IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

GAVIN NEWSOM, in his official capacity as Governor of the State of California, Petitioner, v. **THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SUTTER**, Respondent, **JAMES GALLAGHER and KEVIN KILEY,**	Case No. C093006 [Related Case No. C092070]

On Petition for Writ of Mandate to the Sutter County Superior Court, Case No. CVCS20-0912 (Hon. Sarah Heckman)

[PROPOSED] AMICUS BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF PETITIONER GOVERNOR GAVIN NEWSOM

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INTRODUCTION

The California Emergency Services Act ("CESA") is intended to provide a "clear framework" so that "affected persons and entities, in both the private and public spheres, know exactly what is expected of them." (*Macias v. State* (1995) 10 Cal.4th 844, 858.) In the midst of an emergency, local governments—including members of Amici California State Association of Counties ("CSAC") and League of California Cities ("Cal Cities")—may rely heavily on Executive Orders issued by the Governor under CESA in order to obtain relief from various statutory requirements that would otherwise impede their ability to govern or interfere with emergency response needs, including the need to rapidly allocate necessary resources to an emergency response.

Although Real Parties in Interest challenged just one Executive Order, the trial court enjoined the Governor from "exercising any power under [CESA] which amends, alters, or changes existing statutory law or makes new statutory law or legislative policy." This sweeping injunction—which fails to clarify its use of capacious terms like "amends, alters, or changes"—casts doubt on numerous other Executive Orders and the decisions made in reliance on those Orders. This lack of clarity undermines the statutory purpose of CESA and impedes the coordination of state and local resources to combat the ongoing COVID-19 emergency. And to the extent the trial court's decision suggests that CESA only authorizes unconditional suspensions of statutory mandates during emergencies, such an

interpretation would be contrary to historical practice. It would also impede local governments' ability to modify operations and redirect resources to address emergencies. Under the trial court's decision, Governors would be forced to choose between keeping in place a statutory mandate that is contextually harmful or impossible to fulfill (like in-person public meeting requirements during a pandemic), and suspending it in full despite the values the requirement promotes (like public participation and transparency). This could strip local governments of temporary alternative mechanisms that are critical for maintaining continuity of operations during times of crisis.

The trial court's decision is therefore antithetical to the CESA's goal of ensuring clear and coordinated response to emergencies such as the present COVID-19 pandemic. This Court should grant the relief requested in Petitioner's petition for a writ of mandate.

ARGUMENT

I. The Superior Court's Ruling and Injunction are Impermissibly Vague and Overbroad and They Impair Effective and Coordinated Emergency Response.

The trial court concluded that Executive Order N-67-20 was an unlawful attempt by the Governor to "amend statutory law or make new statutory law." (III Tab 56, p. 709.) On that basis, the court enjoined the Governor from "exercising any power under [CESA] which amends, alters, or changes existing statutory law or makes new statutory law or legislative policy." (*Id*. p. 710.) This vague and overbroad proscription provides little

clarity as to the scope of executive actions that are invalid or prohibited. Executive Order N-67-20 interacts with state law in multiple different ways—but the trial court failed entirely to grapple with the distinctions and instead declared the Order void in its entirety. The upshot is that there no reasonable possibility of discerning from the trial court's ruling or injunction what form of existing or future executive action may constitute an invalid attempt to "amend" or "make new" statutory law in the court's view. (*Id.* p. 709.) "An injunction which forbids an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application exceeds the power of the court." (*Pitchess v. Superior Court* (1969) 2 Cal.App.3d 644, 651.)

The ambiguity of the ruling and the injunction is further compounded because the trial court purported to apply it well beyond the challenged (and already superseded) Executive Order, thereby contravening cardinal legal principles that restrict the scope of injunctive relief to the subject of the litigation. (See, e.g., *Anderson v. Souza* (1952) 38 Cal.2d 825, 840–41.) The trial court insinuated that its ruling and injunction acts on "more than 50 different executive orders" promulgated since the COVID-19 pandemic began. (III Tab. 56, p. 703.) But just as the court's decision provides scant guidance on what parts of Executive Order N-67-20 are unlawful, it is completely devoid of detail as to which of these 50 unnamed orders run afoul of its vague prohibitions. The sweeping ruling and injunction further throw into doubt the validity of executive orders issued under CESA in

response to other declared emergencies, such as California's still-raging wildfires, and purport to restrain executive action under CESA in response to exigencies that have not yet arisen.

As a consequence, local governments are faced with significant uncertainty about which Executive Orders are implicated by the trial court's ruling, whether decisions made in reliance on those Orders are still valid, and which current and future Executive Orders should be considered effective going forward. As a result, local governments cannot reasonably be expected to know whether statutory mandates acted on by an Executive Order issued under CESA remain in effect or whether to comply with a mandate created by such an Executive Order. Such confusion and inconsistency undermine the statute's goal of ensuring a focused and coordinated approach to addressing emergencies such as the present COVID-19 pandemic.

A. The Vague and Capaciously Worded Injunction Provides Scant Guidance as to the Forms of Executive Action It Purports to Restrain.

California law is clear: "An injunction must be definite enough to provide a standard of conduct for those whose activities are proscribed, as well as a standard for the ascertainment of violations of the injunctive order by the courts called upon to apply it." (*Pitchess v. Superior Court* (1969) 2 Cal.App.3d 644, 651.) Thus, "an injunction must clearly define the conduct prohibited" (*Evans v. Evans* (2008) 162 Cal.App.4th 1157, 1170), and it must be "reasonably possible to determine whether a particular act is included within its grasp." (*People v. Custom Craft Carpets, Inc.* (1984) 159 Cal.App.3d 676, 681; see

Continental Baking Co. v. Katz (1968) 68 Cal.2d 512, 534 ["An injunction must not be uncertain or ambiguous and defendant must be able to determine from the order what he may and may not do."].) "An uncertain injunction is invalid." (*Custom Craft Carpets*, *supra*, 159 Cal.App.3d at p. 681.)

The trial court's injunction is fatally ambiguous. The court's statement of decision and injunction repeatedly use terms like "amend[ing] statutory law" and "mak[ing] new statutory law or legislative policy" to describe the executive actions it found to be unlawful. (See, e.g., III Tab 56, pp. 703, 705–08, 710.) The trial court distinguished these phrases from the power to "issue orders and regulations and to suspend certain statutes," which it acknowledged the Governor has the power to do under CESA. (*Id.* p. 706.) But the court never defined these concepts with reference to the actual operation of the challenged Executive Order. Indeed, the statement of decision does not substantively analyze specific provisions of the Executive Order or tie its conclusions to specific aspects of the Order. Absent such a consideration of the Executive Order, the meaning of these capacious phrases is far from clear. (See, e.g., *Evans*, *supra*, 162 Cal.App.4th, at p. 1170 [prohibition on posting "confidential personal information" vague where court did not define the term and thus defendant did not have reasonable basis to understand what was proscribed]; cf. *People ex rel. Gascon v. HomeAdvisor, Inc.* (2020) 49 Cal.App.5th 1073, 1083 [injunction was not vague where the court got "into the weeds" by considering "a plethora of

advertisements," resulting in the use of terminology that referred to background checks for specific categories of employees].)

An examination of Executive Order N-67-20 demonstrates the inscrutability of the trial court's decision. The Order includes seven substantive clauses, which operate on state law in several different ways. (See I Tab 14, pp. 74–77.) Some provisions simply suspend specific requirements imposed by existing law. (See, e.g., I Tab 14, p. 76 [¶ 4] [suspending pre-October 31, 2020 deadlines for counties subject to Voter's Choice Act to open voting centers].) Other parts of the Order conditionally suspend certain statutory requirements if a county complies with criteria enumerated in the Order, while leaving counties the option to comply with existing law if they so choose. (See, e.g., *id.* pp. 75–76 [¶ 3] [suspending statutory requirements governing number and placement of polling places if counties met specified alternative requirements to ensure accessibility of polling places and vote-by-mail ballot drop-off locations]; *id.* p. 76 [¶ 5] [suspending requirements for in-person meetings and workshops in relation to planning for the election if counties met specified public participation requirements]; *id.* p. 77 [¶ 6] [authorizing counties to comply with existing law rather than the conditional suspensions articulated in the Order].) And still other provisions impose mandatory requirements on counties. (*Id.* p. 75 [¶ 2] [requiring the use of the Secretary of State's vote-by-mail tracking system and Intelligent Mail Barcodes].) But rather than specifying which of these exercises exceeded the scope of

executive authority under CESA and why, the trial court simply declared the Executive Order invalid in its entirety.

In the context of the Order, the injunction's language can take on many different meanings. For example, is suspending a statutory deadline for opening vote centers—as Paragraph 4 of the Order does—an impermissible attempt to "amend statutory law"? (III Tab 56, p. 709.) Or does this fall within the power to "suspend any regulatory statute"—which the trial court recognized the Governor is authorized to do under the plain language of CESA? (*Id.* p. 706.) Likewise, is conditionally suspending certain statutory requirements if a county agrees to follow alternative rules (as Paragraphs 3 and 5 do) an improper attempt to "make or amend statutes"—even if counties are given the discretion to follow existing law? (*Id.* p. 705.) Or do these conditional suspensions with alternative criteria fall within the Governor's acknowledged power to "issue orders and regulations and to suspend certain statutes"? (*Id.* p. 706.) And is affirmatively ordering the use of the Secretary of State's vote-by-mail tracking system an impermissible "legislative . . . enactment" or a sanctioned "order" or "regulation"? (*Ibid.*)

Neither the language of the injunction, nor the trial court's impenetrable statement of decision, provides answers to these questions. What executive actions are prohibited under the injunction, and what the standard is for the ascertainment of violations of the injunction, are therefore left largely undefined. Without any meaningful guidance, the Governor—and local governments that rely on Executive Orders promulgated under

CESA to govern in an emergency—are left with indeterminate phrases that provide little insight into which exercises of executive authority in response to a crisis are valid and which are proscribed.

B. The Ruling and Injunction Are a Case Study in Overbreadth, Purporting to Sweep in an Undefined and Indeterminate Universe of Executive Orders Not Before the Court.

Not only is the trial court's ruling and injunction vague as to the conduct proscribed, it is also ambiguous as to which Executive Orders are affected. Although the only executive action challenged in the Real Parties in Interest's complaint was Executive Order N-67-20—which has now been superseded by legislation and pertained to an already-completed election—the court determined that the case was justiciable and not moot because it raised the question of "whether the Governor has the authority under the" CESA to "exercise legislative power." (III Tab 56, p. 702.) Thus, in the court's view, the controversy was ongoing because the court's ruling would govern the "more than 50 different executive orders changing numerous California statutes since the state of emergency was declared." (*Ibid.*) Indeed, in justifying its injunction, the court noted that injunctive relief was proper because the Governor had "issued a multitude of executive orders under the purported authority of CESA, many of which have amended statutory law" and "continue[d] to issue executive orders which create legislative policy." (*Id.* pp. 709–10.)

As an initial matter, the court's analysis confuses the question presented by the Real Parties in Interest—the scope of

the Governor's authority under CESA—with the constitutional case-and-controversy requirement—i.e., the existence of a concrete dispute capable of judicial resolution. For the reasons explained in the Petition for Mandate and Reply, the dispute over Executive Order N-67-20 itself is moot, and the judiciary cannot provide Real Parties in Interest relief with respect to that Order. (Pet. pp. 41–50; Reply Br. pp. 11-16.) The existence of a broader question regarding the statutory interpretation of CESA cannot resuscitate the controversy. Courts have repeatedly cautioned that questions presented may only be answered "in an adversary context and in a form historically viewed as capable of resolution through the judicial process" (*Flast v. Cohen* (1968) 392 U.S. 83, 95), and that the courts' role is "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it" (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132 [internal quotes omitted]).

But even if the case were not moot, the trial court's decision exemplifies the problems of reaching beyond the specific dispute before it to resolve an abstract legal question. The court's injunction could apply to myriad Executive Orders issued during the present COVID-19 emergency that are not identified or examined in the trial court's statement of decision. The court apparently concluded that "many" of the "multitude of executive orders" issued by the Governor "have amended statutory law" and that some of these orders "continue[] . . . [to] create

legislative policy." (III Tab. 56, pp. 709–10.) But which specific Executive Orders the court had in mind—and what aspects of those orders were inappropriate attempts to amend statutory law or create legislative policy—are not revealed.

The result is a ruling and injunction that extends well beyond the specific Executive Order briefed and argued by the parties and encompasses an undefined universe of other executive actions, including executive actions that may be taken in response to emergencies that have not yet arisen. In issuing such a sweeping injunction, the court violated a cardinal rule of California law: "[I]njunctive process ought never to go beyond the necessities of the case." (*Anderson v. Souza* (1952) 38 Cal.2d 825, 840–41.) When a party seeks an injunction, the "court hearing the action is charged with fashioning a remedy *for a specific deprivation*, not with the drafting of a statute addressed to the general public." (*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal. 4th 864, 878–79 [emphasis added, citation omitted].) Here, rather than fashioning "the least disruptive remedy adequate to its legitimate task," the court issued a vague, overbroad injunction that has introduced significant uncertainty and confusion into the State's emergency response—an outcome "inconsistent with the very nature and purpose of injunctive relief." (*Planned Parenthood Golden Gate v. Garibaldi* (2003) 107 Cal.App.4th 345, 354.)

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C. The Flawed Ruling and Injunction Chill Local Government Action Taken in Reliance on Emergency Executive Orders.

The purpose of CESA is to ensure that "all emergency services functions of this state be coordinated as far as possible with the comparable functions of its political subdivisions . . . and of private agencies of every type, to the end that the most effective use may be made of all manpower, resources, and facilities for dealing with any emergency that may occur." (Gov. Code, § 8550.) The statute is intended to provide a "clear framework of authorities" so that "affected persons and entities, in both the private and public spheres, know exactly what is expected of them." (*Macias*, *supra*, 10 Cal.4th at p. 858.) By throwing into question numerous Executive Orders and the decisions made in reliance on those Orders, however, the trial court's vague and overbroad ruling and injunction undermine the statutory purpose of CESA and impede the coordination of state and local resources to combat the ongoing COVID-19 emergency. The ambiguity of the trial court's decision is particularly problematic for local governments, which have relied on the Governor's Executive Orders to modify their operations and dedicate resources to address the emergency. The injunction threatens to undo a wide swathe of local governmental decisions and leaves local governments in limbo about which Executive Orders they may continue to rely on going forward.

For example, Executive Order N-25-20, issued on March 20, 2020, suspends specific provisions of the Brown Act requiring physical presence for public meetings, and authorizes public

meetings to be held via teleconference on the condition that certain criteria intended to promote public access are satisfied. (Governor's Exec. Order No. N-25-20, ¶ 11 (Mar. 20, 2020).) In reliance on this Executive Order, many local governments across the State shifted away from in-person meetings and, since March, have conducted meetings over videoconference or teleconference. To the extent the trial court's injunction invalidates this Executive Order—as Real Parties in Interest acknowledge it may (Return to Writ p. 30 n. 6)—the injunction casts doubt on months of local government decisionmaking at teleconference or videoconference meetings. Local governments thus face uncertainty about whether ordinances, resolutions, contracts, budget approvals, land use agreements, and other decisions vital to local governance adopted over the last eight months are still valid. They also confront an immediate dilemma about whether to continue relying on Executive Order N-25-20 with respect to upcoming meetings of Boards of Supervisors, City Councils, and numerous other local legislative bodies, or whether, in light of the trial court's injunction, they must go back to conducting in-person meetings in the midst of a surge in COVID-19 cases—exposing government workers and the public to direct health and safety risks.

This uncertainty is replicated across numerous other Executive Orders impacting numerous local government services and operations, including Orders that:

- Empower local governments to take steps to prevent certain commercial and residential evictions (Governor's

Exec. Order No. N-28-20 (Mar. 16, 2020) and Governor's Exec. Order No. N-80-20 (Sept. 23, 2020));

- Broaden access to and extend deadlines for social safety net services that are administered at the county level by, for example, allowing counties to enroll persons into the California Work Opportunity and Responsibility to Kids (CalWORKS) program by allowing self-attestation of pregnancy and conditions of eligibility, and waiving in-person identification and signature requirements (see, e.g., Governor's Exec. Orders Nos. N-59-20 (May 1, 2020), N-68-20 (June 5, 2020) & N-71-20 (June 30, 2020);
- Suspend or ease certain statutorily required notices and deadlines for county and city agencies (see, e.g., Governor's Exec. Order Nos. N-63-20 (May 7, 2020), N-65-20 (May 19, 2020) & N-72-20 (July 31, 2020);
- Suspend agencies' physical posting, notice, and public access requirements under the California Environmental Quality Act ("CEQA") provided that the agency undertakes alternative means of ensuring public access and outreach (Governor's Exec. Order Nos. N-54-20 (Apr. 22, 2020) & N-80-20 (Sept. 23, 2020);
- Address school closures and distance learning (see, e.g., Governor's Exec. Order Nos. N-26-20 (Mar. 13, 2020) & N-56-20 (Apr. 22, 2020); and
- Suspend in-person requirements for administrative hearings and other local government proceedings (Executive Order N-63-20).

Faced with the confusion wrought by the trial court's ruling and injunction, some local governments may be deterred from following these Executive Orders for fear that they might be invalid under the trial court's sweeping injunction. And cities and counties that continue to rely on the conditional suspensions and other extensions of statutory deadlines affected by the Governor in response to the COVID-19 pandemic may find themselves diverting historically scarce resources to defending the validity of their actions.

Nor are the harms created by this uncertainty limited to the response to the COVID-19 pandemic. Against the backdrop of COVID-19, the Governor has simultaneously proclaimed states of emergency as a result of extreme heat events (Aug. 14, 2020 Proclamation) and wildfires of unprecedented geographic scope and severity (Aug. 18, 2020 Proclamation). The trial court's injunction threatens local agency reliance on myriad executive actions taken in response to these states of emergency, including, for instance, suspension of fees collected by county recorders for records lost due to wildfires (Aug. 18, 2020 Proclamation, ¶ 8); authorization for State agencies to waive licensing and other requirements for congregate and childcare facilities and healthcare facilities serving fire-affected communities to ensure continuity of services (*id.* ¶¶ 9, 10); waiver of required time-periods for renewal of local emergency and local health emergency declarations (Governor's Exec. Order No. N-81-20, ¶¶ 8, 9 (Sept. 25, 2020)) (providing that local emergencies remain in effect until terminated); suspension and affirmative extension

of deadlines for homeowners in affected areas to file claims to "allow counties time to reappraise the value of property" (*id.* ¶ 6); and suspension of statutes, rules, and regulations to the extent they would hinder the cleanup of hazardous waste and other wildfire debris or environmental restoration (*id.* ¶ 1).

In the context of emergency response, uncertainty regarding the validity of executive actions such as these may have dire consequences. Perhaps a county that had relied on executive suspension of required renewals of fire-related local health emergencies hesitates to take imminently needed preventative measures for cleanup of hazardous waste. Or a county social services department is uncertain whether CalWORKS and Medi-Cal recipients must reverify eligibility and identification in order to continue receiving benefits because the validity of the in-person requirements waiver is thrown into doubt.

As the California Supreme Court foreshadowed in *Macias*, when "even local governmental entities may feel compelled to question the State's judgment during a declared emergency," "the damage to the public interest could be irreparable." (*Macias*, *supra*, 10 Cal.4th at p. 859.) The foundational precept that an injunction must provide clear and unambiguous notice as to what the party bound "may and may not do" (*Weber v. Superior Court* (1945) 26 Cal.2d 144, 148) is amplified in this case: the trial court's vague and overbroad injunction could chill the clear and swift exercise of executive authority in response to conditions of extreme peril and undermine a coordinated and efficient response

by agencies that rely on that authority. The prospect of such "uncoordinated, haphazard, or antagonistic action" is anathema to CESA's goal of "control[ling] and coordinat[ing] the efforts of all the various State agencies and local governments to ensure the most efficient and effective response" to an emergency. (*Macias*, *supra*, 10 Cal.4th at p. 856.)

II. The Superior Court's Ruling and Injunction, as Interpreted by Real Parties in Interest, is Ahistorical and Harmful to Local Governance During Emergencies.

Real Parties in Interest interpret the trial court's ambiguous injunction to limit executive authority under CESA to unconditional suspensions of statutory mandates during emergencies.[1] To the extent the trial court's ambiguous decision can be read in this binary way, this Court should consider that such a reading would be an unprecedented departure from longstanding historical practice and lead to unworkable results that would hamstring local governance during times of crisis.

A. Executive Orders have Historically Gone Beyond Mere Unconditional Suspensions of State Law.

Past Executive Orders issued under CESA have done more than unconditionally suspend state law during emergencies, and the Legislature has never amended CESA in response.

[1] As discussed in Part I.A. above, it is not at all clear that this was the trial court's intended effect, as the court enjoined enforcement of a portion of Executive Order N-67-20 that did nothing more than suspend deadlines such that even an unconditional suspension would appear to violate the trial court's injunction on "amend[ing], alter[ing], or chang[ing]" existing statutory law.

For example, state law prohibits price gouging following emergencies for set periods of time but authorizes certain officials to extend the prohibition for an additional 30 days as needed. (Penal Code, § 396.) In response to devastating wildfires, Governor Brown suspended multiple times the temporal limits on price-gouging prohibitions and then extended those prohibitions beyond the 30 days contemplated by law for a period necessary to meet the needs of the emergency. (Governor's Exec. Order No. B-50-18 (Apr. 13, 2018) [waiving time period limitations under Penal Code section 396 and extending price gouging protections through December 4, 2018]; Governor's Exec. Order No. B-51-18 (Apr. 13, 2018) [same for counties impacted by different wildfires through December 4, 2018]; Governor's Exec. Order No. B-59-18 (Nov. 28, 2018) [same through May 31, 2019].) To continue assisting communities recovering from the wildfires, Governor Newsom likewise suspended the temporal limits on price-gouging prohibitions and then extended the prohibitions beyond the 30 days. (Governor's Exec. Order No. N-12-19 (May 31, 2019) [same through December 31, 2019]; Governor's Exec. Order No. N-22-19 (Dec. 31, 2019) [same through December 31, 2020].) The Governor effected such a suspension of temporal limits and extension of price-gouging prohibitions as recently as September 25, 2020 to protect communities recovering from this season's historic wildfires. (Governor's Exec. Order No. N-81-20 (Sept. 25, 2020).)

Real Parties in Interest dismiss these and other historical examples of modifications to statutory mandates by labeling

them nothing more than an unconditional suspension of state law. (Return to Writ at p. 38.) The Executive Orders did more: first, they suspended the statutory timeframe; then, they affirmatively established a different timeframe for the protections in order to meet the demands of the emergency. By contrast, under Real Parties in Interest's view of the trial court's injunction, the Governor would be limited to suspending the temporal limitation on the price-gouging prohibition without affirmatively establishing an alternative sunset date. And in any event, the apparent confusion over whether these past Executive Orders merely suspend state law or also alter or make new state law only underscores how inscrutable the trial court's ruling is.

There are other historical examples that extend beyond mere "targeted suspensions." (*Cf.* Return to Writ p. 39.) "In order to quickly provide housing for those displaced by" fires, floods, and mud slides, numerous Executive Orders have suspended for three-year periods the various state laws—such as the Mobilehome Parks Act and sections of the Health and Safety Code—that govern the permitting, operation, and construction of mobilehomes, manufactured homes, and certain types of recreational vehicles. (See, e.g., Governor's Exec. Order No. B-35-15 (Oct. 1, 2015); Governor's Exec. Order No. B-43-17 (Oct. 18, 2017); Governor's Exec. Order No. B-50-18 (Apr. 13, 2018); Governor's Exec. Order No. B-57-18 (Nov. 14, 2018).) In addition to suspending these laws, these Executive Orders also directed the "Department of Housing and Community Development and local enforcement agencies with delegated disaster authority [to]

jointly develop permitting, operating, and construction standards" to apply during the three-year suspension period that "shall provide reasonable consistency" with the normal statutory standards and factors. (*Ibid.*) In other words, these Executive Orders suspended state laws that would interfere with recovery efforts and then directed actions that would fill the resulting vacuum left by those suspensions.

Although these Executive Orders went beyond unconditional suspensions in order to meet the demands of the particular emergencies, the Legislature did not amend CESA to prohibit them. (See *Save Our Heritage Org. v. City of San Diego* (2018) 28 Cal.App.5th 656, 668 [courts assume that Legislature is aware of prior practice such that Legislature's failure to change practice in subsequent statutory enactments implies Legislative acquiescence].) The historical practice of modifying statutory mandates in response to a range of declared states of emergencies also underscores just how disruptive such a capacious injunction would be to coordinated emergency response and recovery efforts.

B. Executive Orders that Merely Suspend State Law Could Hamstring Local Governments and Create Unworkable Results.

Local governments are subject to countless statutory and regulatory requirements. These include statutory timeframes for reviewing and approving development projects, responding to Public Record Act requests, and providing notice to claimants under the Government Claims Act; public noticing following determinations under the California Environmental Quality Act and in advance of official legislative meetings under the Brown

Act; various workforce limitations regarding reinstatement, hours, and time for retired annuitants and temporary workers, among others; and more.

These requirements promote core values like timely government action as well as public participation and transparency in governance. But emergencies can severely impede the ability of local governments to comply with these statutory and regulatory requirements in the usual manner and within the usual timeframe. And, as in the case of the COVID-19 pandemic, statutory mandates like those imposing in-person meeting requirements may conflict with and even undermine critical emergency response efforts and compromise public health and safety. Local governments therefore rely on Executive Orders during emergencies in order to obtain relief from various statutory requirements that would otherwise impede their ability to govern or divert resources to emergency response, as well as to fulfill statutory mandates in manners consistent with their management of the crisis. Under the trial court's ruling, Executive Orders must necessarily be limited to suspending a statutory requirement or leaving it intact, but they can not make any modifications to the requirement, even to mitigate the impacts of the suspension and accomplish the legislative intent behind the suspended mandate. This, too, would lead to unworkable results for local governments.

For example, under normal circumstances, the various statutory requirements related to in-person hearings and physical notice promote public participation and transparency.

But the unique circumstances of the COVID-19 pandemic make compliance both difficult and dangerous to public health and safety by subjecting government workers and members of the public to risk of exposure to the virus. Recognizing this reality, Executive Order N-63-20 suspended requirements that public employers post notices on physical "employee bulletin boards" on the condition that the employer provide such notice through electronic means. (Governor's Exec. Order No. N-63-20, ¶ 10 (May 7, 2020).) It also suspended certain requirements that parties, witnesses, or the public participate in hearings in person on the condition that participants may access the entire proceeding while it is taking place through alternative, electronic means and the presiding officer otherwise complies with certain civil rights and accessibility requirements. (*Id.* ¶ 11.) As described above, other Executive Orders took similar actions with respect to the public meeting requirements under the Brown Act. (See *supra*, Part I.C.)

Empowering local governments to move certain operations online to protect against the risks associated with in-person gathering promotes the values of transparency and public participation that animate the suspended requirements while assisting with management of the crisis itself. These conditional suspensions thus afford local governments the flexibility necessary during emergencies to continue governing in a fashion that hews as closely as possible to statutory intent given the circumstances. But under the trial court's ruling, the Executive Orders must either leave contextually harmful in-person noticing

and meeting mandates intact or eviscerate legislative intent by waiving them entirely. This binary choice is damaging to local governments that rely on the alteration of statutory requirements during an emergency in a way that allows them to maintain continuity of operations in a manner most consistent with the underlying purpose of the suspended requirements and their response to the crisis at hand.

Beyond the flexibility that conditional suspensions afford, Executive Orders permitted by CESA also offer critical relief from various statutory deadlines so that local governments implementing continuity of operations plans can focus on addressing the emergency. Under ordinary circumstances, these requirements guarantee timely action by local government. During emergencies, however, when the public workforce may be drastically reduced or redirected, strict adherence to timeframes may disserve the public. For example, County Boards of Equalization or Assessment Appeals Boards are statutorily required to make a final determination on assessment appeals within two years of a timely filed application; if they do not, the applicant's opinion on value is automatically accepted. (Rev. & Tax. Code, § 1604.) Given the various disruptions caused by the COVID-19 pandemic, Executive Order N-72-20 extended to January 31, 2021 the deadline by which Boards must issue decisions on property tax assessment appeals. (Governor's Exec. Order No. N-72-20, ¶ 1 (July 31, 2020).) As another example, agencies normally have 30 days to act on an administrative law judge's proposed decision; if an agency fails to act within 30 days,

the proposed decision is deemed adopted by the agency. Executive Order N-35-20 doubled the time for agency action. (Governor's Exec. Order No. N-35-20, ¶ 8 (Mar. 21, 2020).) Likewise, Executive Order N-40-20 extended by 60 days the deadline for opening and completing investigation of alleged misconduct by public safety officers. (Governor's Exec. Order No. N-40-20, ¶ 15 (Mar. 30, 2020).)

Under the trial court's decision, the Governor could suspend these statutory deadlines but not affirmatively extend them to a time certain. In other words, a Governor would have to choose between providing much needed relief to local governments laboring under emergency conditions and providing predictability to the constituents who rely on timely government action. If, faced with this Cornelian dilemma, a Governor chose not suspend the deadlines because he could not affirmatively extend them, local governments could be forced to redirect much-needed resources *away* from emergency response in order to avoid the penalties that would stem from otherwise missed deadlines.

As these examples demonstrate, the trial court's decision, as interpreted by the Real Parties in Interest, is untenable and would lead to perverse results: less transparent government, less public participation, and fewer resources devoted to the emergency at hand. What Real Parties in Interest label as a "parade of horribles" (Return to Writ at pp. 29–30) is in fact the real and practical harm of the trial court's decision, if left to stand.

CONCLUSION

For the foregoing reasons, CSAC and Cal Cities respectfully urge this Court to grant the relief requested in Petitioner's petition for a writ of mandate directing the trial court to vacate its November 13, 2020 Statement of Decision.

Dated: December18, 2020

Respectfully submitted,

/s/___

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CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.204(c)(1), I certify that the foregoing Brief of Amici Curiae California State Association of Counties and League of California Cities in Support of Petitioners contains 5,588 words, including footnotes, but not including the Table of Contents, Table of Authorities, this Certificate, the caption page, or signature blocks.

Dated: December 18, 2020 Respectfully submitted,

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