

 New Civil Liberties Alliance

August 12, 2024

Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-4797

**Via TrueFiling**

*Re: Ghost Golf, Inc. v. Newsom, Court of Appeal Case No. F085403  
Superior Court Case No. 20CECG03170; Amicus Letter Supporting Petition for Review*

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

The New Civil Liberties Alliance (“NCLA”) respectfully requests permission to file this *amicus curiae* letter pursuant to Rule 8.500(g) in support of Ghost Golf, Inc.’s petition for review in the above-referenced case, which raises an important nondelegation issue under the California Constitution.

The Court should grant review because the court below departed from this Court’s precedent requiring clear standards to guide delegations of legislative power. The court below held that the Emergency Services Act’s delegation of pure lawmaking power to the Governor was nonetheless constitutional because the Legislature’s ability to end the emergency declaration provided an adequate safeguard against abuse of the Act’s standardless delegation. Review is needed to vindicate this Court’s mandate for clear standards to constrain nondelegation or at least clarify what safeguards suffice in the absence of clear standards.

### **About Our Organization**

NCLA is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from the administrative state. Primarily, NCLA defends civil liberties by asserting constitutional constraints against federal agencies. NCLA’s interest in protecting Americans’ civil liberties extends not only to threats from the federal government, but from state governments as well.

### **Review Is Needed to Address the Fifth District’s Departure from this Court’s Analytical Framework for Nondelegation Challenges Under the California Constitution**

Article III, § 3 of the California Constitution provides: “The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.” CA. Const. art. 3, § 3. Article IV further states that “[t]he legislative power of this State is vested in the California Legislature which consists of

the Senate and Assembly,” confirming that legislative power cannot be divested and exercised by executive officials. CA. Const. art. 4, § 1. The nondelegation principle in California “rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues.” *Kugler v. Yocum*, 69 Cal. 2d 371, 376 (1968). That is because “the Legislature as the most representative organ of government should settle insofar as possible controverted issues of policy[.]” *Clean Air Constituency v. California State Air Res. Bd.*, 11 Cal. 3d 801, 817 (1974).

This Court more recently set forth a clear two-part analytical framework for assessing nondelegation challenges in *Gerawan Farming, Inc. v. Agric. Lab. Rel. Bd.*, 3 Cal. 5th 1118 (2017). *First*, the statute may not “leave the resolution of fundamental policy issues to others” and therefore must “provide adequate direction” to the agency. *Id.* at 1146. *Second*, “[i]n addition to sufficiently clear standards, a statute delegating legislative power must be accompanied by safeguards adequate to prevent its abuse.” *Id.* at 1150 (cleaned up).

*Ghost Golf* departs from that standard by holding that safeguards, by themselves, suffice to make a delegation constitutional, and that clear standards of the kind *Gerawan* requires are unnecessary where adequate safeguards exist. The delegation at issue in *Ghost Golf* was broad. The Emergency Services Act (ESA) gave the Governor the authority to exercise “all police power vested in the state,” which is “generally the power to legislate.” *Ghost Golf*, 102 Cal. App. 5th at 102. This was a delegation of pure legislative power to the Governor to wield in times of emergency, which he could declare on his own authority. Though the court below attached the prefix “quasi” to the Governor’s orders issued pursuant to this delegation, his actions under the ESA were legislative in the fullest sense of the word. Indeed, the court bluntly recognized that the “ESA permitted the Governor to amend or make new laws.” *Id.* Such a pronouncement cannot be reconciled with Article III, § 3’s plain text forbidding executive officials from exercising legislative power.

Yet, the Fifth District in *Ghost Golf* did precisely that. In doing so, it departed from this Court’s holding in *Gerawan* that a statute must contain “clear standards” to guide the executive official’s exercise of delegated power. According to the court below, “of greater significance than ‘standards’ is the requirement that legislation provide ‘safeguards’ against the arbitrary exercise of quasi-legislative authority.” *Ghost Golf*, 102 Cal. App. 5th at 105 (quoting *Nemsom v. Superior Ct. (Gallagher)*, 63 Cal. App. 5th 1099, 1116 (2021)). The court below “endorsed” the Third District’s similar decision in *Gallagher*, which even more explicitly claimed that clear standards were unnecessary: “The requirement for ‘standards’ is but one method for the effective implementation of the legislative policy decision; the requirement *possesses no sacrosanct quality* in itself so long as its purpose may otherwise be assured. . . . The need is usually not for standards but for safeguards[.]” 63 Cal. App. 5th at 1116 (2021) (quoting *Kugler*, 69 Cal. 2d at 376). Such reliance on a 1968 case to hold that standardless delegations are permitted stands in sharp contrast with *Gerawan*’s more recent instruction that safeguards must exist “[i]n addition to clear standards.” 3 Cal. 5th at 1150.

The *Ghost Golf* decision thus departs from *Gerawan*'s two-part analytical framework that first asks whether a delegation "provide[s] adequate direction" to the executive official, *id.* at 1146, and then determines whether safeguards exist to prevent abuse, *id.* at 1150. This demotion of clear standards from a prerequisite for constitutional delegations to (at best) a secondary consideration not only defies *Gerawan* but also marks California as an outlier among States by permitting standardless delegations of legislative power.

Other jurisdictions apply a more stringent standards-based test for delegations of legislative power. Federal courts, for instance, ask "whether Congress has supplied an intelligible principle to guide the deleg[at]ee's use of discretion." *Gundy v. United States*, 588 U.S. 128, 135 (2019). The standard must "[limit] agency discretion enough that, at the very least, reviewing courts could 'ascertain whether the will of Congress ha[d] been obeyed.'" *Consumers' Rsch. v. FCC*, No. 22-60008, 2024 WL 3517592, 15 (5th Cir. July 24, 2024) (quoting *Mistretta v. United States*, 488 U.S. 361, 379 (1989)).

In 1985, Michigan definitively replaced a prior form of analysis with a "standards" test, "framed in terms of the adequacy of the standards fashioned by the Legislature to channel the ... exercise of the delegated power." *Blue Cross & Blue Shield of Michigan v. Milliken*, 422 Mich. 1, 51 (1985). Michigan's Constitution uses nearly identical language as California's to forbid executive officials from wielding legislative power. See MI Const. Art. 3, § 2. Yet, the Michigan Supreme Court struck down an analogous delegation of emergency lawmaking power to the executive branch during the Covid-19 pandemic, finding that such delegation lacked clear standards. *In re Certified Questions from United States Dist. Ct., W. Dist. of Michigan, S. Div.*, 506 Mich. 332, 372 (2020).

A safeguards-only approach contradicts Article III, § 3's plain text, which prohibits *any* exercise of legislative power by executive officials, not just when done without adequate safeguards. Review is therefore needed to restore *Gerawan*'s two-part framework and enforce Article III, § 3's plain text.

### **Review Is Needed to Correct the Fifth District's Analysis of the Adequacy of Safeguards**

If, as the Fifth District held, adequate safeguards alone can save a standardless delegation of legislative power to an executive official, then the adequacy question would become critically important in applying the nondelegation doctrine. This Court should review the Fifth District's conclusion that a flimsy (and likely unconstitutional) safeguard is adequate.

The court below found § 8629 of the ESA included "adequate safeguards 'for the delegation of quasi-legislative authority'" because it enabled the Legislature to pass a concurrent resolution to end the state of emergency, thus terminating the Governor's emergency police powers. *Ghost Golf*, 102 Cal. App. 5th at 105. According to that court, this statutory provision was adequate to prevent an unconstitutional delegation because "the Governor may exercise his emergency police powers for only as long as the Legislature allows him to." *Id.*

That view is mistaken. To start, ESA’s safeguard appears to be unconstitutional. Revoking an open-ended delegation of emergency powers is a legislative act that requires bicameralism and presentment under the California Constitution. It thus cannot be achieved through concurrent resolution.

As this Court has previously explained, “[a] statute declares law; if enacted by the Legislature it must be initiated by a bill, passed with certain formalities, and presented to the Governor for signature. Resolutions serve, among other purposes, to express the views of the resolving body.” *Am. Fed’n of Lab. v. Eu*, 36 Cal. 3d 687, 708–09 (1984) (citing Cal. Const. Art. IV §§ 8, 10). California has “specific constitutional provisions [to] prevent a resolution from being treated as a law,” thus circumventing bicameralism-and-presentment procedures. *Id.* (citation omitted).

Next, the concurrent resolution safeguard may incentivize the Legislature to prematurely end a real state of emergency. If the Legislature disagreed with some actions the Governor took but agreed with others, the Legislature’s only recourse would be to end the state of emergency in its entirety and cancel all of the Governor’s orders. If the conditions that called for a declaration of emergency were in fact ongoing, the Legislature would face a dilemma between prematurely ending the emergency, thus revoking all beneficial measures taken, and allowing abuses of the Governor’s delegated power to continue. Moreover, even if the Legislature were to pass a concurrent resolution ending the emergency, the ESA authorizes the Governor to simply redeclare the emergency. Hence, the Legislature cannot revoke the Governor’s emergency lawmaking power in a permanent way. Regardless of what the Legislature does, the Governor may declare a new state of emergency and unilaterally re-assume his broad powers under the ESA.

If adequate safeguards obviate the need for “clear standards” that this Court requires for constitutional delegations, then this Court must determine what safeguards are adequate. It should therefore review the appellate court’s conclusion that an unconstitutional legislative-veto provision was an adequate check on delegated power, especially when the Governor could unilaterally re-assert that power.

### **The Supreme Court of California Must Decide this Question, Whose Import Goes Well Beyond Covid-19**

*Ghost Golf* presents important questions of law for the entire State of California. Indeed, the court below recognized that to be so when it rejected the government’s motion to dismiss for mootness, correctly concluding that “the public interest exception to mootness applies in this case.” *Ghost Golf*, 102 Cal. App. 5th at 99. The Fifth District found that, despite the court’s inability to grant “any effective relief,” *id.* at 100, this case “present[ed] an issue of broad public interest that is likely to recur.” *Id.* (quoting *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga*, 82 Cal. App. 4th 473, 479 (2000)). Explaining further, the court wrote, “[t]he question of whether the ESA allows the Governor to ‘make law’ in a state of emergency is an evergreen question that could arise in the context of any type of emergency.” *Ghost Golf*, 102 Cal. App. 5th at 101.

The court's correct conclusion that the public-interest exception to mootness applies reinforces the need for review. Simply put, this is not a "Covid case." At issue in this case are the constitutional limits on the State's response to a dire emergency. The Covid-19 pandemic was not the last emergency California will face. Doctrinal clarity will prevent the Legislature from drafting laws that delegate power to the executive branch unconstitutionally.

### **Conclusion**

The Court should grant *Golf Ghost's* petition so that it can address the Fifth District's departure from this Court's precedent and clarify a recurring question on how to analyze nondelegation challenges under California's Constitution.

Very truly yours,

/s/ *Sheng Li*

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