



August 2, 2024

Chief Justice Patricia Guerrero
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-478

Re: *Ghost Golf et al. v Newsom et al.*
Supreme Court Case No. S285746
Court of Appeal Case No. F085403
Amicus Letter Supporting Petition for Review

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

This letter, submitted pursuant to Rule 8.500(g), supports Ghost Golf et al in their petition for review in the above referenced case. The California Policy Center (CPC) respectfully requests permission to file this amicus curie letter, in support of the petition for review, because the case raises real and serious public policy implications if the state legislature and executive officers continue abdicating their constitutional authorities and refuse to recognize and sustain the state's non-delegation doctrine.

CPC is an educational non-profit working for the prosperity of all Californians by eliminating public-sector barriers to freedom.¹ CPC aspires to make California the freest and most prosperous region in the nation—a place where everyone can get a fair shake in life, where families can afford to live and flourish, and where our public education system is excellent and devoted entirely to the needs of children. We envision a California where resources are used responsibly and businesses of every kind are welcomed and encouraged to thrive. Our primary areas of focus are education reform, workplace freedom, government transparency, and governance.

As the vice president of CPC, I have a long history with every level of government in California, including 17 years employed in and around the state capitol as a budget analyst in Gov. Arnold

¹ <https://californiapolicycenter.org/about/>

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Schwarzenegger's Department of Finance and as both a legislative consultant and chief of staff for numerous state senators. I speak with firsthand knowledge of the all-consuming administrative state and of elected officials who—in order to maintain their jobs as well as plausible deniability—are happy to wash their hands of the consequences of rules and regulations that silently strangle our economy. I also speak on behalf of CPC.

California was once the place where every opportunity was possible and seemingly every dream would come true. Yet, as the legislature increasingly hands more unchecked power to an insatiable bureaucratic state, the citizens, taxpayers and voters in the once Golden State find themselves confined by the tightening cords of unelected busybodies eager to regulate every activity, good and service.

Californians deserve a government that abides by the constitution, where the people are sovereign and yield only specific power to the legislature to craft a system of laws and rules with even fewer permissions to administrative bodies—limited in scope and power—to regulate the affairs of the people. State officials are constrained by the state constitution and though they have been in the habit of increasingly giving power through ambiguous, “vague, uncertain, and indefinite” provisions and laws, the constitution does not countenance a rapacious delegation of authority.²

Before California was anywhere close to being in the purview of the United States, the American colonies fought a battle against a tyrannical king across the sea as he “erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.”³ And as hardy and enterprising men and women of independent character made their way west, passing through the mountains, taming the great rivers, planting valleys and building ports, they did not intend for their posterity and other immigrant generations hence to be subjected to what Alexis de Tocqueville called the “powerful grasp and...network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate, to rise above the crowd.” We are not destined to be “reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd.”⁴

Yet, in the last several years, we have seen an acceleration of regulators assuming broad authorities over the air we breathe, the fluids we drink, the food we eat, the jobs we work, the property we own, the education we provide and the taxes we pay. They are empowered by our legislature, men and women who—abdicating their constitutional authority—pass ambiguous laws while cowering behind unenforceable legislative-intent statements and press releases so that when they are held to account, they can deny any and all responsibility.

² *Hewitt v. State Board of Medical Examiners*, 148 Cal. 590, 84 P. 39 (Cal. 1906)

³ United States Declaration of Independence, July 4, 1776

⁴ *Democracy in America*, Vol. 2, Section 3, Chapter VI

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The state constitution is clear about the people’s “right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.”⁵ Why? “Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.”⁶ As such, “[t]he legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.”⁷

Further, the state constitution aggressively restricts and defines the powers of an “administrative agency.” Only the legislature can enact new laws—by statute—except when the people use their inherent powers.^{8,9,10,11} And the voters doubled down on the sentiment that legislators should not be “career politicians [who] become representatives of the bureaucracy, rather than of the people whom they are elected to represent.”¹²

Over the last few years, some legislators have tried to impose checks on the state’s bureaucratic machine. They have not been able to restrain the leviathan. And the likelihood that an individual agency or department will limit its own regulatory power is around zero. In fact, they are more likely to burden the process with prescriptive regulations not imagined by the legislature or the public, at large. To be sure, most of this regulatory power was ceded and enabled by the legislature which has been exceedingly willing to abrogate its power so freely. This delegation of power enables autonomous provinces of the state’s bureaucracy to pursue regulations-at-all-costs with little, if any, accountability to the public or the Legislature for its actions. Citizens bear the heavy costs of these regulations without any real way to appeal to their representatives.

As the regulatory bureaucracy was breaking out of the cocoon that had held it in check for over a century, Gov. Jerry Brown created the Office of Administrative Law in 1980 to oversee this nascent, but burgeoning, regulatory regime.¹³ Unfortunately, the office has proven to be a rubber stamp. Subsequently, Gov. Pete Wilson proposed a few executive orders to review, root

⁵ California Constitution, Art. I, Sec. 3

⁶ California Constitution, Art. II, Sec. 1

⁷ California Constitution, Art. IV, Sec. 1

⁸ California Constitution, Art. III, Sec. 3.5

⁹ California Constitution, Art. IV, Sec 8(b)(1)

¹⁰ California Constitution, Art. IV, Sec. 5(f)

¹¹ There are limited references to “regulate,” “regulation” or “regulatory” implied or direct, in the Constitution, in the following instances: horse racing (Art. 4, Sec. 19), Marine Resources Protection Act of 1990 (Art. 10B, Sec. 4), water (Art. 10, Sec. 5) – presumably where the Water Board derives its authority, Governing of local governments and municipalities (Art. 11), Public Utilities Commission (Art. 12, Sec. 7 & 8), tax limitation (Art. 13A, Sec. 3), government spending limitation (Art. 13B, Sec. 6 & 8), voter approval for local tax levies (Art. 13C, Sec. 1), usury (Art. 15), alcohol (Art. 20, Sec. 22), stem cell research (Art. 35, Sec. 2). These sections suggest a narrow interpretation of regulation as enumerated.

¹² California Constitution, Art. IV, Sec 1.5

¹³ AB 1111 (McCarthy, Chapter 567, Statutes of 1979).

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out, modify or repeal onerous or unneeded regulations.¹⁴ Several bills in the 2010s raised the specter of reform, though none were adopted.¹⁵

The legislature could ratify regulations, but chooses not to do so, sometimes raising a fallacious separation of powers argument.¹⁶ Ultimately, without a robust regulatory ratification process, nothing has really improved in the last 45 years. Indeed, much of our industry and labor has been captured by big business ready to assent to unconstitutional laws if it means they can artificially maintain market share.

Futurist Jerry Pournelle proposed an Iron Law of Bureaucracy that posits every bureaucracy has two camps. The first camp is dedicated to the goals of the agency and the second is dedicated to the bureaucracy itself. The second camp inevitably gains control of the bureaucracy and becomes parasitic, eventually eating the host. That host is now the people, taxpayers, businessmen, property owners, families and citizens of the state of California.

California's elected officials, regulators, captured entities and those who otherwise benefit from the system have embraced the regulatory process over the last century accepting it as the de facto process for making "law" (albeit, regulatory law). They claim that the non-delegation doctrine is dormant and abrogated and should be ignored because of the passage of time, not because the constitutional principles have changed.

In a court challenge to Asm. William H. Parks Drainage Act of 1880, the California Supreme Court ruled the bill unconstitutional on the basis that the legislature cannot delegate its powers. "Here is wholesale delegations of general legislative powers to executive officers – the power of organizing districts in which taxes are to be levied, fixing boundaries, etc....Any act which attempts to substitute the judgment and discretion of any person for the judgment and discretion of the Legislature in a matter committed to the Legislature, and not expressly authorized by the Constitution to be delegated, is void."¹⁷ I am not aware of any constitutional action or precedent since the decision in 1881 that would have negated this decision.

In conclusion, it is unlikely that the legislature or governor will significantly suspend, modify and/or streamline the regulatory process. There is almost no chance they'll bring that process

¹⁴ W-127-95, W-131-96 and W-144-97

¹⁵ As an example, there were a number of bills seeking for regulatory reform in 2011, including but not limited to, SB 396 (Huff), SB 400 (Dutton), SB 401 (Fuller), SB 553 (Fuller) and AB 425 (Nestande).

¹⁶ The legislature uses a ratification process on a regular basis: Indian compacts (Art. 4, Sec. 19), the annual budget bill, memoranda of understanding, confirming executive officers, Governor's agency/department/board appointees, governor's reorganization plans, etc. The legislature also has the ability to provide for the order of succession, in the event that the Governor cannot fulfill his duties. Conversely, there is a significant crossover from the executive to the legislative branch with the Lt. Governor's ability to cast a deciding vote in the Senate.

¹⁷ *The People v. Parks*, 1881, Supreme Court of California

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into alignment with the constitutional requirement that all regulatory process be explicitly authorized and controlled by specific statutory guidelines; transparent and open to the public; necessary for the public health and safety; cost-effective to the state and private enterprise; and regularly reviewed, modified and/or voided if outdated or unnecessary. Such judgment of bringing the regulatory process back into alignment with our state's constitution is squarely in the purview of the courts.

It is time to take note of the United States Supreme Court's recent action reining in decades of bureaucratic overreach and realize the power has been in the California Constitution all along.¹⁸ As such, we hope you will take and consider this case with the deference it deserves.

Sincerely,

Lance Christensen
Vice President of Government Affairs



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Vice President of Government Affairs

¹⁸ 22-451 *Loper Bright Enterprises v. Raimondo* (06/28/2024)

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