the world. The northeast section of the County is the home of the Lodi and Mokelumne appellations—home to more than 60 wineries and tasting rooms, all of which were significantly impacted by the initial, extended closure and then the continued closures and restrictions under the Blueprint. Small businesses, especially area restaurants, were hardest hit by the Blueprint model. Sales tax revenue in the unincorporated county experienced a 21% year over year decrease. While other counties floated between various Blueprint tiers with ever-loosening restrictions, San Joaquin

County remained in the most restrictive tier for most of the past year, with only a few weeks in the red tier in late summer of 2020.

The extended restrictions on the restaurants reduced the demand for the fruits and vegetables grown on many of those farms. Many of these businesses were incapable of sustaining themselves at the reduced levels mandated by the Blueprint. Federal grants were made available by the County, but they contained significant restrictions, making many businesses ineligible to receive the assistance.

**Fresno County.** Fresno County's poverty rate is 24.1% compared to a statewide average of 14.3%. Many of the residents of the County rely on jobs in the service sector such as the restaurant industry, which has been heavily impacted by the closures mandated by the Blueprint. Many smaller businesses have closed permanently both in the unincorporated areas and the cities within the County. As a result, the County, which is responsible for providing social services, public health services, and behavioral health services, has had its resources severely stretched by the extended closures, and the erratic and constant changes in standards issued pursuant to the Blueprint.

County revenues were severely impacted by the closures, particularly in the second quarter of 2020. If the current situation continues, or if there is a return to the more severe mandates and restrictions Respondents imposed in 2020, the County will

struggle to meet its basic obligations to unincorporated communities that rely on County infrastructure and services.

In addition to the adverse economic impacts that Respondents have visited upon the County, the County has an interest in assuring the constitutional administration of laws as they affect the County. The potential misuse of executive power involved in the unchecked exercise of emergency powers supplants the legitimate role of the State Legislature, and results in arbitrary and uncertain dictates that make planning for and providing the critical services that are the County's responsibility nearly impossible.

**D. The Third Appellate District's Recent Decision in *Newsom v. Superior Court* Should Not Be Followed**

Respondents defend their actions on the grounds that section 8627 of the Government Code (relating to the Governor's powers) and section 120140 of the Health and Safety Code (relating to the CDPH's powers) grant them open-ended authority to make whatever legislative orders they deem necessary to control the spread of COVID-19. As Appellants explain in their briefs, the statutes should be reasonably interpreted to deny Respondents a general police power, unfettered by any real standards or controls, in order to avoid violation of the nondelegation doctrine. (*See* AOB, Parts IIB & IIC; Reply Brief, Parts I.B and I.C).

*Amici* will not repeat Appellants' arguments here. Instead, they wish to bring to the Court's attention a decision of the Third

Appellate District in *Newsom v. Superior Court*, published on May 5, in which the court held that section 8627 authorizes the Governors’ sweeping COVID-19 orders without running afoul of the nondelegation doctrine.<sup>10</sup> (*Newsom v. Super. Ct.*, 2021 Cal.App. LEXIS 383 (May 5, 2021) (Case No. C093006)). Respectfully, *Amici* submit that the decision’s analysis is misguided and should not be followed.

First, section 8627 limits the power conferred on the Government to such “police power” as is “vested in the state by the Constitution and laws of the State of California.” (Gov. Code § 8627). Properly construed so as to avoid any nondelegation problem, that limiting language authorizes the Governor himself to exercise all rulemaking and enforcement powers that already reside in the Executive Branch, including administrative agencies. Whereas in nonemergency circumstances, only an administrative agency might have the power to engage in rule making and issue orders, section 8627 gives the ***Governor alone***—in an emergency—to exercise that power. (*See, e.g., Farmers Ins. Exch. v. California* (1985) 175 Cal.App.3d 494, 500-01 (affirming that the Governor may direct state agencies and resources in responding to

---

<sup>10</sup> The decision does not address whether section 120140 of the Health and Safety Code confers on the CDPH Director an unbridled police power to address public-health emergencies—and, if so, whether such a delegation of legislative authority violates the nondelegation doctrine. It addresses only section 8627 of the Government Code from the Emergency Services Act.

an emergency under section 8627)). In effect, the statute can be read to consolidate all executive power—normally dispersed among the Governor and administrative agencies—in the office of the Governor.

The court in *Newsom* took a narrow view of the “police power.” In two lines, it concluded that the “police power” means only the “power to legislate,” to the exclusion of the power to *execute* the law. (*Newsom*, 2021 Cal.App. LEXIS at \*21). That view of the “police power” does not square with how the concept has been defined in the Constitution or in the case law. (See, e.g., Const. art. XI, § 7 (describing cities’ and counties’ power to “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws”); *San Francisco Police Officers’ Assn. v. San Francisco Police Com.* (2018) 27 Cal.App.5th 676, 685 (“The power of a city to enact and enforce regulations relating to the use of firearms by police officers is in the exercise of the police power . . . .”); see also Albert C. Lin, *Public Trust and Public Nuisance: Common Law Peas in a Pod?*, 45 U.C. Davis L. Rev. 1075, 1093 (2012) (“Public nuisance presupposes trust in executive branch officials to exercise the police power appropriately to protect public rights, subject to judicial oversight.”)). If, contrary to the *Newsom* decision, the “police power” encompasses the authority to execute the law, then section

8627 can and should be limited to conferring power on the Governor to execute *all* executive (and *only* executive) functions.

Second, the *Newsom* court saw no constitutional defect in a section 8627 that is interpreted to delegate all legislative power to the Governor. The parties in this case and in *Newsom* do not appear to dispute that, under California Supreme Court precedents, a delegation of legislative power is unconstitutional if the legislative body “(1) leaves the resolution of the fundamental policy issue to others,” “(2) fails to provide adequate direction for implementation of that policy,” **or** (3) fails to include “safeguards adequate to prevent . . . abuse” of the exercise of the delegated power. (*Gerawan Farming, Inc. v. Agric. Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1146, 1150-51; *see also* Resp. Br. at 45-46 (outlining *Gerawan* test; *Newsom*, 2021 Cal.App. LEXIS at \*22-23 (same)).

The *Newsom* court conceded that “section 8627 does not set forth express standards.” (*Newsom*, 2021 Cal.App. LEXIS at \*23). But it found implied standards in the *purpose* of the statute—namely (in the court’s words) “to provide a coordinated response to the emergency.” (*Id.* at \*25 (citing Gov. Code §§ 8550, 8569)). But stating the *objective* of a delegating statute is not the same as providing substantive criteria and guidance for legislating in a way that achieves that objective. Under what circumstances should the Governor issue emergency orders under the statute? What factors

should he weigh to decide the nature and scope of such orders, as well as which residents and businesses are made subject to them? What criteria should the Governor consider in modifying or terminating orders? The statute is utterly silent on these fundamental policy questions, rendering it unconstitutional. (*Sims v. Kernan* (2018) 30 Cal.App.5th 105, 111 (holding that the fundamental policy test asks whether the Legislature has made the truly “momentous decision[s]”; *In re Application of Peppers* (1922) 189 Cal. 682 (holding that the Legislature failed to resolve a fundamental policy in defining a defect in citrus that should prohibit its shipment, notwithstanding the statement of the statute’s purpose to protect the “reputation of the citrus industry”)).

In short, the *Newsom* court’s analysis on the first two *Gerawan* factors falls short. Section 8627 is an unconstitutional delegation of legislative power, because it leaves the resolution of fundamental policy questions to the Governor and fails to provide any substantive direction for implementing such policy.

Finally, the *Newsom* court concluded that section 8627 satisfies the third *Gerawan* factor—the provision of adequate safeguards against abuse of the exercise of legislative power. It held that “[t]he Governor’s obligation under the Emergency Services Act to terminate the emergency and thereby nullify orders issued under his emergency powers as soon as conditions warrant,

as well the Legislature’s authority to terminate the emergency at any time with the same effect, provides a safeguard for the delegation of quasi-legislative authority in section 8627.” (*Newsom*, 2021 Cal.App. LEXIS at \* 27). For these reasons, the *Newsom* Court concluded that the Act “and specifically section 8627 . . . is not an unconstitutional delegation of legislative power.” The analysis is incomplete.

The third *Gerawan* factor requires consideration of whether a delegation provides, not just safeguards, but safeguards that are “*adequate to prevent . . . abuse.*” (*Gerawan Farming*, 3 Cal.5th at 1150-51 (emphasis added)). Assuming *arguendo* that requiring the Governor to terminate his state of emergency “at the earliest possible date that conditions warrant” (Gov. Code § 8629) were a “safeguard,” it is far from clear that such a requirement is actually “adequate to prevent abuse.” As famed law professor Erwin Chemerinsky has aptly put it, “[g]overnment officials rarely voluntarily relinquish power.” (Erwin Chemerinsky, *To: President Barack Obama, Subject: Restoring Separation of Powers*, 35 Human Rights 6, 6 (2008)). The *Newsom* decision does not consider the salient fact that a Governor will rarely voluntarily relinquish emergency powers at the appropriate time.

Similarly, the Legislature’s discretion to end the Governor’s declaration of a state of emergency by “concurrent resolution” is not a meaningful safeguard that adequately prevents executive



abuse. (Gov. Code § 8567). In most cases, as in this one, the abuse of power lies, *not* in the Governor’s declaration of a state of emergency as such, but in some orders issued pursuant to that declaration. Even if both houses of the Legislature could come to agreement that such orders were unlawful, their only recourse under section 8567 would be to jointly terminate the state of emergency; the consequences would be to terminate the additional resources made available for emergencies, as well as to wipe out *all* executive orders—both the good and the bad. It strains credulity to believe that both houses of the Legislature would pursue that strategy as a means of addressing abusive orders. The *Newsom* court did not analyze or discuss these practical considerations, and simply assumed that availability of such a blunt legislative tool is “adequate . . . to prevent abuse.” (*Gerawan Farming*, 3 Cal.5th at 1150-51).

### III. CONCLUSION

This Court should reverse the Superior Court’s denial of a preliminary injunction and instruct it to enter a preliminary injunction in Appellants’ favor, enjoining Respondents from enforcing their unlawful Blueprint and related executive orders.

DATED: May 7, 2021.

Respectfully submitted,

/s/ Paul Beard II

---

Counsel for *Amici Curiae*  
COUNTIES OF FRESNO, PLACER  
AND SAN JOAQUIN

**CERTIFICATE OF COMPLIANCE**

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing **APPLICATION OF THE COUNTIES OF FRESNO, PLACER, AND SAN JOAQUIN COUNTY FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS, AS WELL AS THE PROPOSED AMICUS CURIAE BRIEF ITSELF**, are proportionately spaced, have a typeface of 13 points or more, and contain a total of 5906 words.

DATED: May 7, 2021.

/s/ Paul Beard II

---

*Counsel for Amici Curiae*

## DECLARATION OF SERVICE

I, Paul Beard II, declare as follows:

I am over the age of 18 years and am not a party to the above-entitled action. My business address is 4470 W. Sunset Blvd., Suite 93165, Los Angeles, CA 90027.

On May 7, 2021, a true copy of **APPLICATION OF THE COUNTIES OF FRESNO, PLACER, AND SAN JOAQUIN COUNTY FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS; PROPOSED AMICUS CURIAE BRIEF** was electronically filed with the Court through Truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's e-filing system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service.

LUKE WAKE  
Pacific Legal Foundation  
930 G Street  
Sacramento, CA 95814  
**Attorneys for Appellants**

AARON JONES  
Office of the Attorney General  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102  
**Attorneys for Respondents**

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

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

Date: May 7, 2021

/s/ Paul Beard II