



August 30, 2024

Hon. Patricia Guerrero, Chief Justice,
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re. *Ghost Golf v. Newsom*, No. S285746

Dear Chief Justice Guerrero and Associate Justices:

The Cato Institute respectfully files this letter as *amicus curiae* pursuant to Rule 8.500(g) of the California Rules of Court in support of the Petition for Review in the above-referenced case.

I. *Amicus's Interest in the Petition.*¹

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual Cato Supreme Court Review, and files *amicus* briefs.

This case interests Cato because the right to individual liberty is best preserved by a constitutionally constrained executive branch, consistent with the Framers' design. This principle is no less important where a state constitution divides the executive and legislative powers between two branches of government.

¹ No counsel for any party authored this letter in whole or in part. No person or entity other than amicus made a monetary contribution to its preparation or submission.

II. The Nondelegation Doctrine is a Key Aspect of the Constitutional Separation of Powers.

The separation of the executive and legislative powers was core to the federal Constitution's design. The Framers understood that the "separate and distinct exercise of the different powers of government . . . [is] essential to the preservation of liberty." THE FEDERALIST NO. 51, at 289 (James Madison) (Clinton Rossiter ed., 1999). Yet inevitably, there is a "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power." *INS v. Chadha*, 462 U.S. 919, 951 (1983). To protect liberty against this threat of encroachment, "[a]mbition must be made to counteract ambition." THE FEDERALIST NO. 51, *supra*, at 290.

[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.

Id. at 289–90.

Intrinsic to this separation of powers scheme is the principle that no branch of government may delegate its assigned powers to the other branches. The federal judiciary has enforced this principle through the nondelegation doctrine. *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). And although the federal and California nondelegation standards differ, the concerns underlying the two doctrines remains the same. In both cases, "[the legislature] is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested." *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 529.

The Founders justifiably feared what would happen if the legislative and executive powers were permitted to intermingle. When separation of powers is eroded, it is easy to abuse power. A prosecutor can charge people with crimes and infractions never contemplated by the legislature. An unconstrained judge can rule against those he dislikes. The legislature can impose penalties on individuals for their past legal acts, or even just for who they are. And each can exempt themselves and their friends from legal accountability. As John Locke once stated:

It may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their

hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage.

JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 74–75 (C. B. Macpherson ed., 2002).

Delegating legislative power also threatens accountability. “Delegation undermines separation of powers, not only by expanding the power of executive agencies, but also by unraveling the institutional interests of Congress.” Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1465 (2015). The result is a legislature (either state or federal) whose members are less accountable both to their constituents and to each other. Delegation discharges them from the duty to come together as a deliberative body to legislate on even the most pressing matters. *Id.* When the legislature delegates its power to the executive, it no longer needs to shoulder the responsibility for the policies it has enacted. Instead, it retains plausible deniability as the executive confronts the hard questions of governing. *See* Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, in REGULATORY POLICY AND THE SOCIAL SCIENCES 175, 187 (Roger G. Noll ed., 1985). Under this system, rather than a clash of ambitions, “[L]awmakers may prefer to collude, rather than compete, with executive agencies over administrative power and so the Madisonian checks and balances will not prevent excessive delegations.” Rao, *supra*, at 1466.

Nondelegation is no less important when protected by state constitutions. In fact, the Framers’ construction of the federal government between three distinct branches was partly influenced by the states’ experiments with different governmental structures. However, around the time of the Founding, many states had reached a consensus that the merging of governmental powers posed a great threat to its citizens’ liberty. Recognizing this danger, the Virginia Constitution of 1776, the Georgia Constitution of 1777, the Massachusetts Constitution of 1780, and the Vermont Constitution of 1786 all contained provisions explicitly prohibiting the legislative, executive, and judicial branches from exercising each other’s powers. *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 341 (2002); Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 291–92 (1993).

California recognized this same danger when constructing its government some decades later. Echoing many state constitutions of the founding era, California’s

Hon. Patricia Guerrero, Chief Justice,

and Honorable Associate Justices

August 30, 2024

Page 4 of 4

Constitution explicitly prohibits the comingling of governmental powers. CAL. CONST., art. III, § 3 (“Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.”). California’s explicit division of governmental powers warrants careful consideration by this Court.

CONCLUSION

For the foregoing reasons, as well as those presented by plaintiff-petitioners, this Court should address the important nondelegation questions presented in this case. As such, the petition for review should be granted, and the decision below reversed.

Respectfully submitted,

Alexander R. Khoury

Counsel of record

Thomas A. Berry

Cato Institute

100 Massachusetts Ave. NW

Washington, DC 20001

(202) 789-5202

akhoury@cato.org