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,** Real Parties in Interest	Case No. C093006 [Related to Case No. C092070]

Sutter County Superior Court, Case No. CVCS20-0912
Honorable Sarah Heckman, Judge

APPLICATION OF CALIFORNIA STATE SENATORS SHANNON GROVE, BRIAN DAHLE AND SENATOR JIM NIELSEN; AND STATE ASSEMBLYMEMBERS MARIE WALDRON, MEGAN DAHLE, AND JORDAN CUNNINGHAM TO FILE AN AMICUS BRIEF IN SUPPORT OF REAL PARTY IN INTEREST CALIFORNIA ASSEMBLYMEMBER JAMES GALLAGHER AND CALIFORNIA ASSEMBLYMEMBER KEVIN KILEY; PROPOSED AMICUS CURIAE BRIEF

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State of California
Court of Appeal
Third Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
California Rules of Court, rules 8.208, 8.490(i), 8.494(c), 8.496(c), or 8.498(d)

Court of Appeal Case Caption:

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,
Real Parties in Interest

Court of Appeal Case Number: C093006

Please check here if applicable:

[**X**] There are no interested entities or persons to list in this Certificate as defined in the California Rules of Court.

Date: December 18, 2020

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief of Howard Jarvis Taxpayers Association, et al. is produced using 13-point Roman type including footnotes and **contains 2,033 words,** which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 18, 2020 Respectfully submitted,

BELL, McANDREWS & HILTACHK, LLP

By: _____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE PRESIDING JUSTICE OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT:

Amici Curiae, CALIFORNIA STATE SENATOR SHANNON GROVE, BRIAN DAHLE AND SENATOR JIM NIELSEN; AND STATE ASSEMBLYMEMBERS MARIE WALDRON, MEGAN DAHLE, AND JORDAN CUNNINGHAM request permission, pursuant to Rules 8.487 and 8.200(c) of the California Rules of Court, to file the attached amicus curiae brief in support of Real Parties In Interest California State Assembly Members James Gallagher and Kevin Kiley ("Real Parties").

Amici Curiae are respective members of the two houses of the State Legislature whose power the Governor has usurped constituting the basis for the underlying action. *Amici Curiae* have an interest in this case because, at its core, this case implicates the doctrine of separation of powers between the Executive Branch (Petitioner) and the Legislative Branch (Real Parties In Interest and *Amici Curiae*).

INTRODUCTION

The California Constitution, as adopted by the People, have never contemplated a strong executive role for the Governor. The Constitution unambiguously proclaims the three political branches are co-equal branches of our government, and that one branch shall not exercise the powers of another:

> 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.

(Cal. Const., art. III, § 3, and see *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 297 ["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"].)

The Legislature's core function, of course, is to pass statutes. (Cal. Const., art. IV, § 8; *Perez v. Roe* 1 (2006) 146 Cal.App.4th 171, 177.)

When the Governor exercises legislative power beyond his authority, he violates the doctrine separation of powers, (*See Lukens v. Nye* (1909) 156 Cal. 498, 501 ["As an executive officer, [the Governor] is forbidden to exercise any legislative power or function except as in the constitution expressly provided."]; *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1084 [the Governor "may exercise legislative power only in the manner expressly authorized by the Constitution"].)

Here, state law expressly specifies the manner in which the Governor may act in the area of his emergency powers. The Governor exceeded that authority when he enacted Executive Order N-67-20 to

impose *new* elections laws on California voters. Because the Governor legislated outside the scope of his powers, violating the doctrine of separation of powers, the purported executive order was never a valid enactment and was null and void on its face.

EXECUTIVE ORDER N-67-20

Governor Gavin Newsom issued Executive Order N-67-20 (the "Order") on June 3, 2020.

The Governor has claimed his powers under the California Emergency Services Act (Government Code §8550, *et seq*.) authorize him to amend statutory law. Using this purported power, the Governor imposed through his Order fundamental changes to the way 17 million voters would receive, cast and return ballots for the November 3, 2020 election. Among other changes to elections statutes, the Governor's Executive Order unilaterally altered the procedures for the number, location, and duration of polling places and voting centers.

Until issuance of the Order, the conduct of elections was governed by the Elections Code, a duly enacted statutory scheme passed by the Legislature, and supplemented by a short code of regulations promulgated by the Secretary of State (the Secretary of State's power to enact elections regulations was also enacted by the legislature). The Governor's Order N-67-20 attempted to supersede the Elections Code by not only suspending certain provisions of the statute, but *enacting* others. Indeed, the text of the Order itself acknowledges purpose of the Order is to legislate, by imposing new legal requirements on county elections officials (e.g. "Notwithstanding any contrary provision of state law [including, but not limited to, Elections

Code sections 3019.5 and 3019.7], all county elections officials are required to use the Secretary of State's vote-by mail ballot tracking system"). The Order likewise attempted to legislate the process for voting in-person, contravening existing California law in the process. The Order also altered the procedures for the number, location, and duration of polling places and voting centers – all previously provided for by valid legislative enactments (see, e.g., Elections Code sections 12200-12286; 12288).

ORDER N-67-20 IS A VOID LEGISLATIVE ENACTMENT

Of course, the Governor can't legislate. He can't wield "the power to enact statutes"; he only can "execute or enforce statutes." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068 (2004); see Cal. Const. art. V, § 1 [The power of the executive is to "see that the law is faithfully executed"]; *Howard Jarvis Taxpayers Ass'n v. Padilla* (2016) 62 Cal.4th 486, 498 ["[U]nlike the United States Congress, which possesses only those specific powers delegated to it by the federal Constitution, it is well established that the California Legislature possesses plenary legislative authority except as specifically limited by the California Constitution"].) The People or the Legislature adopt public policies and legislate, and the Governor sees that those policies are fulfilled. (*Id.*) A Governor's policy preferences cannot override the Legislature's policy choices, let alone the People's policy choices codified in the California Constitution. That would be tantamount to gubernatorial legislation.[1] Additionally, the powers vested exclusively in the legislature (to legislate) cannot be delegated by it.

[1] The Governor's principal legislative function under the state's constitution is his veto power, which is not at issue here. *See* Cal Const., art. III, § 10.

(*Dougherty v. Austin* (1982) 94 Cal. 601, 606-607; see also *People v. Johnson* (1892) 95 Cal. 471, 475.) "This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues." (*Kugler v. Yocum* (1968) 69 Cal. 2d 371, 377.)

These are the default rules, of course, the Constitution can expressly empower the Governor to exercise specific legislative powers that the separation of powers clause would otherwise forbid him to exercise. (See *Lukens v. Nye* (1909) 156 Cal. 498, 501 ["As an executive officer, he is forbidden to exercise any legislative power or function except as in the constitution expressly provided."]; *Harbor v. Deukmejian* (1987) 43 Cal. 3d 1078, 1084 ["Unless permitted by the Constitution, the Governor may not exercise legislative powers"]; *Prof'l Eng'rs in California Gov't v. Schwarzenegger* (2010) 50 Cal.4th 989, 1015-16, 1041.) These limited transfers of legislative power to the Governor are essentially restrictions on the Legislature's plenary power, and like any other such restriction, they must be "construed strictly" so as to preserve the Legislature's plenary power. (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal. 3d 685, 691.)

Here, there are no provisions in the Constitution empowering the Governor to enact election laws. Undaunted, the Governor attempts to rely on the California Emergency Services Act (Gov. Code, §§ 8550-8669.7) ("CESA") for exercise of legislative powers purporting to amend the Elections Code in response to the COVID-19 pandemic. The Governor cites to *Macias v. State of California* (1995) 10 Cal.4th 844, 858 and argues

that his police powers under the CESA grant him broad power to unilaterally amend legislatively-enacted statutes.

But the CESA, as interpreted by *Macias*, offers no relief to the Governor. Instead, *Macias* limits the Governor's powers in times of emergency to "suspend[ing] any regulatory statute or the orders, rules or regulations of any state agency if these would 'prevent, hinder, or delay the mitigation of the effects of the emergency.'" (*Macias*, *supra*, 10 Cal. 4th at 854, citing Gov. Code, § 8571.) Nothing in CESA and/or *Macias* empower the Governor to legislate, and amend the statutory scheme the Legislature has enacted for the orderly conduct of elections in California. For this reason, the Governor's efforts here must be rejected. (See also *Smiley v. Holm* (1932) 285 U.S. 355, 368 [Striking down an effort by Minnesota's Legislature to implement a vetoed redistricting plan because it was not enacted according to the state's prescribed method for legislative enactments].)

Finally, executive orders are not legislation and are not part of the legislative process. (*Hobart v. Supervisors of Butte Cty.* (1860) 17 Cal. 23, 30 ["The general principle is unquestionably true, that our system is not a pure democracy, but a representative republican government; one of whose departments, the Legislature, has the exclusive faculty of enacting laws"].) To count executive orders as a state lawmaking power risks introducing "a virus which destroys that power, which in effect annihilates representative government and causes a State where such condition exists to be not republican in form in violation of the guarantee of the Constitution." (*Ohio ex rel. Davis v. Hildebrant* (1916) 241 U.S. 565, 569.)

MASSINGILL AND *COUNTY MEMORIAL HOSPITAL* OFFER NO RELIEF TO THE GOVERNOR.

The Governor also cites to *Massingill v. Department of Food & Agriculture*, (2002) 102 Cal.App.4th 498 and *County Memorial Hospital. v. County of Ventura* (1996) 50 Cal.App.4th 199 for the proposition that he maintains the power to enact laws to promote the public health, safety, morals and general welfare – including election laws. This is a misreading of these cases, for example, the Governor cuts-off a quoted passage from *County Memorial Hospital* (Reply, p. 18-19) which results in a twisting of the quotation's intended meaning. The full passage reads as follows:

> The police power is the authority to enact laws to promote the public health, safety, morals and general welfare. *Legislation is within the police power if it is reasonably related to a proper legislative goal.*

(*County Memorial Hospital. v. County of Ventura* (1996) 50 Cal.App.4th 199, 206 (emphasis added, internal citations omitted).)

Later, the Court in *County Memorial Hospital* confirms that "[t]he determination of what constitutes a public purpose is primarily a matter for the *Legislature* and will not be disturbed as long as it has a reasonable basis." (*Id*. at 207 (emphasis added).) The U.S. Supreme Court concurs:

> The definition [of police power] is essentially the product of *legislative* determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the *legislature* has spoken, the public interest has been declared in terms well-nigh conclusive.

(*Berman v. Parker* (1954) 348 U.S. 26, 32 (emphasis added).)

What is clear is that the police power starts with the legislative branch and may be delegated to the executive branch only in limited fashion, not in its entirety – meaning so long as the *purpose or policy to be achieved* is not delegated. (*See People v. Williams* (1985) 175 Cal.App.3d Supp. 16, 23 ["The power... to determine the general purpose or policy to be achieved by the law and to fix the limits of its operation cannot be delegated"].)

This is because the power to declare whether or not there shall be a law, to determine the general purpose or policy to be achieved by the law and to fix the limits of its operation, belongs to the *legislature* alone.

> An unconstitutional delegation of legislative power occurs when the Legislature confers ... unrestricted authority to make fundamental policy decisions. In order to avoid an unlawful delegation of its authority, the Legislature must first resolve the truly fundamental issues, and must then establish an effective mechanism to assure the proper implementation of its policy decisions.

(*Wilkinson v. Madera Community Hospital* (1983) 144 Cal.App.3d 436, 442; and see *Ixta v. Rinaldi* (1987) 241 Cal. Rptr. 144, 162 ["If [the power to legislate] had been intended, it would have been granted by the people to the Governor explicitly"] (citation omitted).)

Until this matter, the CESA powers afforded to governors in have generally been constrained to "suspend[ing] the orders, rules or regulations of any *state agency*" (*Martin v. Mun. Court* (1983) 148 Cal. App. 3d 693, 696) and have not been extended to enacting broad statutory law. The

Governor wishes to read the enactment of section 8627 as an unlimited delegation to the Governor of *all* of the Legislature's powers – including its lawmaking functions.

In this matter, the Legislature has prepared a body of laws to govern the effective administration of elections in the State. The legislature simultaneously designated the Secretary of State as "the chief elections officer of the state," with the power to "administer the provisions of the Elections Code." (Gov. Code, § 12172.5.) The Legislature has also empowered the Secretary of State to "adopt regulations to assure the uniform application and administration of state election laws." (*Id*.)

Here, however, through Order N-67-20, the Governor attempted to step over the Legislature, and Secretary of State, and fundamentally alter the prior legislative policy and legislative enactment of the Legislature, by essentially rewriting whole sections of the Elections Code. These acts would have been forbidden even by the Secretary of State, to whom the Legislature has delegated the authority to administer elections and promulgate elections regulations. This is because the changes were so fundamental as to usurp the power of the Legislature.

Although sections 8567 and 8627 grant the Governor authority to "make, amend, and rescind orders and regulations necessary to carry out the provisions of the CESA" and commandeer state agencies and exercise "all designated police powers" as well as issue "orders and regulations" he deems necessary under, neither section 8567 nor section 8627 give the Governor the authority to unilaterally change state election laws. Thus, those section are inapplicable here. Moreover, the power to make, amend,

or rescind orders and regulations (section 8567) is not the power to legislate or make "legislative enactments." (*Smiley*, *supra*, 285 U.S. at 367.) The Governor did not "amend" or "rescind" any orders or regulations by signing Order N-67-20. He attempted to enact *new* laws that conflict with existing elections law enacted by the California Legislature.

To endorse the Governor's reading of section 8627 is to allow *any* governor to unilaterally designate a state of emergency and in its wake create new statutory law without any legislative oversight.

GOVERNOR'S POWER TO CALL SPECIAL SESSION OF THE LEGISLATURE

If there is a question has to *how* the Governor could effectuate his desire to amend the elections laws, it is though the constitutionally-authorized legislative special session. Article IV, section 3 of the California Constitution provides:

> (b) On extraordinary occasions the Governor by proclamation may cause the Legislature to assemble in special session. When so assembled it has power to legislate only on subjects specified in the proclamation but may provide for expenses and other matters incidental to the session.

Although the Legislature was in regular session on June 3, 2020 (senate.ca.gov/legdeadlines; assembly.ca.gov/legislativedeadlines), if there was any doubt about the ability of legislation to be timely introduced to address the Governor's concerns relative to the conduct of the election during the COVID-19 pandemic, the Governor had at his disposal the power to call a special session of the legislature. (Cal. Const. art. IV, § 3;

and see *Martin v. Riley* (1942) 20 Cal.2d 28 [The duty of the legislature in a special session to confine itself to the subject matter of the governor's call is mandatory and the legislature cannot legislate on any subject not specified in the proclamation].)

Calling a special session puts the law-making functions of the State in proper order: (1) The Governor calls the special session and proposes legislation; (2) the Legislature considers and passes the legislation; and (3) the Governor signs the legislation into law. This is the constitutionally-blessed process for enacting statutory change in California, even in the face of a pandemic.

There is no alternative constitutional provision for the Governor to act as the legislature *and* the executive in matters of enacting legislation. Were this Court to endorse such a process, an untenable precedent weaking the separation of powers doctrine (and weakening the State Legislature) would result.

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/ / /

CONCLUSION

Amici Curiae urge this Court to accept this brief for filing in support of Real Parties in Interest in this matter, and to deny the relief requested by the Governor.

DATED: December 18, 2020. Respectfully submitted.

BELL, McANDREWS & HILTACHK, LLP

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PROOF OF SERVICE - *Case: C093006*

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is 455 Capitol Mall, Suite 600, Sacramento, CA 95814.

On December 18, 2020, I served the following:

APPLICATION OF CALIFORNIA STATE SENATORS SHANNON GROVE, BRIAN DAHLE AND SENATOR JIM NIELSEN; AND STATE ASSEMBLYMEMBERS MARIE WALDRON, MEGAN DAHLE, AND JORDAN CUNNINGHAM TO FILE AN AMICUS BRIEF IN SUPPORT OF REAL PARTY IN INTEREST CALIFORNIA ASSEMBLYMEMBER JAMES GALLAGHER AND CALIFORNIA ASSEMBLYMEMBER KEVIN KILEY; PROPOSED AMICUS CURIAE BRIEF

BY ELECTRONIC MAIL: By causing true copies of PDF versions of said documents to be sent via TrueFiling to the e-mail address of each party listed:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 18, 2020 at Sacramento, California.

Kiersten Merina