No. F085403

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

PROPOSED *AMICUS CURIAE* BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. IN SUPPORT OF PETITIONERS

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Document received by the CA 5th District Court of Appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

STATEMENT OF INTEREST.. 7

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. The Accumulation of Both the Law-Making and Law-Executing Powers in the Blueprint Violates the California Constitution and Severely Threatens the Liberty of Californians 9

II. The *Blueprint* Crushed Small Businesses and Many Are Still Suffering From the Effects of the Overreach 20

CONCLUSION 25

WORD COUNT CERTIFICATION 26

Document received by the CA 5th District Court of Appeal.

TABLE OF AUTHORITIES

Cases

Bostock v. Clayton Cty.,
140 S. Ct. 1731 (2020)... 10

Cal. Redevelopment Ass'n v. Matosantos,
53 Cal.4th 231 (2011) 12

Carmel Valley Fire Protection Dist. v. State,
25 Cal.4th 289 (2001) 11, 12

Clinton v. City of New York,
524 U.S. 417 (1998)... 12

Committee on the Judiciary, United States House of Representatives v. McGahn,
415 F. Supp. 3d 148 (D.D.C. 2019)... 11

Gilb v. Chiang,
186 Cal.App.4th 444 (2010)... 19

Gundy v. United States,
139 S. Ct. 2116 (2019)... 10

Korematsu v. United States,
323 U.S. 214 (1944)... 15

Kugler v. Yocum,
69 Cal. 2d 371 (1968) 13

Locke's Appeal,
72 Pa. 491 (1873) 12

Lockyer v. City and Cty. of San Francisco,
33 Cal.4th 1055 (2004) 16

Nougues v. Douglass,
7 Cal. 65 (1857) 12

People v. Bunn,
27 Cal.4th 1 (2002) 11, 12, 16

People v. Parks,
58 Cal. 624 (1881) 13

Steinberg v. Chiang,
223 Cal.App.4th 338 (2014)... 19

Stern v. Marshall,
564 U.S. 462 (2011)... 10

Document received by the CA 5th District Court of Appeal.

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30 Cal.4th 528 (2003) 19

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Iman Ghosh, *Mapped: The State of Small Business Recovery in America* VISUAL CAPITALIST (Apr. 28, 2021) 22

JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES (1764) 14

John Adams, VI. "A Dissertation on the Canon and the Feudal Law," No. 2, in 1 Papers of John Adams 115 (Massachusetts Historical Society, 1977)... 15

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Document received by the CA 5th District Court of Appeal.

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Kris Reyes, *Bay Area Small Businesses Hit Their Breaking Point as Gov. Newsome Issues New Lockdown*, ABC (Nov. 17, 2020) 22
Montesquieu, THE SPIRIT OF LAWS (Batoche Books 2001) (1748) . 9
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Nomination of Judge Amy Coney Barrett: Hearings Before the Comm. on the Judiciary, 116th Cong. (2020)........................... 10
PLUTARCH, *The Life of Julius Caesar, in* THE PARALLEL LIVES Vol VII (1919) 14
Priyanshi Sharma, *Next Pandemic Will Come, It's Only a Matter of Time: World Bank Chief* NDTV (July 19, 2023 7:50 PM)..... 18
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Small Business Profile—California, U.S. Small Business Administration Office of Advocacy (2022) 20
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THE FEDERALIST NO. 47 (James Madison) (Easton Press ed., 1979) 10
TOM HOLLAND, RUBICON: THE LAST YEARS OF THE ROMAN REPUBLIC (2003) 14
U.S. Bureau of Labor Statistics, *2020 Results of the Business Response Survey*, Table 20 23
U.S. Small Business Administration, *PPP Loan Forgiveness* 23
World Intellectual Property Day, 2021, 86 Fed. Reg. 22339 (Apr. 28, 2021) 20

Constitutional Provisions

CAL. CONST. art. III, § 3 .... 11, 12, 16
CAL. CONST. art. IV, § 1 .... 11, 16

Document received by the CA 5th District Court of Appeal.

CAL. CONST. art. V, §§ 4, 6 16
CAL. CONST. art. V., § 1 11

Document received by the CA 5th District Court of Appeal.

STATEMENT OF INTEREST

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation’s courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

NFIB Legal Center seeks leave to file an amicus brief in this case to demonstrate the harm to small businesses when government actors transgress their constitutional boundaries.

SUMMARY OF ARGUMENT

Liberty cannot exist where tyranny lives. Tyranny may take the form of an oppressive autocrat who rules with an iron fist. But it need not. Instead, it may look less obvious, such as the combination of multiple distinct powers of government—executive, legislative, and judicial. One person or agency holding at least two of these powers is enough for tyranny to take root. This is especially so where actors with authority to carry out the third power defer to or cease to be a meaningful check on whomever possesses the other two.

Document received by the CA 5th District Court of Appeal.

This case concerns the latter form. Governor Newsom and the California Department of Public Health (CDPH) responded to the COVID-19 pandemic with the *Blueprint for a Safer Economy* (*Blueprint*). In enacting and carrying out the *Blueprint*, they exercised core powers of both the legislative and the executive departments. Instead of the legislature being responsive to its constituents and determining their specific needs, the Governor and CDPH grabbed this power for themselves by crafting a one-size-fits-all regime mandating when areas of the State would have limited capacity restrictions or be shut down entirely. Exercising the powers of the legislative department, they created statewide social policy in the face of competing interests–the economic interests of businesses in staying open and the State in a vibrant market, the liberty of Californians in choosing to patronize certain establishments in the face of a health risk, the health of Californians in venturing out in the public sphere, the different needs or desires of Modoc's residents versus Los Angeles County's residents, etc. In exercising the powers of the executive department, they enforced this mandate on small businesses and all Californians with civil and criminal penalties. Put simply, they made the law, and then they enforced the law. Neither the Governor nor CDPH may do so. California's Constitution does not permit such an aggrandizement and this Court must serve as a meaningful check on their actions.

This conglomeration of the law-making and law-executing powers not only violated the California Constitution but imposed

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significant ruin on small businesses. Many small businesses suffered financially or closed during the pandemic due to the oppressive *Blueprint*. And they still suffer financial hardship to this day in the form of COVID-19 relief repayments they otherwise may not have but for the *Blueprint*'s crushing restrictions.

Now, without the excuse of a pressing emergency or "trust me" justification, this Court has the chance to provide meaningful oversight to ensure the constitutional abuses of the past, which are still felt in the present, do not recur in the future. *Amicus* respectfully urges this Court to seize the opportunity before it and reverse the Superior Court's grant of summary judgment to Respondents.

ARGUMENT

I. The Accumulation of Both the Law-Making and Law-Executing Powers in the *Blueprint* Violates the California Constitution and Severely Threatens the Liberty of Californians.

"When the legislative and executive powers are united in the same person . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Montesquieu, THE SPIRIT OF LAWS 173 (Batoche Books 2001) (1748). Blackstone similarly defined a "tyrannical government" as one where "the right both of making and of enforcing the laws, is vested in one and the same man, or one and the same body of men," because "wherever these two powers are united together, there can be no public liberty." 1 W. Blackstone, COMMENTARIES ON THE LAWS OF

Document received by the CA 5th District Court of Appeal.

ENGLAND 142 (1765). Our founders heeded these warnings, cautioning that "[t]he accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny[]" and "the preservation of liberty requires that the three great departments of power should be separate and distinct." THE FEDERALIST NO. 47, at 322 (James Madison) (Easton Press ed., 1979). It is axiomatic that the United States Constitution does not contain an explicit separation of powers, but instead, rests upon a structural division of power between three coordinate branches. Nevertheless, every current and recent member of the Supreme Court has reiterated Montesquieu's caution.[2]

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[2] *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ.) ("Congress, this court explained early on, may not transfer to another branch 'powers which are strictly and exclusively legislative.'" (citation omitted)); *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (Gorsuch, J., writing for the Court) (discussing how vague laws threaten the separation of powers because they allow the executive branch to define crimes); *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (Roberts, C.J., joined by Scalia, Kennedy, Thomas and Alito, JJ.) (explaining that the "basic concept of separation of powers" prohibits one branch of government from sharing core functions of that branch with another (citation omitted)); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1824 (2020) (Kavanaugh, J., dissenting) (discussing the distinction between two branches as "critical" and its destruction as "threatening . . . individual liberty"); *Nomination of Judge Amy Coney Barrett: Hearings Before the Comm. on the Judiciary*, 116th Cong. (2020) (Response of Hon. Amy Coney Barrett, U.S. Court of Appeals for the Seventh Circuit, to Sen. Ben Sasse), https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-amy-coney-barrett-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-3 ("The original idea [of the Constitution] . . . was that the very structure of government

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Unlike the United States Constitution, California's Constitution expressly provides for the separation of powers. Article III 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. 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.

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 289, 297 (2001) (quoted source omitted). While this 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 (2002). "At the core of the legislative power is the authority to make

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protected rights. . . . because it was thought that the separation of powers and the structure of federalism would be a protection for those rights."); *Committee on the Judiciary, United States House of Representatives v. McGahn*, 415 F. Supp. 3d 148, 213 (D.D.C. 2019) (Jackson, J.) ("[T]he primary takeaway from the past 250 years of recorded American history is that Presidents [and Governors] are not kings. . . . [T]hey do not have subjects, . . . whose destiny they are entitled to control."), *reversed by Committee on the Judiciary of United States House of Representatives v. McGahn*, 973 F.3d 121 (D.C. Cir. 2020)).

Document received by the CA 5th District Court of Appeal.

laws." *Cal. Redevelopment Ass'n v. Matosantos*, 53 Cal.4th 231, 254 (2011) (citation omitted). This "core" function to make law is simply the "power to weigh competing interests and determine social policy." *Bunn*, 27 Cal.4th at 15 (quoted and 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[.]").

Even if the Legislature wanted to give the Governor or CDPH lawmaking authority, it may not do so under the California Constitution. *See* CAL. CONST. art. III, § 3; *Locke's Appeal*, 72 Pa. 491, 494 (1873) ("[I]t is a cardinal principle of representative government, that the *legislature cannot delegate the power to make laws to any other body or authority*." (emphasis added)). Thus, the fundamental distinction between proper and improper is that "[t]he legislature cannot delegate its power to make a law; but it can make a law to delegate a power." *Clinton v. City of New York*, 524 U.S. 417, 478 (1998) (Breyer, J., dissenting joined by O'Connor and Scalia, JJ.) (quoting *Locke's Appeal*, 72 Pa. at 498). "[T]he legislative can have no power to transfer their Authority of making Laws, and place it in other hands." John Locke, *Two Treatises of Government* (New York: New American Library, Laslett ed., 1963), pp. 408–09; *see also Matosantos*, 53 Cal.4th at 254 ("Under [the state Constitution], 'the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature[.]'" (quoted source omitted)).

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The California Supreme Court has long recognized that constraining the Legislature's authority to delegate lawmaking power to the executive branch is essential to preserve California's constitutional design:

> There are powers conferred upon [the Legislature] alone by the Constitution, and it can not delegate them to any other department of the government, or to any agency of its appointment, because it would be confiding to others that legislative discretion which legislators are bound to exercise themselves, and which they can not delegate to any other man or men to be exercised. Most of all, the Legislature can not delegate such powers to executive officers of the State, because the Constitution has divided the powers of government into three departments—the Legislative, Executive, and Judicial; and has declared that no person, charged with the exercise of powers properly belonging to one of these departments, shall exercise any function pertaining to either of the others, except it is expressly directed or permitted by the Constitution

People v. Parks, 58 Cal. 624, 643 (1881) (internal citation omitted); *see also id.* at 626 ("if the Legislature could transfer its authority in one instance, it might in all others, and it could thus change the nature of the government entirely"). Put another way, "the purpose of the doctrine that legislative power cannot be delegated is 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." *Kugler v. Yocum*, 69 Cal. 2d 371, 376 (1968) (cleaned up).

History teaches us the consequences of government actors amassing a combination of legislative, executive, and judicial

Document received by the CA 5th District Court of Appeal.

powers. America was born, in part, from a king who refused to assent to new laws, ignored current laws, and imposed his will on judicial officers. Declaration of Independence, ¶¶3–8, 10–11.

Rome provides another example. The long fall of the Roman Republic culminated in a tyrant having "such a concentration of authority" never before seen "in the hands of one man" such that he was declared "dictator for life." TOM HOLLAND, RUBICON: THE LAST YEARS OF THE ROMAN REPUBLIC 327, 334 (2003); *see also* PLUTARCH, *The Life of Julius Caesar, in* THE PARALLEL LIVES Vol VII, at 443–609 (1919), https://tinyurl.com/mr2ck2zn (describing Caesar's appointment as "dictator for life" to be "tyranny"). Rome is instructive, not because it represents the most obvious or shocking abuses of tyranny but because the historical transition from the Roman Republic to the Roman Empire influenced members of the Revolutionary era and served as a backdrop in crafting our own Constitution.[3] Indeed, none other than our second president, first vice president, co-author of the Declaration of Independence, and primary author of the Massachusetts

[3] *See* Charles F. Mullet, *Classical Influences on the American Revolution* 35 CLASSICAL J. 2, 92–104 (1939), https://tinyurl.com/ry95tcpz (describing how the writers, thinkers, and events of Rome influenced key Revolutionary era figures); *see also* JOSIAH QUINCY, MEMOIR OF THE LIFE OF JOSIAH QUINCY, JUN. 418–20 (1825), https://tinyurl.com/fd77s7kd (describing Julius Caesar's abuses including acting "against the laws" and preparing "the way for a succeeding Nero to spoil and slaughter them"); JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES 15 (1764), https://tinyurl.com/34ttae9s (describing Julius Caesar as the "destroyer of the roman glory and grandeur").

Document received by the CA 5th District Court of Appeal.

Constitution recognized "the republic[s] of Greece and Rome" as the "ancient seats of liberty." John Adams, VI. "A Dissertation on the Canon and the Feudal Law," No. 2, in 1 Papers of John Adams 115, 117 (Massachusetts Historical Society, 1977), https://tinyurl.com/ytdd5fb6.

A more recent, and local, example. In 1942, based on the recent attack at Pearl Harbor and America's entry into World War II, President Roosevelt used fear and the excuse of emergency to issue Executive Orders 9066 and 9102. These Orders were the justification to forcibly relocate and detain over a hundred thousand American citizens of Japanese descent, including Fred Korematsu. *See* Authorizing the Secretary of War to Prescribe Military Areas, 7 Fed. Reg. 1407 (Feb. 25, 1942); Establishing the War Relocation Authority in the Executive Office of the President and Defining its Functions and Duties, 7 Fed. Reg. 2165 (Mar. 20, 1942); Fred T. Korematsu Institute, *Fred Korematsu's Story*, https://korematsuinstitute.org/freds-story/ (last visited October 23, 2023). President Roosevelt was not alone in relying on "emergency" circumstances to justify egregious constitutional violations and infringements on the liberties of American citizens. So did the Supreme Court. *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) ("the need for action was great, and time was short") *abrogated* by *Trump v. Hawaii*, 128 S. Ct. 2392, 2423 (2018) (describing as "obvious" that "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and —to be clear—'has no place in law under the Constitution.'"

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(citation omitted)). As demonstrated by this relocation of Americans during World War II and *Korematsu*, great harm can come when courts defer to politicians claiming pressing emergencies or shouting, "trust me."

The *Blueprint* framework is the product of the law-making and law-executing powers in the hands of one branch. Appellants have thoroughly explained why the Governor or CDPH have no independent or statutory authority to issue *Blueprint*-type restrictions on the liberties of Californians. *See* App. Br. *Amicus* will not reiterate those arguments except to note that lawmaking is the very "core" function of the legislative branch, and this "core" function cannot reside in a non-legislative branch. *Bunn*, 27 Cal.4th at 14. Because the *Blueprint* combined the law-making and law-executing powers in one person or entity within the executive branch,[4] it violates the California Constitution's separation of powers. CAL. CONST. art. III, § 3 ("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." (emphasis added)); CAL. CONST. art. IV, § 1 ("The legislative power . . . is vested in the California Legislature[.]").

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[4] While administrative agencies are created by the Legislature, they are members of the executive branch. *See Lockyer v. City and Cty. of San Francisco*, 33 Cal.4th 1055, 1084 (2004) ("[A]gencies are all part of the Executive Branch of government, charged with the duty of enforcing the law."); *see also* CAL. CONST. art. V, §§ 4, 6 (discussing the Governor's authority over agencies in the article of the Constitution detailing the executive branch).

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The *Blueprint* represents the combination of law-making and law-executing powers that Montesquieu, Blackstone, and Madison warned us about. *See supra*. As those great minds foretold, when the various powers of government were combined in the hands of the Governor and CDPH during the COVID-19 pandemic, liberty suffered. The liberty of small business owners to keep open their places of businesses vanished. The liberty of small business owners to serve the public demand was curtailed through capacity restrictions. The financial freedom of business owners, who depended on their business revenue to live, was eliminated. Californians have significant interests in having legislation in California made by the California Legislature as the California Constitution provides. Put simply, Californians suffer when the members of the executive branch usurp the Legislature's authority.

Given the *Blueprint*'s recission in 2021, it may be tempting to accept the Government's argument that this controversy is moot. Doing so would be unwise: This important question would remain unresolved while California awaits the next crisis that threatens the proper operation of state government. We will undoubtedly see another emergency, financial, safety, health, or otherwise, which places executive and legislature power in conflict. According to some, it is unquestionable that we will see another public health emergency. Aliza Chasan, *Prepare for next pandemic, future pathogens with "even deadlier potential" than COVID, WHO chief warns* CBS NEWS (May 23, 2023 5:45 PM), https://tinyurl.com/2yw7cpdw (quoting WHO Director General:

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"The threat of another variant emerging . . . remains, and the threat of another pathogen emerging with even deadlier potential remains"; "[w]hen the next pandemic comes knocking—and it will—we must be ready"); Priyanshi Sharma, *Next Pandemic Will Come, It's Only a Matter of Time: World Bank Chief* NDTV (July 19, 2023 7:50 PM), https://tinyurl.com/42b2tw4c (quoting the World Bank chief that "the next pandemic will come, it's only a question of how long before it comes"). A scientist who assisted in developing the COVID-19 vaccine is also sounding the alarm. Kizzmedia Corbett, *This Emergency is Over. Now It's Time to Get Ready for the Next Pandemic* TIME (May 11, 2023 7:05 AM), https://tinyurl.com/48k6f3mx. California is also preparing for the next public health emergency. *See* California Secretary of State, *Eligible Statewide Initiative Measures*, https://tinyurl.com/4yzcmtye (describing November 2024 ballot initiative 21-0022A1 to "provide[] funding for pandemic detection and prevention").

In addition, CDPH expressly claims that it has the continued authority to issue *Blueprint*-esque restrictions independent of the Emergency Services Act or a declared state of emergency by the Governor. *See* Defendants' Memorandum of Points and Authorities in Support of Motion for Summary Judgment 18–19. As told by CDPH, its authority to issue and enforce the *Blueprint* was "separate and independent of the Governor's statutory authority under the ESA." *Id.* at 19. In other words, unelected bureaucrats within the executive branch claim, based only on the phrase "take

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measures as are necessary," that they alone may shut down the entire State, regardless of the Governor or a declared state of emergency. This alarming assertion of widespread authority by government actors not responsive to the electorate further necessitates this Court's review.

The State wishes to have it both ways: to declare challenges to government action taken during the most recent public health emergency moot while also claiming the same legal authority and powers to respond to the next emergency for which it is already preparing. This Court should not permit it to do so.

Indeed, California courts have routinely found exceptions to mootness when, as here, a case challenges the authority of statewide officials and raises questions of broad public interest where judicial resolution can set future controversies to rest. *See, e.g.*, *White v. Davis*, 30 Cal.4th 528, 563 (2003) (despite issue being moot, the Supreme Court reached the merits of dispute over the State Controller's authority, concluding that "it is appropriate to address the state employee salary issue that has been briefed in this court, in order to provide guidance to the State Controller and other public officials in the event of a future budget impasse"); *Gilb v. Chiang*, 186 Cal.App.4th 444, 460 (2010) (applying public interest exception to mootness where State Controller had "made it clear" that he would pursue the same course of conduct in a future controversy); *Steinberg v. Chiang*, 223 Cal.App.4th 338, 343 (2014) (rejecting mootness argument where the court did "not need

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to guess at any additional facts" to resolve the case and State Controller "continu[ed] to litigate his authority" under state law).

The Court should reverse the Superior Court's decision granting summary judgment to Respondents. Doing so ensures compliance with the California Constitution's separation of powers and protects the liberties of Californians in future emergencies.

II. The *Blueprint* Crushed Small Businesses and Many Are Still Suffering From the Effects of the Overreach.

State Government directives to Californians to stay home, close businesses, or both, including the *Blueprint* and related orders issued by the Governor during the COVID-19 pandemic, imposed enormous harm on small businesses, the effects of which they still feel today.

Make no mistake, the success of small business is the success of America and California. As President Biden has commented, "[s]mall businesses are critical to our success as a Nation" and "make up 90 percent of businesses in the United States, employ nearly half of America's private sector workers, and create two-thirds of new jobs[.]" World Intellectual Property Day, 2021, 86 Fed. Reg. 22339 (Apr. 28, 2021). In California, small businesses account for 99.8 percent of all businesses, with their 7.4 million employees being roughly 48 percent of the total workforce. Small Business Profile—California, U.S. Small Business Administration Office of Advocacy (2022), https://tinyurl.com/24d89xx6.

During the COVID-19 pandemic, the NFIB Research Center regularly collected information from small businesses across America, including California, about the financial struggles they

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faced due to government mandates. A March 2021 survey of over 20,000 member businesses revealed that 51 percent of respondents who received a Paycheck Protection Program loan in 2020 had already applied for a second PPP loan or were considering doing so. NFIB RESEARCH CENTER, COVID-19 SMALL BUSINESS SURVEY (16) 6 (Mar. 2021), https://tinyurl.com/mrx7fea6. Over three-fourths of those not applying or not considering applying were doing so because they did not meet the "gross receipts" eligibility requirement, not because they were financially stable. *Id.* at 7.[5] Twenty-two percent of respondents reported that sales were still fifty percent or less than Q1 2020 levels, while twenty-four percent reported the same compared to Q1 2019 levels. *Id.* at 9. Perhaps the most troubling statistic was that 13 percent of businesses expected to close within the subsequent 6 months if then-economic conditions persisted. *Id.*

The *Blueprint* decimated small businesses in California. 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." Kris Reyes, *Bay Area Small Businesses Hit*

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

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Their Breaking Point as Gov. Newsome Issues New Lockdown, ABC (Nov. 17, 2020), https://tinyurl.com/28dw5w55. Shortly after the *Blueprint* went into effect, a San Diego entrepreneur complained that the "cure [the government's] come up with is worse than the pandemic." *See* Artie Ojeda, *Ramona Small Businesses Plead 'Let Us Reopen' as Sobering Economic Numbers Released*, NBC SAN DIEGO (Oct. 15, 2020), https://tinyurl.com/d8a9dcb4 (discussing two small business owners in the San Diego region and the direct financial impact caused by the government's COVID-19 response). The data suggests these *Blueprint*-related fears were justified. As of April 2021, *eight* major California cities had at least 30% of their small businesses close compared to January 2020. Iman Ghosh, *Mapped: The State of Small Business Recovery in America* VISUAL CAPITALIST (Apr. 28, 2021), https://tinyurl.com/etfry2a9. This led the nation as the next closest state had only three cities with similar closure numbers. *Id.* San Francisco and Oakland led the way in California with *nearly half* of each city's small businesses ceasing operations. *Id.*; *see also* Stephanie Sierra, *Nearly 50% of San Francisco small businesses remain closed, data shows* ABC (June 16, 2021), https://tinyurl.com/4bzxe2hy.

While the *Blueprint* may have ended in June 2021, small business owners still feel the consequences of that illegal regime today through the payments they continue to make on COVID loans. Many of the businesses that were forced to operate under the *Blueprint*'s capacity restrictions or full closures obtained COVID loans, such as the Paycheck Protection Program (PPP) loan

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or the Economic Injury Disaster Loan (EIDL), to help them survive. In fact, 60 percent of all California establishments received COVID-related financial assistance. U.S. Bureau of Labor Statistics, *2020 Results of the Business Response Survey*, Table 20, https://tinyurl.com/4pvtwnze (last visited October 23, 2023).

According to the Small Business Administration, California businesses received over 1.25 million PPP loans during 2020 and 2021, totaling over $100 billion. U.S. Small Business Administration, *PPP Data – Program Reports 2021 and 2020*, https://tinyurl.com/4bfwc6tn (last visited October 23, 2023). PPP loans are forgivable, so long as borrowers apply and meet certain spending conditions. U.S. Small Business Administration, *PPP Loan Forgiveness*, https://tinyurl.com/4bfwc6tn (last visited October 23, 2023). Those businesses failing to achieve full forgiveness still suffer from the *Blueprint*'s impact through this outstanding loan balance.

Unlike PPP loans, EIDL loans are not forgivable. These loans have a 30-year term, paired with a 30-month deferment period from the date of the original note and lower interest rates. California businesses received 591,850 EIDL loans totaling almost $68 billion. Small Business Administration, *Disaster Assistance Update Nationwide COVID EIDL, Targeted EIDL Advances, Supplemental Targeted Advances* (Apr. 28, 2022), https://tinyurl.com/3z9v9hd2. Ninety-seven percent of these EIDL loans to California businesses were approved before June 24,

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2021,[6] meaning the program's 30-month deferment period has just recently ended or will be ending this calendar year. Those business owners forced to take EIDL loans to keep their business afloat in the face of ultra vires capacity restrictions and closures are currently feeling the financial implications in the form of loan repayment—both the principal and interest.

Petitioner-Appellant Sol Y Luna is one of these businesses. Compl. ¶ 89. Expressing the same concern as many business owners across America, Sol Y Luna's owner was "concerned about relying on EIDL loan money because that loan must be repaid with interest." *Id.* Additionally, the NFIB Legal Center has heard from numerous business owners this year struggling with EIDL repayments. For many of these businesses, the pandemic was bad enough. But it was the *Blueprint*'s extreme restrictions on business operations that prevented small businesses from operating at all or at full capacity regardless of safety measures taken. They were forced to either sink under the tide of crushing closure and capacity restrictions, like the *Blueprint*, or accept the government's monies to try to remain afloat. This "choice" was simply a mirage. Now,

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[6] The total number of EIDL loans to California businesses was 591,850. Small Business Administration, *Disaster Assistance Update Nationwide COVID EIDL, Targeted EIDL Advances, Supplemental Targeted Advances* (Apr. 28, 2022), https://tinyurl.com/3z9v9hd2. EIDL loans to California businesses as of June 24, 2021 was 576,515. Small Business Administration, *Disaster Assistance Update Nationwide COVID EIDL, Targeted EIDL Advances, Supplemental Targeted Advances* (Jun. 24, 2021), https://tinyurl.com/ywhhj29v.

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because of restrictions like the *Blueprint*, these businesses are saddled with debt for years to come, while the government profits, via interest, from their times of hardship.

In sum, the *Blueprint*'s closures and capacity restrictions hurt small businesses during the pandemic, continue to do so now, and will for the foreseeable future.

CONCLUSION

For the reasons set forth above, *amicus curiae* NFIB Small Business Legal Center, Inc. urges the Court to reverse the Superior Court's decision granting summary judgment to Respondents.

Respectfully submitted,

Dated: November 7, 2023

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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 4,646 words.

Dated: November 7, 2023

s/ Stephen M. Duvernay
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