THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

NO. C093006

GAVIN NEWSOM, as Governor of the State of California,

Petitioner,

v.

THE SUPERIOR COURT OF SUTTER COUNTY,

Respondent,

JAMES GALLAGHER and KEVIN KILEY,

Real Parties in Interest.

Petition for Writ of Extraordinary Mandate, Prohibition, or Certiorari from

Sutter County Superior Court,

Case No. CVCS20-0912, Hon. Sarah Heckman.

APPLICATION OF COUNTY OF PLACER FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT THE SUPERIOR COURT OF SUTTER COUNTY AND REAL PARTIES IN INTEREST JAMES GALLAGHER AND KEVIN KILEY

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rule 8.208 and Rule 8.488 of the California Rules of Court, *Amicus curiae* County of Placer herein certifies, through its undersigned counsel, it knows of no entity or person that must be listed under Rule 8.208 or Rule 8.488 of the California Rules of Court.

Dated: December 11, 2020

Respectfully submitted,

/s/ Emily F. Taylor
Emily F. Taylor
Office of the Placer County Counsel
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APPLICATION OF COUNTY OF PLACER FOR PERMISSION TO FILE AN *AMICUS CURIAE* BRIEF ON BEHALF OF RESPONDENT THE SUPERIOR COURT OF SUTTER COUNTY AND REAL PARTIES IN INTEREST JAMES GALLAGHER, ET AL.

Pursuant to rule 8.487, subdivision (e), of the California Rules of Court, Placer County respectfully requests permission to file an *amicus curiae* brief in this proceeding in support of Respondent The Superior Court of Sutter County and Real Parties in Interest James Gallagher *et al*. This application is timely made within 14 days after the filing date of the real parties in interest's return.

The Court of Appeal's decision in this case will not only affect the Real Parties in Interest, but it is likely to have repercussions for counties across the entire State, including Placer County. The lower court's ruling addressed the separation of powers under the California Constitution between the legislative and executive branches of state government and the Governor's exercise of authority under the California Emergency Services Act ("CESA"). These issues are relevant to Placer County because the Governor is also limited under the California Constitution and CESA in his exercise of authority over local governments during a state of emergency. Placer County has an interest in preserving the authority granted the governing body of local agencies under the California Constitution, CESA and the California Health & Safety Code. The Superior Court's ruling aligns with Placer County's interpretation of the law because it recognized those limits placed on the Governor's authority by the California Constitution and CESA.

Placer County has drafted the accompanying brief to complement the arguments submitted to this Court by the real parties in interest to this case. Placer County has drafted this brief to assist the Court in understanding the implications of the decision for Placer County and other county governments in California.

This Brief was prepared by the Placer County Counsel's Office. No party or counsel for a party in this proceeding authored any part of the accompanying proposed *amicus curiae* brief or made any monetary contribution to fund the preparation or submission of the brief. Nor did any person or entity make any monetary contribution to fund the preparation of the brief.

Placer County respectfully requests that this Court grant this application for leave to file the accompanying *amicus curiae* brief.

Dated: December 11, 2020

Respectfully submitted,

/s/ Emily F. Taylor
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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

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PROPOSED *AMICUS CURIAE* BRIEF OF COUNTY OF PLACER IN SUPPORT OF RESPONDENT THE SUPERIOR COURT OF SUTTER COUNTY AND REAL PARTIES IN INTEREST JAMES GALLAGHER AND KEVIN KILEY

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rule 8.208 and Rule 8.488 of the California Rules of Court, *Amicus curiae* County of Placer herein certifies, through its undersigned counsel, it knows of no entity or person that must be listed under Rule 8.208 or Rule 8.488 of the California Rules of Court.

Dated: December 11, 2020

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* COUNTY OF PLACER

I. INTRODUCTION

The Court of Appeal's decision in this case will not only affect the Real Parties in Interest, but it is likely to have repercussions for counties across the entire State, including Placer County. Real Parties in Interest challenged both a particular executive order and the Governor's assertion of power to amend statutes during a state of emergency. Whether the Governor has the authority under the California Constitution and the California Emergency Services Act ("CESA") to amend statutes, with binding effect on counties, remains a material disputed issue. The lower court's ruling supports the California Constitution's requirement of the separation of powers between the branches of government. Basic rules of statutory construction support the court's ruling regarding the limits to the Governor's authority granted by CESA. The California Constitution and CESA both grant authority to local governing bodies. The lower court's ruling preserves the authority of local governing bodies, including that of Placer County, by requiring the Governor to follow the law as written.

II. ARGUMENT

A. This Case is Not Moot.

As a preliminary matter, the lower court correctly ruled that this case was not moot. As noted below, Executive Order N-67-20 continues to have repercussions. Moreover, whether the Governor has the authority under the California Constitution and CESA to amend statutes is still in dispute. Placer County adopts by reference the argument of Real Parties in Interest that the trial court's decision not to dismiss the case as moot was correct and within the court's inherent discretion. (Return, pp. 18-26.)

B. The Lower Court's Ruling Supports the Constitutional Requirement of Separation of Powers.

The lower court's ruling supports the California Constitution's requirement of the separation of powers. The lower court correctly held that the Constitutional separation of powers prohibits the Governor from amending statutes or creating new statutes. By affirming the Constitutional limit on the Governor's ability to create law, the court's ruling protects the powers granted by the Constitution to local governing bodies to enact local ordinances and regulations that do not conflict with general laws. The ruling also affirms that the Governor does not have the Constitutional authority to unilaterally impose new statutory requirements on county governments, such as the election-related requirements set forth in Executive Order N-67-20.

The Constitution provides that, except as permitted by the Constitution, the "[p]ersons charged with the exercise of one power may not exercise" the other powers of state government. (Cal. Const. Art. III, § 3.) As the lower court acknowledged, the Constitution vests the California Legislature with the power to legislate (with the powers of initiative and referendum reserved to the people), Cal. Const. Art. IV, § 1, and vests the Governor with the power to execute that legislation, Cal. Const. Art. V, § 1.

"The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch." (*Carmel Valley Fire Prot. Distr. v. State of California* (2001) 25 Cal. 4th 287, 297.) A "core function[] of the legislative branch [is] passing laws." (*Id*. at 299.) The Legislative branch "properly may delegate some quasi-legislative or rulemaking authority to" the executive branch. (*Id.*) This generally does not run afoul of the separation of powers. The California Supreme Court has recognized, "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 in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." (*Id.*, quoting *Loving v. United States* (1996) 517 U.S. 748, 758-759.)

By affirming that the Governor does not have the power to make or amend statutes, the court's ruling preserves power expressly granted by the California Constitution to the local governing bodies of counties, including Placer County. The Constitution grants counties, particularly a charter county like Placer County, the power to make and enforce local ordinances and regulations not in conflict with state statutes. (*See* Cal. Const. art. XI, § 4(g) ("Whenever any county has framed and adopted a charter, and the same shall have been approved by the Legislature as herein provided, the general laws adopted by the Legislature in pursuance of Section 1(b) of this article, shall, as to such county, be superseded by said charter as to matters for which, under this section it is competent to make provision in such charter, and for which provision is made therein, except as herein otherwise expressly provided."); *see also*, Cal. Const. art. XI, § 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.").)

While it may be expedient to skip the legislative process during an emergency, doing so is unconstitutional. Among other effects, shortcutting the process through executive action deprives the people of the opportunity to be heard during the legislative process.[1] It is inapposite whether the

[1] The ongoing effects of the executive branch's circumvention of the legislative process through executive orders was also recently demonstrated by the approximately $35 million owed on a voter outreach contract entered into by the Secretary of State's Office through an expedited, emergency bid process, without budget authority to pay for it. The Secretary of State's Office has argued that Executive Order N-67-20 allows it to pay for this contract by ***taking funds which the Legislature expressly allocated for***

Legislature subsequently enacted legislation. Any such subsequent action does not erase the Governor's usurpation of the authority of the legislative branch and unconstitutional imposition of new statutory requirements on county governments. (*See Morrison v. Hous. Auth. of the City of Los Angeles Bd. of Comrs.* (2003) 107 Cal. App. 4th 860, 876 (noting that subsequent public hearing does not cure initial Brown Act violation and that "[i]t is the job of the courts in enforcing [a statute] to block, not facilitate, such evasive techniques".) For example, through Executive Order N-67-20, the Governor effectively sought to amend the Elections Code to impose new requirements on counties to use the Secretary of State's vote-by-mail tracking system, including the use of Intelligent Mail Barcodes. (*See* Petitioner's Appendix, I Tab, p. 75 [¶2].) Only the Legislature, not the Governor, had the authority to amend the Elections Code to that effect, and the Legislature took no such action.[2]

Even if the Court were to accept that in an emergency the Governor has some power to act in the legislative sphere, such power must be construed narrowly. For example, the Governor may need to act on an emergency and short-term basis where the Legislature is not in session but defer the lawmaking to the Legislature when it is able. Supreme Court

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counties in AB-89, which amended the Budget Act of 2020. This is the subject of pending litigation in Sacramento County Superior Court, *Howard Jarvis Taxpayers Association vs. Alex Padilla in his official capacity as the Secretary of State of California*, Case No. 34-2020-00286875-CU-MC-GDS (Oct. 9, 2020).

[2] The Governor's argument that counties were not strictly required to comply with other requirements imposed by Executive Order N-67-20 is unpersuasive and self-defeating. The Governor argues in part that "a county that did not need to avail itself of those suspensions was free to continue to comply with existing law, without otherwise fulfilling the conditions set forth in the Order." (*See* Pet. at p. 52-32.) However, if counties were able to strictly comply with existing law, there would be no legal basis for the Executive Order whatsoever. (*See* Gov. Code § 8571.)

Justice Gorsuch recently explained the need to curtail executive emergency action to better recognize constitutional rights the longer an emergency persists:

> THE CHIEF JUSTICE expressed willingness to defer to executive orders in the pandemic's early stages based on the newness of the emergency and how little was then known about the disease. Post, at —— (opinion of BREYER, J.). At that time, COVID had been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow, that rationale has expired according to its own terms. Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical.

(*Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354, at *5 (U.S. Nov. 25, 2020) (Gorsuch, concurring).)

The Judicial Council also recognized this concept by enacting emergency rules concerning evictions and foreclosure proceedings in response to Executive Order N-38-20. The Judicial Council explained:

> At the time of the council's action and for several weeks thereafter, the Legislature was not in session. The council acted with the expectation that legislation to address these statutory issues would follow quickly once the Legislature reconvened. In her statement regarding the temporary emergency authority provided by the Governor, the Chief Justice expressly noted that the judicial branch cannot usurp the responsibility of the other two branches on a long-term basis to deal with the myriad impacts of the pandemic—that it is the duty of the judicial branch to resolve disputes not to legislate.

(Judicial Council Circulating Order No. CO-20-13 (Aug. 11. 2020).)

Here, Petitioner failed to recognize and explain the initial breach of the separation of powers doctrine. He failed to acknowledge that during an emergency it is even more important to include the Legislature (and local governments) when making new law. The legislative, executive and judicial branches of government (as well as local governments) all have equally important roles to play in addressing a state of emergency.

C. The Lower Court's Ruling is Supported by Principles of Statutory Interpretation.

The lower court's ruling that the CESA does not grant the Governor the power to amend statutes or create new ones is supported by principles of statutory interpretation.

1. The Plain Language of the CESA Grants the Governor Limited Authority.

In the CESA, the Legislature expressly delegated certain powers to the Governor. Specifically, Government Code section 8567, subdivision (a), provides in relevant part:

> The Governor may **make, amend, and rescind orders and regulations** necessary to carry out the provisions of this chapter. The orders and regulations shall have the force and effect of law.
> (Emphasis added.)

Section 8571 provides in relevant part:

> During a …state of emergency the Governor **may suspend any regulatory statute, or statute prescribing the procedure** for conduct of state business, or the orders, rules, or regulations of any state agency, …where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency.
> (Emphasis added.)

Section 8627 further provides:

> 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 the 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.

The plain language of these provisions does *not* delegate to the Governor the power to make or amend statutes. It can be presumed that the Legislature was aware that the power to make or amend statutes is exclusively granted to the Legislature under the state constitution. (Cal. Const. Art. IV, §1.) In enacting the CESA, the Legislature was expressly preserving its power during a state of emergency by **not** granting the additional authority to Governor.

The California Supreme Court has long held that when a question arises regarding statutory interpretation, a court must "begin with the words of a statute and give these words their ordinary meaning. If the statutory language is clear and unambiguous, then we need go no further." (*Hoechst Celanese Corp. v. Franchise Tax Bd*. (2001) 25 Cal.4th 508, 519) (internal citations omitted.) Here, the language is clear and unambiguous, so the Court "need go no further." (*Id.*)

The CESA only delegated to the Governor the specific powers set forth in the statute. (*See, e.g., Carmel Valley Fire Prot. Distr. v. State of California* (2001) 25 Cal. 4th 287 at 299 ("executive agency created by statute, has only as much rulemaking power as is invested in it by statute.").) The plain language of the statute cannot be reasonably interpreted as a total delegation of the Legislature's authority to the Governor during emergencies. Section 8627 gives the Governor "complete authority over all agencies of the state government," but the plain meaning of "agencies of the state government" does not include the legislative branch of government. (*See, e.g.*, Cal. Gov. Code § 11011.13 ("'Agency' means a state agency, department, division, bureau, board, commission, district agricultural association, and the California State University. '**Agency' does not mean the Legislature** …") (Emphasis added.) It likewise follows, and of particular import to Placer County that "Agency" does not mean local governments such as counties and cities. A narrow

construction of CESA is critical to preserve the essential roles that that government has at both the state and local levels.

a) The Lower Court's Interpretation Need Not Have the Dire Results of Which Petitioner Warns.

Petitioner warns of draconian consequences, including for local governments, if the lower court's interpretation of the CESA is upheld. (*See* Pet. at p. 15.) In particular, Petitioner threatens that the lower court's ruling "would call into question every action taken by the legislative body of every local government pursuant to a conditional suspension of the Brown Act that allows for virtual public meetings—which is to say, virtually every action taken by the legislative body of every local government in California since mid-March." (*Id.*) As a local government, Placer County would undoubtedly be concerned if all the actions of its Board of Supervisors during the past several months were called into question. However, the Court can avoid any such unnecessary negative impacts while upholding the rule of law.

The plain language of the CESA indisputably authorizes the Governor to "suspend" regulatory statutes, such as the Brown Act. (Cal. Gov. Code § 8571.) The parties in this proceeding have referred to Executive Order N-29-20, which provides in part, "All requirements in … the Brown Act expressly or impliedly requiring the physical presence of members [of a local legislative body], the clerk or other personnel of the body, or of the public as a condition of participation in or quorum for a public meeting are hereby waived. In particular, any otherwise-applicable requirements … are hereby suspended." (Petitioner's Appendix, IV Tab 60.) Neither the parties nor Placer County dispute that Governor Newsom had the authority to thus suspend the provisions of the Brown Act during the ongoing state of emergency.

Petitioner contends that permitting the Governor only to suspend the Brown Act, but not permitting him to include additional requirements would result in potential deprivation of public access and participation, and thereby undermine its legislative purpose. (Pet. at pp. 62-63, n. 12.) This thinking is reflective of the Governor's overbroad view of CESA. It supposes that he alone is equipped to fill in those gaps despite the Legislature or local governments being better suited to do so, consistent with our constitutional framework.

To the extent this Court or another reviewing court finds other provisions of Executive Order N-29-20 unlawful exercises of legislative authority, the Court could sever such offending provisions, while leaving in effect the lawful suspension of the Brown Act. (*See, e.g., Barr v. American Association of Political Consultants, Inc* (2020) 140 S.Ct. 2335, 2350 ("The Court presumes that an unconstitutional provision in a law is severable from the remainder of the law or statute" and generally "tr[ies] to limit the solution to the problem, severing any problematic portions while leaving the remainder intact.")(internal citation omitted).)

In addition, while the potential ability for an interested person to invalidate an action under the Brown Act exists, it is limited by the terms of the statute. For instance, actions cannot be invalidated when they (1) are taken in substantial compliance with the law, (2) create a contractual obligation where a party in good-faith relied to its detriment, (3) involve the issuance of notes, bonds, or indebtedness, (4) involve the collection of any tax, or (5) concern an action by the complaining party who had actual notice at least 72 hours before the meeting when the action was taken. (*See* Gov. Code § 54960.1; *Castaic Lake Water Agency v. Newhall Cty. Water Dist.* (2015) 238 Cal. App. 4th 1196, 1207; League of California Cities, *Open & Public V: A Guide to the Ralph M. Brown Act* (2016) at 56.) If a situation exists that could merit invalidation the interested party must send

a written "cure or correct" demand to the legislative body. (Gov. Code § 54960.1(b).) The "sweeping harm" that Petitioners contend would ensue as it pertains to the Brown Act, is more likely a mirage.

Accordingly, upholding the lower court's decision need not "call into question every action taken by the legislative body of every local government" pursuant to the suspension of the Brown Act. (*See* Pet. at p. 15.)

2. The Plain Language of the CESA Grants Local Governments Authority.

That the CESA cannot be reasonably interpreted as a total delegation of the Legislature's authority to the Governor during emergencies is further evidenced by the Legislature's delegation of authority to local governments. Through the CESA, the Legislature delegated specific authority to the Governor *and* to local governing bodies. In this statute, the legislature "found and declared to be necessary":

> To confer upon the Governor **and upon the chief executives and governing bodies of political subdivisions of this state the emergency powers provided herein** …

(Cal. Gov. Code § 8550(a).)[3] (Emphasis added.) The Court cannot ignore the plain language of the CESA, including the Legislature's delegation of authority to local governments. Indeed, Petitioner has acknowledged the "cardinal rule of statutory interpretation that all portions of a statute must be interpreted to have meaning and effect." (Pet. at p. 59.)

[3] The CSEA defines "political subdivision" to include "any city, city and county, county, district, or other local governmental agency or public agency authorized by law." (Gov. Code § 8557(b).) It further defines "governing body" as "the legislative body, trustees, or directors of a political subdivision." (Gov. Code § 8557(c).)

The CESA further provides that the Governor may suspend and supersede local ordinances and regulations. However, his authority to do so is necessarily limited to the scope of his authority to issue an "order or regulation." (*See* Cal. Gov. Code § 8614(c) ("Ordinances, orders, and regulations of a political subdivision shall continue in effect during a state of war emergency or a state of emergency, except as to any provision suspended or superseded by an order or regulation issued by the Governor.").) As set forth above, that authority does not include the power to amend statutes or create new ones.

III. CONCLUSION

For the reasons set forth above, Placer County requests that this Court uphold the lower court's ruling.

Dated: December 11, 2020

Respectfully submitted,

/s/ Emily F. Taylor
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Office of the Placer County Counsel
Attorneys for *Amicus Curiae* COUNTY OF PLACER

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204 of the California Rules of Court, I hereby certify that the foregoing brief uses a typeface of Times New Roman 13-point. I further certify that the foregoing brief, not including the cover page, application, Certificate of Interested Entities or Persons, tables of contents and authorities, and this certificate, contains 3,230 words, according to the word counting function of Microsoft Word, the word processing software used to prepare this brief. This is within the 14,000-word limit set by the California Rules of Court. In preparing this Certificate, I relied on the word count generated by Microsoft Word.

Dated: December 11, 2020

Respectfully submitted,

/s/ Emily F. Taylor
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PROOF OF SERVICE

Gavin Newsom v. Superior Court of Sutter County
Third Appellate District Case No. C093006
Sutter County Superior Court No. CVCS20-0912

I, Jeanette A. Lovejoy, declare:

I am employed in the County of Placer, State of California. My business address is 175 Fulweiler Avenue, Auburn, CA 95603 and email address is jlovejoy@placer.ca.gov. I am over the age of 18 and not a party to the within action. On December 11, 2020, I served the following:

APPLICATION OF COUNTY OF PLACER FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT THE SUPERIOR COURT OF SUTTER COUNTY AND REAL PARTIES IN INTEREST JAMES GALLAGHER AND KEVIN KILEY AND PROPOSED *AMICUS CURIAE* BRIEF OF COUNTY OF PLACER IN SUPPORT OF RESPONDENT THE SUPERIOR COURT OF SUTTER COUNTY AND REAL PARTIES IN INTEREST JAMES GALLAGHER AND KEVIN KILEY

on the interested parties in this action addressed as follows:

☒ **BY ELECTRONIC TRANSMISSION (TrueFiling)** by causing a true copy thereof to be electronically delivered to the following person(s) or representative(s) at the email address(es) listed below. I did not receive any electronic message or other indication that the transmission was unsuccessful.

☒ **BY FIRST CLASS MAIL** by causing a true copy thereof to be placed in a sealed envelope, with postage fully prepaid, addressed to the following person(s) or representative(s) as listed below, and depositing said envelope(s) with the United States Postal Service at Auburn, California.

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 11th day of December, 2020, at Auburn, California.

/s/ Jeanette A. Lovejoy

JEANETTE A. LOVEJOY