No. F082357

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

GHOST GOLF, INC., DARYN COLEMAN, SOL Y LUNA MEXICAN CUISINE, AND NIEVES RUBIO,

Petitioners,

v.

GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF CALIFORNIA, XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA, SANDRA SHEWRY, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, ERICA S. PAN, IN HER OFFICIAL CAPACITY AS ACTING STATE PUBLIC HEALTH OFFICER,

Respondents.

On Appeal from the Superior Court of Fresno County
Case No. 20CECG03170

APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

NFIB SMALL BUSINESS LEGAL CENTER, INC.
Karen R. Harned*
Rob Smith*
555 12th St. NW, Ste. 1001
Washington, D.C. 20004

*not admitted in California

BENBROOK LAW GROUP, PC
Bradley A. Benbrook (177786)
Stephen M. Duvernay (250957)
400 Capitol Mall, Ste. 2530
Sacramento, CA 95814
Telephone: (916) 447-4900
Facsimile: (916) 447-4904

Attorneys for *Amicus Curiae*
NFIB Small Business Legal Center

CERTIFICATE OF INTERESTED PARTIES

The National Federation of Independent Business Small Business Legal Center certifies that there are no interested entities or persons that must be listed in this certificate under California Rules of Court, Rule 8.208.

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APPLICATION TO FILE *AMICUS CURIAE* BRIEF

To the Honorable Presiding Justice of the Court of Appeal, Fifth Appellate District:

Pursuant to Rule 8.200(c) of the California Rules of Court, the National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") respectfully applies for leave to file an *amicus curiae* in support of Petitioners Ghost Golf, Inc., et al.[1]

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small business in the nation's courts through representation on issues of public interest affecting small business. The National Federation of Independent Business (NFIB) is the nation's leading small business association representing members in Washington, D.C., and all 50 state capitols. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents approximately 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employees 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

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[1] The proposed brief was authored in whole by counsel for NFIB Legal Center. No other counsel or party made a monetary contribution intended to fund the briefs preparation or submission.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact the small business community. NFIB Legal Center files in this case because it raises an important issue for small business owners. The proposed amicus curiae brief makes three key points:

The Legal Center files this friend of the court brief to make three key points:

First, California's small businesses have suffered and continue to suffer irreparable harm because of actions taken in official capacity by the Governor of California to address the COVID-19 pandemic.

Second, those actions by the Governor to address the COVID-19 pandemic have violated California's statute on emergencies and its constitutional separation of powers.

Third, the Court should reverse the Superior Court's denial of the preliminary injunction against enforcement of unconstitutional COVID-19 related orders issued by the Governor and his agents.

NFIB emphasizes that a preliminary injunction against the unconstitutional actions of the Governor is necessary and does not prejudice the ability of the California Legislature and Governor to enact appropriate measures for the public health to address the COVID-19 pandemic. Nor would a preliminary injunction against the Governor's actions disturb the ability of counties and municipalities to enact measures protecting the public health.

Accordingly, amicus NFIB Legal Center respectfully urges this Court to grant this application and file the attached *amicus curiae* brief.

Respectfully submitted,

Dated: April 13, 2021

NFIB Small Business Legal Center
Karen R. Harned
Rob Smith

Benbrook Law Group, PC
Bradley A. Benbrook
Stephen M. Duvernay

By: /s/ Stephen M. Duvernay
Stephen M. Duvernay

Attorneys for *Amicus Curiae* NFIB Small Business Legal Center

AMICUS CURIAE BRIEF

SUMMARY OF ARGUMENT

The NFIB Small Business Legal Center files this friend of the court brief to make three key points:

(1) California's small businesses have suffered and continue to suffer irreparable harm because of actions taken in official capacity by the Governor of California to address the COVID-19 pandemic;

(2) Those actions by the Governor to address the COVID-19 pandemic have violated California's statute on emergencies and its constitutional separation of powers; and

(3) The Court should reverse the Superior Court's denial of the preliminary injunction against enforcement of unconstitutional COVID-19 related orders issued by the Governor and his agents.

NFIB emphasizes that a preliminary injunction against the unconstitutional actions of the Governor is necessary and does not prejudice the ability of the California Legislature and Governor to enact appropriate measures for the public health to address the COVID-19 pandemic. Nor would a preliminary injunction against the Governor's actions disturb the ability of counties and municipalities to enact measures protecting the public health.

ARGUMENT

1. California's Small Businesses Suffer Irreparable Injury Because of the Actions of the Governor Beyond His Constitutional Powers

State Government directives to Californians to stay home, close businesses, or both, including the "*Blueprint for a Safer Economy*" and related orders issued by the Governor, have put small businesses in dire straits. As small businesses continue to fold, they suffer irreparable harm.

The NFIB Research Center consistently collects information from small businesses across America, including California, about the financial struggles that they face due to government mandates imposed in response to the COVID-19 pandemic. A recent survey of over 20,000 member businesses conducted in mid-March revealed that 51 percent of respondents who received a Paycheck Protection Program loan in 2020 already applied for a second PPP loan or were considering doing so.[2] Over three-fourths of those not applying or not considering applying were doing so because they do not meet the "gross receipts" eligibility requirement, not because they are financially stable.[3] Twenty-two percent of respondents reported that

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[2] NFIB RESEARCH CENTER, COVID-19 SMALL BUSINESS SURVEY (16) 6 (Mar. 2021), https://assets.nfib.com/nfibcom/Covid-19-16-Questionnaire.pdf.

[3] *Id.* at 7. The "gross receipts" eligibility requirement refers to the requirement for second-draw PPP loans that a borrower must have suffered a 25 percent loss in gross receipts for all quarters of 2020 compared to all quarters of 2019, or a 25 percent loss in gross receipts for a specific 2020 quarter compared to that same 2019 quarter. Thus, even a business struggling mightily might be

sales are still fifty percent or less than Q1 2020 levels, while twenty-four percent reported the same compared to Q1 2019 levels.[4] Perhaps the most troubling statistic is that 13 percent of businesses expected to close within the next 6 months if current economic conditions persist.[5] NFIB's previous survey revealed that 15 percent expected to close their business within that same timeframe.[6] An additional early-October survey revealed 42 percent of respondents were in danger of going out of business during the fourth quarter of 2020.[7]

In California, just a few short months after introduction of the *Blueprint* framework, small business revenue was down 33.8 percent as of December 31 compared to January 2020.[8] In the almost-three months since, little has improved; small business revenue continues to hover around 30 percent less than that of

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ineligible for a second PPP loan if they cannot satisfy this requirement.

4 *Id.* at 9.

5 *Id.*

6 NFIB RESEARCH CENTER, COVID-19 SMALL BUSINESS SURVEY (15) 10 (Jan. 2021), https://assets.nfib.com/nfibcom/Covid-19-15-Questionnaire_.pdf.

7 Justin Lahart, *Covid is Crushing Small Businesses. That's Bad News for American Innovation.*, WALL ST. J. (Oct. 9, 2020), https://www.wsj.com/articles/covid-is-crushing-small-businesses-thats-bad-news-for-american-innovation-11602235804 (discussing the results of a survey done by Alignable).

8 OPPORTUNITY INSIGHTS: ECONOMIC TRACKER, *Percent Change in Small Business Revenue (California)*, https://tracktherecovery.org/ (last visited Mar. 25, 2021).

January 2020.[9] Specifically, the Leisure & Hospitality industry's revenue was down a whopping 72.1 percent as of December 31st compared to January 2020.[10] One representative from the Silicon Valley Small Business Development described the *Blueprint* tier formula as "frustrating and confusing," as well as causing "more businesses [to] be shuttered indefinitely."[11] Small business owners are desperate as they lose thousands of dollars each month, urge targeted restrictions to non-safety-protocol-compliant businesses instead of the *Blueprint*'s one-size-fits-all framework, and think to themselves that the "cure [the government's] come up with is worse than the pandemic."[12] As of mid-September 2020, California ranked second in business closure rates per 1,000, trailing only Hawaii.[13] In short, America's small businesses, including those in California,

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9 *Id.*

10 *Id.* (last visited March 18, 2021).

11 Kris Reyes, *Bay Area Small Businesses Hit Their Breaking Point as Gov. Newsome Issues New Lockdown*, ABC (Nov. 17, 2020), https://abc7news.com/coronavirus-san-jose-lion-plaza-small-businesses/8029385/.

12 *See* Artie Ojeda, *Ramona Small Businesses Plead 'Let Us Reopen' as Sobering Economic Numbers Released*, NBC SAN DIEGO (Oct. 15, 2020), https://www.nbcsandiego.com/news/small-businesses-plead-let-us-reopen-as-sobering-economic-numbers-released/2425299/ (discussing two small business owners in the San Diego region and the direct financial impact caused by the government's COVID-19 response).

13 Anjali Sundaram, *Yelp Data Shows 60% of Business Closures to the Coronavirus Pandemic Are Now Permanent*, CNBC (last updated Dec. 11, 2020), https://www.cnbc.com/2020/09/16/yelp-data-shows-60percent-of-business-closures-due-to-the-coronavirus-pandemic-are-now-permanent.html.

have suffered and continue to suffer irreparable harm from government mandates, including in California the "*Blueprint for a Safer Economy*" and related orders issued by the Governor.

The *Blueprint* not only imposes irreparable financial harm, but continuing operational harm. Under the regime, small businesses face continued uncertainty and ever-changing rules, sometimes on a weekly basis. A business composing biweekly employee schedules must constantly check to ensure its county has not moved into a new tier. Similarly, businesses that have perishable inventory, like restaurants, need to endlessly consider whether they could be shut down or severely restricted in the coming weeks.

The closure and capacity restrictions of the Governor's *Blueprint* framework threatens to close an immeasurable number of small businesses in the coming months. In California alone, the number of small businesses open as of December 31 compared to January of 2020 decreased by 36.6 percent.[14] As of March 16, that decrease stood at 35.3 percent.[15] Because of the mental, physical, and financial consequences flowing from losing one's business, this Court should follow the lead of the U.S. Court of Appeals for the Ninth Circuit and conclude these harms are sufficiently irreparable to justify injunctive relief. *See American Trucking Assocs., Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) ("the loss of

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[14] OPPORTUNITY INSIGHTS: ECONOMIC TRACKER, *Percent Change in Number of Small Businesses Open (California)*, https://tracktherecovery.org/ (last visited Mar. 25, 2021).

[15] *Id.*

one's [business] does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of [losses]") (alteration in original, citation omitted). The U.S. Court of Appeals for the Second Circuit agrees, noting a "*threat* to the continued existence of a business can constitute irreparable injury." *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 435 (2d Cir. 1993) (quoting *John B. Hull, Inc. v. Waterbury Petroleum Prods. Inc.*, 588 F.2d 24, 28-29 (2d Cir. 1978)). No award of monetary damages can reopen one's lost business, rehire employees, discharge debt, repurchase sold physical capital, reinvigorate community goodwill, reverse the toll of stress from closure, reverse emotional suffering, and eliminate past financial hardship from closure. Thus, the harm suffered by small businesses is unquestionably irreparable.

2. Actions by the Governor to Address the COVID-19 Pandemic Violate California's Emergency Statute and Constitutional Separation of Powers

The Governor lacks the power to impose the *Blueprint* restrictions on California. The Governor's delegated legislative authority in an emergency[16] extends to making, amending, and rescinding orders and regulations, but does not extend to making or amending statutes. And even if the Legislature were to attempt by law to delegate emergency authority to make statutes, such a delegation would violate the separation of powers for which the California Constitution expressly provides.

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16 *See* CAL. GOV. CODE § 8627.

The Governor has claimed § 8627 as a plenary grant of authority to take whatever actions he deems necessary to address an emergency such as the COVID-19 pandemic. Section 8627 states:

> During a state of emergency the Governor shall, to the extent he deems necessary, have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes of this chapter. In exercise thereof, he shall promulgate, issue, and enforce such orders and regulations as he deems necessary, in accordance with the provisions of Section 8567.[17]

The Court should not construe the phrase "all police power vested in the state" to grant the Governor authority in an emergency to make, amend, or repeal a statute.

The U.S. Supreme Court has stated on multiple occasions that the police power of the state rests solely with the legislature. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) (defining "the police power" as "essentially the product of *legislative determinations* addressed to the purposes of government" (emphasis added)); *Manigault v. Springs*, 199 U.S. 473, 485 (1905) (commenting on an action by a "*state legislature*, exercising *its* police power" (emphasis added)); *Stone v. Mississippi*, 101 U.S. 814, 817 (1880) ("[T]he legislature cannot bargain away the *police power* of a State. . . . no *legislature* can curtail the power of *its* successors to make such *laws* as *they* deem proper in matters of *police*." (citation omitted, emphasis added)). The California Supreme Court recognizes the

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17 *Id.*

same. *See State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners*, 40 Cal.2d 436, 440 (1953) (repeatedly referring to the police power as the legislature's domain and the test for a valid act of the legislature).[18]

The Court should hold that § 8627 does not delegate power to the Governor to make, amend, or repeal statutes. But if the Court were instead to hold that § 8627's delegation in an emergency of all the state's police power gives the Governor authority to make, amend, or repeal statutes by himself, the Court should then hold that the delegation violates the California Constitution's express separation of powers.

Article III of the California Constitution states that "[t]he 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.

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[18] The entirety of the relevant passage reads:

> If the *statute* can be sustained as constitutional it is because it is a reasonable *exercise of the police power* of the state. Under the law generally *that power extends to legislation enacted* to promote the public health, safety, morals and general welfare. It has rightly been said that 'Such (police) regulations may validly be imposed if they constitute a reasonable exertion of governmental authority for the public good. If there is a *proper legislative purpose, a law enacted* to carry out that purpose, if not arbitrary nor discriminatory, must be upheld by the courts.' [citation omitted]. However, in the *exercise of the police power the law places limits on the discretion of the legislature*.

State Bd. of Dry Cleaners, 40 Cal.2d at 440.

Const., art. III, § 3 (emphasis added). Article IV specifies that "[t]he legislative power . . . is vested in the California Legislature[.]" Cal. Const., art. IV. § 1. Finally, Article V vests the "executive power" in the Governor. Cal. Const., art. V., § 1.[19] The primary purpose of the separation of powers doctrine is to "prevent the combination in the hands of a single person or group of the basic or fundamental powers of government." *Carmel Valley Fire Protection Dist. v. State*, 25 Cal.4th 287, 297 (2001) (quoted source omitted). While the California Supreme Court has said these provisions do not prevent some overlapping powers, it has repeatedly affirmed that each of the branches has "core" or "essential" powers upon which the others cannot intrude. *See e.g.*, *People v. Bunn*, 27 Cal.4th 1, 14–15 (2002). "At the core of the legislative power is the authority to make laws." *Cal. Redevelopment Ass'n v. Matosantos*, 53 Cal.4th 231, 254 (2011) (cited source omitted). This "core" function to make law is simply the "power to weigh competing interests and determine social policy." *Bunn*, 27 Cal.4th at 14–15 (cited sources omitted); *Carmel Valley Fire Protection Dist.*, 25 Cal.4th at 299; *see also Nougues v. Douglass*, 7 Cal. 65, 70 (1857) ("The legislative power is the creative element in the government" and "makes the laws[.]"); *see In re Certified Questions from United States Dist. Court, W. Dist. of Michigan, S. Div.*, No. 161492, 2020 WL 5877599, at *14 (Mich. Oct.

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[19] Without implementation of these crucial provisions of the California Constitution, it is doubtful that California would have the "Republican Form of Government" that the Constitution of the United States guarantees to each state. U.S. CONST., art. IV, § 4 ("The United States shall guarantee to every State in this Union a

2, 2020) ("We accordingly conclude that the delegation of power to the Governor to 'promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property,' MCL 10.31(1), constitutes an unlawful delegation of legislative power to the executive and is therefore unconstitutional under Const. 1963, art. 3, § 2, which prohibits exercise of the legislative power by the executive branch.").

Whether the Court concludes that § 8627 does not grant authority to legislate, or instead concludes that § 8627 grants such authority but the grant violates the California Constitution's separation of powers provision and therefore is void, the Court logically must conclude either way that the Governor has no power to legislate. Therefore, the ultimate issue the Court faces is whether the Governor, by issuance of the orders imposing his *Blueprint*, legislated.

The California Supreme Court has identified what constitutes the exercise of legislative power. In *Carmel Valley Fire Protection Dist.*, the Court stated:

> Essentials of the legislative function include the determination and formulation of legislative policy. . . . [¶]
> . . . For the most part, delegation of quasi-legislative authority to an administrative agency is not considered an unconstitutional abdication of legislative power. 'The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and

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Republican Form of Government . . . .").

> in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'

25 Cal.4th at 299 (quoted and cited sources omitted).

That court has also made clear how to distinguish an unconstitutional attempt to delegate authority to legislate from a constitutional delegation of discretion in the execution of the law. In *Gerawan Farming, Inc. v. Agric. Labor Relations Bd.*, the Court explained:

> 'The doctrine prohibiting delegations of legislative power does not invalidate reasonable grants of power to an administrative agency, when suitable safeguards are established to guide the power's use and to protect against misuse.' Accordingly, '[a]n unconstitutional delegation of authority occurs only when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy.'

3 Cal.5th 1118, 1146–47 (2017) (quoted and cited sources omitted).

Applying the standards of *Carmel Valley Fire* and *Gerawan Farming*, it is clear that the Governor's orders issuing the *Blueprint* constituted an unconstitutional exercise of legislative power. Section 8627 of the Government Code, on which the Governor bases the claim of authority to issue the *Blueprint*, both (1) left to the Governor rather than the legislature the resolution of fundamental policy issues, and (2) gave no direction for the implementation of a policy set by the legislature. Examples of the fundamental policy

issues left to the Governor rather than the legislature include: (1) balancing health requirements of Californians and economic requirements of Californians during a lethal pandemic; (2) deciding the degree of personal liberty Californians may exercise, as reflected in orders concerning who must stay home and when; and (3) deciding the degree of economic liberty Californians may exercise, as reflected in orders concerning what businesses must stay open, may stay open, and must close. No more fundamental policy issue could exist than deciding the extent to which the state will curtail the basic physical freedom of the citizens of the state. Further, § 8627 purported to give the entire police power of the State of California to the Governor in an emergency to use "to the extent he deems necessary," a standardless grant of legislative authority. Thus, the Governor's exercise of authority under § 8627 to issue the *Blueprint*-related orders violated California's constitutional separation of powers.

3. The Court Should Reverse the Superior Court's Denial of the Preliminary Injunction Preventing the Governor from Enforcing *Blueprint*-Related Orders

The *Blueprint* framework is the product of the lawmaking and law executing powers in the hands of one person, the Governor. Because lawmaking is the very "core" function of the legislative branch, and this "core" function cannot reside in a non-legislative branch, the Blueprint framework violates the California Constitution's separation of powers. The Court should hold in favor of the plaintiff-appellants, who suffer from the Governor's exercise of authority in violation of the California Constitution.

The plaintiff-appellants have demonstrated a likelihood that they will prevail on the merits at trial by showing that the Governor's *Blueprint*-related orders violate the California constitutional separation of powers. They have also shown that the harms they will likely sustain, which are irreparable in the case of many small businesses, outweigh any harm the defendants are likely to suffer if a preliminary injunction issues. Accordingly, Plaintiff-Appellants have met their burden for a preliminary injunction against the Governor's enforcement of the *Blueprint*-related orders. *See Butt v. State of California*, 4 Cal.4th 688, 677–78 (1992) ("In deciding whether to issue a preliminary injunction, a court must weigh two 'interrelated' factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction." (cited source omitted)).

Californians have significant interests in having legislation in California made by the California Legislature as the California Constitution provides. Accordingly, the Court should reverse the Superior Court's denial of the preliminary injunction to prohibit the Governor from enforcing the *Blueprint*-related orders due to their violation of the California constitutional separation of powers. Such a holding ensures compliance with the California Constitution's separation of powers and protects the liberties of Californians.

CONCLUSION

For the reasons set forth above, *amicus curiae* NFIB Small Business Legal Center urges the Court to reverse the denial of the Superior Court's preliminary injunction against enforcement, by the Governor in his official capacity and his agents, of *Blueprint*-related orders issued by the Governor.

Respectfully submitted,

Dated: April 13, 2021

NFIB Small Business Legal Center
Karen R. Harned
Rob Smith

Benbrook Law Group, PC
Bradley A. Benbrook
Stephen M. Duvernay

By: /s/ Stephen M. Duvernay
Stephen M. Duvernay

Attorneys for *Amicus Curiae* NFIB Small Business Legal Center

WORD COUNT CERTIFICATION

I certify, pursuant to Rule 8.204(c) of the California Rules of Court, that the attached brief, including footnotes, but excluding the caption page, tables, and this certification, as measured by the word count of the computer program used to prepare the brief, contains 3,124 words.

Dated: April 13, 2021

/s/ Stephen M. Duvernay
Stephen M. Duvernay