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. [Related to Case No. C092070]

Sutter County Superior Court, Case No. CVCS20-0912
Honorable Sarah Heckman (Civil: (530) 822-3304)

PETITION FOR EXTRAORDINARY WRIT OF MANDATE, PROHIBITION, OR CERTIORARI; APPLICATION FOR TEMPORARY STAY; MEMORANDUM OF POINTS AND AUTHORITIES

IMMEDIATE STAY REQUESTED – NOVEMBER 13, 2020 STATEMENT OF DECISION; STAY DENIED BY THE TRIAL COURT ON NOVEMBER 13, 2020

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to rules 8.208 and 8.488 of the California Rules of Court, Petitioner Governor Gavin Newsom hereby certifies, through his undersigned counsel, that there are no interested entities or persons that must be listed in this certificate.

Dated: November 16, 2020

Respectfully submitted,

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INTRODUCTION

Governor Gavin Newsom seeks an immediate stay of a statement of decision after trial issued on November 13, and a peremptory or alternative writ directing the trial court to vacate its statement of decision and enter an alternative statement of decision and judgment. This is the second time that urgent intervention from this Court has been necessary in this case. (*Newsom v. Superior Court* (2020) 51 Cal.App.5th 1093.)

Although the complaint challenged only a single Executive Order—Executive Order No. N-67-20, which was subsequently superseded by substantially identical legislation and which concerned an election that has now taken place—the trial court is poised to enter a sweeping and unprecedented permanent injunction that would "enjoin[] and prohibit[]" the Governor "from exercising any power under the California Emergency Services Act . . . which amends, alters, or changes existing statutory law or makes new statutory law or legislative policy." The trial court is poised to enter this injunction despite conceding (as it must) that the Emergency Services Act empowers the Governor to suspend relevant statutes and to issue orders with the force and effect of law; the trial court has offered no administrable standard for distinguishing between these permissible suspensions and supplementations of existing law, and what it views as impermissible "alter[ations]" or "changes."

This injunction would have no effect whatsoever on the controversy actually before the trial court: that controversy is moot twice over, as it concerned an Executive Order that has

been rescinded and an election that has taken place. This inadministrably vague injunction would, however, call into question dozens of unrelated and as-of-yet uncontroverted actions that the State has taken in response to the COVID-19 pandemic, which has sickened a million and claimed the lives of nearly 20,000 Californians. For example, this injunction 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.

The injunction would also hamstring future State action in this and other emergencies. If a wildfire or earthquake were to strike tomorrow, it is unclear how the Governor—in the midst of a time-sensitive emergency response—could discern whether he is suspending law and issuing orders (which is permissible) or "alter[ing] law" or making new "legislative policy" (which according to the trial court is not). This is contrary both to the text of the Emergency Services Act (which, as noted, empowers the Governor to suspend existing law, to issue orders with the force and effect of law, and to otherwise exercise the full police power of the state) and to the Act's purpose: if the trial court's injunction were to take effect, "[t]he State's emergency response would thus grind to a halt while the internecine court battle raged." (*Macias v. State* (1995) 10 Cal. 4th 844, 859.) This harm would be compounded if the Legislature were out of session (as it is right now), and the Legislature were thus not immediately

available to give its stamp of approval to the Governor's emergency response (as it did in this very case).

The trial court's vague and overbroad injunction thus causes immediate, irreparable harm: it calls into question vast swaths of the State's emergency response to COVID-19 (far beyond the confines of this case), and it chills the State's response to every potential new emergency that may co-occur, as others already have, with the COVID-19 emergency. The Real Parties in Interest, Assemblymembers James Gallagher and Kevin Kiley, have confirmed as much: they have trumpeted that many of the State's emergency actions "are called into question by the Court's ruling,"[1] and that at least 24 other Executive Orders are undermined by the trial court's ruling.[2] This uncertainty is untenable in any circumstance—but particularly during a once-in-a-century global pandemic. For these reasons, an immediate stay should issue, and the Court should resolve this issue of critical public importance by extraordinary writ.

Even a cursory review of the trial court's decision confirms its many errors. First and foremost, this case is (and has long been) moot. As this Court recognized, the passage of AB 860 rendered this case "partially moot," and the challenges to the

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[1] See https://twitter.com/KevinKileyCA/status/1325953434042867713 (last accessed November 12, 2020).

[2] See https://twitter.com/KevinKileyCA/status/1324458841799499776 (last accessed November 12, 2020).

remaining elements of Executive Order N-67-20 could "likewise become moot if Senate Bill No. 423 also passes." (*Newsom*, *supra*, 51 Cal.App.5th at p. 1100.) That is exactly what occurred: SB 423 passed, and the Governor expressly declared that AB 860 and SB 423 had completely superseded the Executive Order. Moreover, even if the Executive Order had retained any force or effect (which it did not), it concerned only the November 2020 election—and that election has now occurred. There can be no meaningful, ongoing dispute over the validity of Executive Order N-67-20.

Even if the case were not moot, the trial court also erred on the merits. Executive Order N-67-20 is a permissible exercise of the Governor's power, under the Emergency Services Act, to suspend relevant state statutes. (Gov. Code, § 8571.) This power is complemented by the Governor's power to issue orders with the force and effect of law. (Gov. Code, § 8567.) And these powers are further bolstered by the Governor's authority to exercise, in express statutory terms, "all police power vested in the state." (Gov. Code, § 8627.) Indeed, the trial court's order is inconsistent not only with the plain text of the Emergency Services Act, but also with historical practice. It is also inconsistent with the practical necessities of emergencies (and therefore with the purpose of the Emergency Services Act): the trial court's interpretation would be unworkable, because it would result in huge gaps in the State's emergency response as the Governor, local officials, and citizens would be forced to wait for the Legislature to address every wildfire, flood, or earthquake

(assuming the Legislature is even in session). The Legislature enacted the Emergency Services Act to avoid this sort of haphazard, uncoordinated scenario by vesting the Governor with the responsibility and authority to respond to State emergencies.

Above all, the trial court erred in holding that Executive Order N-67-20 violated the California Constitution's separation-of-powers provision. Contrary to this Court's prior opinion, the trial court refused even to consider whether this case presented "substantive conflict between the Governor's emergency authority and the Legislature." (*Newsom*, *supra*, 51 Cal.App.4th at p. 1100; see *ibid.* ["the current circumstances present a much different case than would exist if the Legislature and Governor were at an impasse over vote by mail"].) And indeed, this case does not: Executive Order N-67-20 was a cooperative effort between the Governor and Legislature to address the effects of the COVID-19 pandemic on the November 2020 election. The Governor made clear from the outset that "pending legislation was meant to ultimately govern the election." (*Newsom*, *supra*, 51 Cal.App.5th at p. 1100.) Once the Legislature enacted AB 860 and SB 423, the Governor formally confirmed that his Order had no further force or effect, making clear that AB 860 and SB 423 controlled. On these facts, Executive Order N-67-20 served to reinforce (rather than undermine) the power of the Legislature—and there is therefore no conflict between the Executive Order and the California Constitution's separation-of-powers.

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PETITION FOR WRIT OF MANDATE

JURISDICTION

This Court has jurisdiction. (Cal. Const., art. VI, § 10; Code Civ. Proc., § 1085.)

AUTHENTICITY OF EXHIBITS

All exhibits accompanying this petition are true and correct copies of original documents on file with the respondent court, true and correct copies of original documents on file with this Court in related case number C092070, or true and correct copies of public records which are judicially noticeable and for which judicial notice is being sought concurrently.

The exhibits are incorporated herein by reference as though fully set forth in this petition and are paginated consecutively in the concurrently filed four-volume Petitioner's Appendix. The exhibits are referenced by their volume, tab, and, where applicable, by page number (e.g., "[Vol.] Tab [x], p. [y]").

PARTIES

1. Petitioner Gavin Newsom is the Governor of the State of California. Governor Newsom is the sole defendant in Sutter County Superior Court case number CVCS20-0912.

2. Respondent is the Superior Court of Sutter County, the Honorable Sarah Heckman.

3. Real Parties in Interest James Gallagher and Kevin Kiley are Members of the California State Assembly. Gallagher and Kiley are plaintiffs in Sutter County Superior Court case number CVCS20-0912.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

I. THE COVID-19 PANDEMIC

4. COVID-19 is "a novel severe acute respiratory illness" that has now killed almost 250,000 Americans. (*S. Bay United Pentecostal Church v. Newsom* (2020) 140 S.Ct. 1613, 1613 [Roberts, C.J., concurring].) "At this time, there is no known cure, no effective treatment, and no vaccine." (*Ibid.*) "Because people may be infected but asymptomatic, they may unwittingly infect others." (*Ibid.*)

5. To prepare for and respond to suspected or confirmed cases of COVID-19 in California, and to implement measures to mitigate the spread of COVID-19, the Governor proclaimed a State of Emergency on March 4, 2020. (I Tab 7, p. 42.)

6. California's Emergency Services Act, Gov. Code § 8550 et seq., "confers upon the Governor broad powers to deal with such emergencies." (*Cal. Corr. Peace Officers Ass'n v. Schwarzenegger* (2008) 163 Cal.App.4th 802, 811.) In particular, under the Emergency Services Act, the Governor may issue orders with "the force and effect of law" (Gov. Code § 8567(a)); may suspend "any regulatory statute" or any "statute prescribing the procedure for conduct of state business" (*ibid.* § 8571); and may "exercise . . . all police power vested in the state"—and in the exercise of such power may "promulgate, issue, and enforce such orders and regulations as he deems necessary" (*id.* § 8627). Through the Legislature's broad grant of authority to the Governor through the Emergency Services Act, the Governor may temporarily exercise the State's police powers to respond to State

emergencies—reflecting California's determination that "[a] public emergency is not a time for uncoordinated, haphazard, or antagonistic action."[3] (*Macias v. California* (1995) 10 Cal. 4th 844, 858.)

II. CALIFORNIA'S EFFORTS TO PROTECT THE NOVEMBER 2020 ELECTION FROM THE EFFECTS OF THE COVID-19 PANDEMIC

7. Among its many effects, in spring 2020 the COVID-19 virus seriously affected elections throughout the country. (See, e.g., Viebeck, Gardner, Simmons, & Larson, *Long Lines, Anger and Fear of Infections: Wisconsin Proceeds With Elections Under Court Order*, Wash. Post (Apr. 7, 2020); Gardner, Lee, Willis, & Glionna, *In Georgia, Primary Day Snarled by Long Lines, Problems With Voting Machines – a Potential Preview of November*, Wash. Post. (June 9, 2020).)

A. Executive Order N-64-20

8. On May 6, California Senator Tom Umberg and California Assemblymember Marc Berman—the Chairs of the committees responsible for elections legislation in the California State Senate and Assembly, respectively—sent a letter to

[3] As explained below, if the Legislature disagrees with the Governor's actions, the Emergency Services Act empowers it to terminate a state of emergency (and, thus, to revoke the powers delegated to the Governor under the Emergency Services Act). (Gov. Code, § 8629.) It may also enact legislation to supersede executive action.

Governor Newsom, requesting that the Governor act in concert with them to ensure a safe election in November. (I Tab 9, p. 52.)[4]

9. The Committee Chairs informed Governor Newsom that they were "announcing a legislative package today to ensure a safe and fair election" in light of the uncertainties surrounding COVID-19. (I Tab 9, p. 52.)

10. Among other things, that legislative package would include a requirement that "all voters be mailed a ballot for this November's election." (I Tab 9, p. 52.)

11. As an interim measure, the Committee Chairs asked Governor Newsom to "issue an Executive Order immediately to formalize that requirement until the pending legislation can be enacted." (I Tab 9, p. 52.)

12. As they explained, "[i]mmediate action by Executive Order will allow counties to begin the procurement of equipment and materials to allow for every Californian to receive a mail ballot." (I Tab 9, p. 52.)

13. Two days after the request from the Committee Chairs, Governor Newsom issued Executive Order N-64-20. (I Tab 11, p. 58.)

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[4] The trial court excluded from evidence this letter, despite it being a public record that this Court referred to in its earlier opinion. (*Newsom*, *supra*, 51 Cal.App.5th at p. 1095; see https://sd34.senate.ca.gov/sites/sd34.senate.ca.gov/files/elections_chairs_letter_to_gov_re_nov_2020_election_signed_final_may6.pdf [last accessed November 12, 2020].) As explained in Memorandum Section II(D) *infra*, the trial court's evidentiary ruling was erroneous.

14. Governor Newsom found that because "it is unknown to what degree COVID-19 will pose a threat to public health in November . . . California and its counties must begin taking action now—to procure supplies, secure polling places, enlist volunteers, and draw up plans, among other steps—to ensure that the November 3, 2020 General Election is held in a manner that is accessible, secure, and safe." (I Tab 11, p. 58.)

15. Among other steps, Executive Order N-64-20 directed county elections officials to "transmit vote-by-mail ballots for the November 3, 2020 General Election to all voters who are, as of the last day on which vote-by-mail ballots may be transmitted to voters in connection with that election, registered to vote in that election." (I Tab 11, p. 59.)

16. Governor Newsom recognized that "partnership with the Legislature and the Secretary of State . . . will be essential to ensure that the November election is accessible, safe, and secure." (I Tab 11, p. 58.)

17. Governor Newsom invited further action from the Legislature, and expressly stated that "[n]othing in this Order is intended, or shall be construed, to limit the enactment of legislation on [requirements for in-person voting and other details of the November election]." (I Tab 11, p. 59.)

B. Executive Order N-67-20

18. On June 3, Governor Newsom issued Executive Order N-67-20, which specified in-person voting requirements and other requirements congruent with parallel legislation. (I Tab 14, p. 74.)

19. Governor Newsom reiterated that it was "now critical—given counties' pressing need to take action to prepare for the November election—as recognized in Executive Order N-64-20—that counties be able to prepare to meet requirements for in-person voting opportunities and to implement other details of the November election." (I Tab 14, p. 74.)

20. In a June 15 filing with this Court, the Secretary of State's Office echoed this need to prepare immediately for the November 2020 election:

> Preparations for the November 2020 presidential election are, of necessity, well under way throughout the State. In addition to the challenges typically encountered in a presidential election year, this year there is heightened uncertainty due to the COVID-19 pandemic. Other states recently have had serious disruptions to their elections. COVID-specific challenges include recruiting and protecting a sufficient number of poll workers, ensuring the safety of polling places, and ensuring the availability and integrity of mail or other remote forms of voting. California election officials are planning for every possible contingency, including a resurgence of the COVID-19 virus or changes in the law because of the COVID-19 pandemic.

(I Tab 18, p. 133.)

21. The Governor determined that "strict compliance with various statutes specified in this Order would prevent, hinder, or delay appropriate actions to prevent and mitigate the effects of the COVID-19 pandemic." (I Tab 14, p. 75.)

22. Then, under the authority of "Government Code sections 8567, 8571, and 8627" (I Tab 14, p. 75), the Governor:

a. Reiterated Executive Order N-64-20's requirement that all eligible voters receive a vote-by-mail ballot. (I Tab 14, p. 75 [¶ 1].)

b. Required local officials to use the Secretary of State's vote-by-mail tracking system, including the use of "Intelligent Mail Barcodes," "notwithstanding any contrary provision of state law." (I Tab 14, p. 75 [¶ 2].)

c. Suspended statutory requirements regarding the number, timing, and placement of polling places and ballot drop-off locations, on the condition that counties met specified alternative requirements. (I Tab 14, pp. 75-76 [¶ 3].)

d. Suspended requirements governing the opening of vote centers. (I Tab 14, p. 76 [¶ 4].)

e. Suspended certain requirements for the holding of in-person meetings and workshops "in connection with the preparation of plans for the administration of the November 3, 2020 election," on the condition that counties met specified alternative requirements. (I Tab 14, p. 76 [¶ 5].)

f. Made clear that that for the core elements of the Executive Order, the conditional suspensions in the Executive Order did not "limit a county's ability to fulfill the requirements imposed on that county by existing law"—that a county could, in lieu of satisfying the conditions in the Executive Order

(and thereby availing itself of the suspensions set forth in the Order), simply comply with existing law. (I Tab 14, p. 77 [¶ 6].)

23. Like Executive Order N-64-20, Executive Order N-67-20 emphasized the ongoing partnership between the Legislature, the Governor, and the Secretary of State, and contemplated that this cooperation would culminate in legislation. The Order again made clear that "[n]othing in this Order is intended, or shall be construed, to limit in any way the enactment of legislation concerning the November 3, 2020 General Election." (I Tab 14, p. 77 [¶ 7].)

24. Executive Order N-67-20 applied only to the November 2020 election, a statewide general election in a presidential election year, and not to any future election. (I Tab 14.)

C. AB 860 and SB 423

25. Meanwhile, the Committee Chairs (Senator Umberg and Assemblymember Berman) advanced the legislative package they had promised: Assembly Bill 860 ("AB 860") (Berman) and Senate Bill 423 ("SB 423") (Umberg). (I Tabs 21 & 27.)

26. AB 860 ratified and superseded Executive Order N-64-20 by directing that vote-by-mail ballots be sent to all eligible California voters in November, among other things. (I Tab 21.)

27. AB 860 required local officials to use the Secretary of State's vote-by-mail tracking system (which used Intelligent Mail Barcodes) unless they could provide a tracking system that "exceed[ed] the level of service provided by the Secretary of State's system." (I Tab 21, p. 150.) Executive Order N-67-20 had

required local officials to use the Secretary of State's vote-by-mail tracking system and use "Intelligent Mail Barcodes." (I Tab 14, p. 75.)

28. Real Parties presented no evidence in the trial court that any county sought not to use the Secretary of State's tracking system. Hence, the parallel provisions requiring the use of the Secretary of State's system (including Intelligent Mail Barcodes) were functionally identical.

29. SB 423 specified requirements for the conduct of the election, including procedures for the numbers, locations, and operations of voting centers, ballot drop-off boxes, and polling places throughout California. (I Tab 27.)

30. The requirements of SB 423 mirrored provisions of Executive Order N-64-20 and N-67-20, with one minor difference: Executive Order N-67-20 included requirements for the holding of in-person meetings and workshops "in connection with the preparation of plans for the administration of the November 3, 2020 election." (I Tab 14, p. 76.) By the time SB 423 was enacted in August, the Legislature opted not to address this requirement, possibly because such plans had already been made.

31. On June 18, the Legislature passed AB 860; that same day, the Governor signed AB 860 into law. (I Tab 21.) Real Parties Gallagher and Kiley voted "Yes." (I Tab 22.)

32. Seven weeks later, on August 6, the Legislature passed SB 423; that same day, the Governor signed SB 423 into law. (I Tab 27.) Real Parties Gallagher and Kiley voted "No." (I Tab 28.)

33. Both AB 860 and SB 423 were urgency measures that required two-thirds votes of each House of the California Legislature, and took effect immediately. (I Tab 21, p. 152; I Tab 27, p. 188.)

34. Both AB 860 and SB 423 applied only to the November 2020 election, and not to any future election. (I Tab 21; I Tab 27, p. 183.)

35. Immediately following the enactment of AB 860 and SB 423, Executive Order N-67-20 was of no further force or effect.

D. Governor Newsom Formally Rescinded Executive Orders N-64-20 and N-67-20

36. After issuing his Executive Orders at the request of key members of the Legislature, and welcoming legislative involvement in both Orders, at the end of the Legislative Session Governor Newsom formally rescinded Executive Orders N-64-20 and N-67-20. (II Tab 37, pp. 28-29.)

37. On September 30, in an official statement posted to his official website, Governor Newsom stated that "[l]egislation has superseded the following orders, which have no further force or effect as of that legislation's effective date: . . . Executive Order N-64-20 and Executive Order N-67-20 (elections) – superseded by AB 860 and SB 423." (II Tab 37, pp. 28-29.)

38. The November 2020 general election was held on November 3, 2020.

III. THIS LAWSUIT

A. Real Parties' Complaint

39. On June 11, Real Parties filed their complaint. (I Tab 15.) Real Parties are "sitting legislators in the California State Legislature"; according to their complaint, they were "actively working on both SB [423] and AB 860." (I Tab 15, p. 81 [¶ 12].) "Gallagher is currently the Vice-Chairman of the Assembly Elections & Redistricting Committee." (*Ibid.*)

40. Real Parties allege that Executive Order N-67-20 "exercise[d] legislative powers by substantively amending, altering, or changing existing California statutes . . . ." (I Tab 15, p. 81 [¶ 14].) Real Parties allege that the Executive Order was "in clear violation of the separation of powers" provision of the California Constitution. (*Id.* ¶ 16.)

41. Real Parties sought "an order and judgment declaring that Defendant's Executive Order is null and void. . . .") (I Tab 15, p. 83 [Prayer for Relief ¶ 3].)

42. Other than Executive Order N-67-20, Real Parties did not identify any specific conduct of Governor Newsom that allegedly violated the law. Real Parties did not allege any facts concerning any other Executive Order. (I Tab 15.)

B. Real Parties' Demand for Relief and Application for Temporary Restraining Order

43. As explained above, "[u]pon final hearing," the complaint sought "an order and judgment declaring that

Defendant's Executive Order is null and void." (I Tab 15, p. 83 [Prayer for Relief ¶ 3].)

44. Along with their complaint, Real Parties also filed an application for a temporary restraining order. (I Tab 16.) In their application, Real Parties sought preliminary relief that was broader than the final relief they sought in the complaint. (I Tab 15, p. 83 [Prayer for Relief ¶¶ 1, 2 (seeking broader preliminary relief)]; I Tab 17, p. 94 [ordering Governor Newsom to show cause why broader relief should not be granted].)

45. On June 12, the day after the complaint was filed, the trial court granted Real Parties' application for temporary restraining order. (I Tab 17.) Despite inadequate notice that deprived the Governor of any meaningful opportunity to be heard, the trial court (the Honorable Perry Parker) signed "without modification" the proposed order that Real Parties handed to the Court. (*Newsom*, *supra*, 51 Cal.App.5th at p. 1098; I Tab 17.)

46. That order not only temporarily enjoined Executive Order N-67-20, but directed the Governor to show cause why he should not be enjoined from "further exercising any legislative powers in violation of the California Constitution and applicable statute [sic], specifically from unilaterally amending, altering, or changing existing statutory law or making new statutory law." (I Tab 17, p. 94.)

47. Governor Newsom promptly filed a petition for writ of mandate in this Court. (I Tab 18.)

48. On June 17, this Court stayed the trial court's temporary restraining order. (I Tab 19.)

49. On July 10, this Court issued a peremptory writ of mandate directing the trial court to vacate its order of June 12 and to enter a new and different order that denied the ex parte application for a temporary restraining order.

50. In its opinion, the Court noted that "the issue of whether the Governor's Executive Order exceeds his authority is partially but not entirely moot, as both parties have agreed in supplemental briefing. There remain substantive issues governing the conduct of the election, most notably how many polling stations will be open and in what manner. Those issues may likewise become moot if Senate Bill No. 423 also passes and is signed by the Governor." (*Newsom*, *supra*, 51 Cal.App.5th at p. 1100.)

C. Pre-Trial Proceedings

51. On July 13, Governor Newsom filed a motion for peremptory challenge under Code of Civil Procedure section 170.6. (I Tab 23.)

52. The case was re-assigned to the Honorable Sarah Heckman. (I Tab 25.)

53. On August 12, the trial court set a trial date of October 21. (I Tab 29.)

54. On September 3, Governor Newsom filed a motion for judgment on the pleadings on the basis that the case was moot. (I Tab 30.)

55. On September 16, Real Parties filed a motion for judgment on the pleadings on the basis that there were no disputed facts and they were entitled to judgment as a matter of law. (I Tab 32.)

56. At the request of the parties, the trial court consolidated both motions for hearing on October 7.

57. After hearing argument on October 7 about mootness, the Emergency Services Act, and the separation of powers under the California Constitution, the trial court denied both motions for judgment on the pleadings in one-sentence orders. The trial court did not explain the rationale for its decisions, either at the hearing or in subsequent orders. (II Tabs 43 & 44.)

D. The Trial and Post-Trial Proceedings

58. On October 16, the parties filed a joint statement of evidence and exhibits. (II Tab 46.) The parties agreed that neither side would call live witnesses at the October 21 trial. (*Ibid.*) The parties agreed to a joint list of documents that would be entered into evidence, with the exception of (1) the May 6 letter from Senator Umberg and Assemblymember Berman to Governor Newsom; and (2) an August 5 Senate Floor Analysis. (*Ibid.*) Real Parties did not stipulate to admit these two documents into evidence.

59. The parties subsequently filed cross-motions in limine about the admissibility of the two disputed exhibits. (II Tabs 49 & 50.)

60. Also on October 16, the parties filed trial briefs, where they again briefed the issues of mootness, the Emergency Services Act, and the separation of powers. (II Tabs 47 & 48.)

61. On October 20, the trial court held a telephonic pre-trial conference.

62. On October 21, the trial court held a half-day trial. (III Tab 51.) At the trial, the parties again argued about the two disputed items of evidence, whether the case was moot, whether Executive Order N-67-20 was consistent with the Emergency Services Act, and whether the California Constitution's separation-of-powers provision had been violated in any way. No live witnesses were called, and no new evidence was presented.

63. On October 28, the trial court issued a ruling on the parties' cross-motions in limine. (III Tab 52.) The trial court denied the Governor's request to admit into evidence the May 6 letter from Senator Umberg and Assemblymember Berman to Governor Newsom and an August 5 Senate Floor Analysis. (*Ibid*.)

64. On November 2—the day before Election Day—the trial court issued its Tentative Decision Following Court Trial. (III Tab 53.) In the Tentative Decision, the trial court tentatively determined that:

a. The case was not moot.

b. Executive Order N-67-20 was not a lawful exercise of the Governor's authority under the Emergency Services Act.

c. Executive Order N-67-20 violated the Constitution's separation of powers.

(III Tab 53.)

65. As a remedy, the trial court issued the following declaration:

> Executive Order N-67-20 issued by the Governor on June 3, 2020 is void as an unconstitutional exercise of legislative power and shall be of no further force or effect. The California Emergency Services Act (CA Government Code §8550 et seq.) does not authorize or empower the Governor of the State of California to amend statutory law or make new statutory law, which is exclusively a legislative function not delegated to the Governor under the CESA.

(III Tab 53, pp. 149-150.)

66. The trial court also found "good cause to issue a permanent injunction" as follows:

> Gavin Newsom, in his official capacity as Governor of the State of California is enjoined and prohibited from exercising any power under the California Emergency Services Act (Government Code § 8550 et seq.) which amends, alters, or changes existing statutory law or makes new statutory law or legislative policy.

(III Tab 53, pp. 150-151.)

67. The trial court provided that its Tentative Decision would "become the statement of decision unless, within 10 days after service of this Tentative Decision, a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the Tentative Decision, in accordance with Cal Rules of Court, Rule 3.1590(c)(4)." (III Tab 53, p. 151.)

68. On November 6, Governor Newsom filed a Statement of Controverted Issues in response to the Tentative Decision. (III Tab 54.) Governor Newsom also asked the trial court to stay the enforcement of its judgment to enable the Governor to seek prompt appellate review. (III Tab 54, p. 157.) Governor Newsom had requested such a stay at the October 7 motions hearing and again at the October 21 trial. (*Ibid.*)

69. On November 10, Real Parties filed a response to Governor Newsom's Statement. (III Tab 55.)

70. Late in the afternoon on last Friday, November 13, the trial court issued a Statement of Decision. (III Tab 56.) The Statement of Decision was virtually identical to the Tentative Decision.

71. The trial court ordered Real Parties to "submit to the Court a proposed judgment in conformity with this Statement of Decision within 10 days of the date of this decision." (III Tab 56, p. 176.)

72. The trial court denied Governor Newsom's request for a stay, giving no reason. (III Tab 56, p. 176.)

ISSUES PRESENTED

73. The issues presented by this petition are:

a. Whether the case below was moot, when subsequent legislation superseded the Executive Order that was the subject of the complaint, when the Governor made clear that the Executive Order had no further force or effect as of the effective date of that legislation, when the election that was the

subject of the complaint had occurred, and when the complaint identified no other conduct of the Governor that was unlawful.

b. Whether the Governor's authority under California's Emergency Services Act is limited to "suspending" certain statutes unconditionally, or whether the Governor also has authority to (i) require regulated parties to satisfy certain conditions to avail themselves of statutory suspensions and/or (ii) to issue "orders" under the State's police powers to fill the gaps left by the suspended statutes and provide needed direction to local officials and residents, consistent with both the plain text of the Emergency Services Act and the consistent actions of prior Governors with which the Legislature has repeatedly acquiesced.

c. Whether the Executive Order that is the subject of the complaint violates the California's Constitution's separation of powers provision (Cal. Const. art. 3, § 3).

d. Whether the trial court erred by excluding from evidence items from the legislative history of AB 860 and SB 423—in particular, a publicly available letter from two legislators to the Governor, and a publicly available Senate Floor Analysis.

APPEAL IS AN INADEQUATE REMEDY

74. Writ relief is necessary because this case involves issues of "great public importance and require[s] prompt resolution." (*People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 494.) The trial court's injunction potentially affects not only a single executive order, but potentially dozens of other executive actions taken in response to the once-in-a-century pandemic facing California. The trial court's order also restrains future actions of the executive in this and other emergencies; were a wildfire or earthquake to strike tomorrow, it is unclear to what extent the Governor and local officials have the ability to respond to such an emergency, or if they are constrained to wait until the Legislature reconvenes in December.

75. Real Parties have trumpeted the fact that the trial court's order threatens to undermine dozens of executive actions in the middle of a pandemic—militating in favor of prompt review of the trial court's order:

> Judge Heckman's ruling specifically rejects Gov. Newsom's argument that Section 8627 of the Emergency Services Act awards him autocratic powers. Of his existing Executive Orders, at least 24 rely on that section.[5]

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[5] See https://twitter.com/KevinKileyCA/status/1324458841799499776 (last accessed November 11, 2020)

Updated 150-page list of every Executive Order issued and every law unilaterally changed by Gov. Newsom. Many are called into question by the Court's ruling.[6]

BENEFICIAL INTEREST

76. As the named defendant in the underlying case, Governor Newsom has a beneficial interest in this matter.

APPLICATION FOR AN IMMEDIATE STAY

77. Governor Newsom requests that the Court issue an immediate stay of the superior court's Statement of Decision. (*Brown v. Superior Court* (1982) 137 Cal.App.3d 778, 782 [staying temporary restraining order entered against Governor based on Governor's purported lack of authority].) A stay is necessary to preserve the status quo—the long-standing expectations of the Governor, Legislature, local officials, and citizens about how emergencies should be addressed in California—while the Court considers the trial court's novel ruling.

78. On November 13, the trial court denied Governor Newsom's request for a stay of the Statement of Decision. (III Tab 56, p. 176.)

PRAYER FOR RELIEF

WHEREFORE, Governor Newsom respectfully prays that this Court:

1. Immediately stay the trial court's November 13 Statement of Decision, pending disposition of this petition.

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[6] See https://twitter.com/KevinKileyCA/status/1325953434042867713 (last accessed November 11, 2020).

2. Issue a peremptory or alternative writ of mandate or other appropriate writ directing respondent superior court to vacate its November 13 Statement of Decision and enter a Statement of Decision and judgment dismissing the complaint as moot, or Statement of Decision and judgment entering judgment in favor of Governor Newsom on the merits.

3. Alternatively, if a peremptory writ does not issue in the first instance, and in addition to or in lieu of any alternative writ, issue an order directing respondent superior court to show cause why its November 13 Statement of Decision should not be vacated and a Statement of Decision and judgment dismissing the complaint as moot be entered, or a Statement of Decision and judgment entering judgment in favor of Governor Newsom be entered.

4. Award Governor Newsom his costs in this action.

5. Award such other relief as may be just and proper.

Dated: November 16, 2020

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STANDARD OF REVIEW

A decision granting an injunction is reviewed for an abuse of discretion. (*People ex rel Reisig v. Acuna* (2017) 9 Cal.App.5th 1, 22.) The trial court's factual findings are reviewed under the substantial evidence standard. (*Ibid.*) Issues of statutory interpretation are reviewed de novo. (*Cal. Teachers' Assn. v. Governing Bd. of Hilmar Unified School Dist.* (2002) 95 Cal.App.4th 183, 190.)

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. (*County of Glenn v. Foley* (2012) 212 Cal.App.4th 393, 398.) But when "the issue is one law, [appellate courts] exercise de novo review." (*Condon-Johnson & Associates, Inc. v. Sacramento Municipal Utility Dist.* (2007) 149 Cal.App.4th 1384, 1392, as modified on denial of reh'g (May 8, 2007).)

II. ARGUMENT

A. The Trial Court Erred by Not Dismissing the Case as Moot

By the time the trial court entered its Statement of Decision, legislation had superseded Executive Order N-67-20 and the election whose procedures the order regulated had taken place. As a consequence, the Real Parties' challenge to the order was moot, and the trial court erred by issuing an advisory opinion concerning the validity of that executive order and others not even before the court.

1. Real Parties' Challenge to Executive Order N-67-20 Is Moot Because Legislation Has Superseded the Order

When this case was previously before the Court, the Court recognized that the passage of AB 860 rendered the Real Parties' challenge "partially moot" and observed that the challenges to the remaining elements of Executive Order N-67-20 could "likewise become moot if Senate Bill No. 423 also passes." (*Newsom*, *supra*, 51 Cal.App.5th at p. 1100.) This is exactly what occurred: the Legislature passed SB 423, which superseded the remaining operative provisions of Executive Order N-67-20 and rendered this case moot.

From the beginning, the Governor has made clear that the enactment of AB 860 and SB 423 would supersede Executive Orders N-64-20 and N-67-20. Executive Order N-67-20 itself stated that "[n]othing in this Order is intended, or shall be construed, to limit the enactment of legislation on [requirements for in-person voting and other details of the November election." (I Tab 11, p. 59.) In parallel federal litigation, the Governor confirmed that AB 860 had superseded Executive Order N-64-20. (*Republican National Committee v. Newsom* (E.D. Cal. June 25, 2020) Case No. 2:20-cv-01055-MCE-CKD, Dkt. No. 70.) The Governor also confirmed that the executive orders "no longer ha[ve] any legal effect" because they have been "superseded." (*Ibid.*) In this case, the Governor confirmed that the Order's provisions "have been ratified and superseded by subsequently enacted legislation." (I Tab 30, p. 201.) Finally, to dispel any possible doubt, the Governor issued an official statement

expressly stating that AB 860 and SB 423 had completely superseded Executive Order N-67-20 (and Executive Order N-64-20)—and that Executive Order N-67-20 (like Executive Order N-64-20) had no further force or effect. (II Tab 37, pp. 28-29.)

Because the Executive Order challenged by the Real Parties has been superseded by legislation, that challenge is now moot. "A party has no legally cognizable interest in the constitutional validity of an obsolete statute. Such challenges are clearly moot." (*Hillsboro Properties v. City of Rohnert Park* (2006) 138 Cal.App.4th 379, 389, fn. 3 [citation omitted].) This same principle applies to Executive Orders, which are interpreted like statutes. (*Brown v. Chiang* (2011) 198 Cal.App.4th 1203, 1222.) Thus, the enactment of a statute ratifying prior executive action moots a challenge to the validity of that executive action—particularly where, as here, the executive was challenged on the basis that it was unsupported by valid statutory authority. (See, e.g., *Southern Cal. Gas Co. v. Pub. Utils. Comm.* (1984) 38 Cal.3d 64, 67.)[7]

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[7] These mootness principles are particularly apt in cases (such as this one) where plaintiffs seek declaratory or injunctive relief, which are necessarily forward-looking remedies. (*East Bay Mun. Utility Dist. v. Dept. of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1113, 1126 ["[a]n injunction should not issue as a remedy for past acts which are not likely to recur"]; *In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 804 ["Declaratory relief operates prospectively, serving to set controversies at rest before obligations are repudiated, rights are invaded, or wrongs are committed"] [internal citation omitted].)

In nonetheless ruling that this case was not moot, the trial court misconstrued the relationship between Executive Order N-67-20 and pointed to minor differences between SB 423 and Executive Order N-67-20 concerning (1) the Secretary of State's barcode-based vote-by-mail ballot tracking system and (2) in-person meetings to develop election-administration plans. (III Tab 56, pp. 169-170.) As noted above, these putative differences are immaterial because Real Parties have not shown that they had any practical impact: there is no evidence that any county sought not to use the Secretary of State's tracking system, and no evidence that any county still needed to conduct in-person meetings to develop election-administration plans by the time that SB 423 was enacted. (See *supra* Relevant Factual and Procedural Background ¶¶ 27-30.) Moreover, the relevant inquiry before the trial court was not whether there were any differences between SB 423 and Executive Order N-67-20, but whether Executive Order N-67-20 in any way controlled the administration of the November election. It did not: as explained above, the Governor made absolutely clear that SB 423 had superseded Executive Order N-67-20, and that the Executive Order had no further force or effect.[8]

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[8] The trial court also cited a May 22 statement by Governor Newsom and a reference to Executive Order N-67-20 in a July Secretary of State memorandum that the Secretary of State's Office subsequently corrected (III Tab 56, pp. 175 ["on firm legal ground"], 170 [July 14 Secretary of State Memorandum].). Neither suggested that Governor Newsom's Executive Orders remained in effect after SB 423 was enacted in August. The

(continued…)

2. Real Parties' Challenge to Executive Order N-67-20 Is Also Moot Because the Election It Concerned Has Taken Place

When the trial court entered its Statement of Decision, Real Parties' challenge to Executive Order N-67-20 was also moot for an additional reason: the November 2020 election that the order concerned had taken place. Executive Orders N-64-20 and N-67-20 both addressed the procedures for the November 2020 election, and nothing more. Once the election was over, the trial court was being asked to resolve a dispute that had become a matter "of only academic interest" and to compel the Governor to fix a problem he had already "fixed." (*TransparentGov Novato v. City of Novato* (2019) 34 Cal.App.5th 140, 153.) Thus, even if Executive Order N-67-20 somehow had some impact after the enactment of AB 860 and SB 423 (which, as explained above, it did not), the occurrence of the November election mooted the Real Parties' challenge to it.

(…continued)
Governor's May 22 statement was made months before SB 423 was enacted, and the Secretary of State corrected the misstatement in the July memorandum to make clear, long before the election, that "Assembly Bill 860 and Senate Bill 423 superseded Executive Orders N-64-20 and N-67-20 upon their enactment." (II Tab 38, p 35, fn. 1.).

3. The Existence of Other, Unspecified Executive Orders Does Not Make This Challenge to Executive Order N-67-20 Justiciable, or Justify the Trial Court's Overbroad Relief

The trial court alternatively determined that this lawsuit was justiciable because, regardless of the viability of Real Parties' challenge to Executive Order N-67-20, there were other executive orders that remained in effect: as the trial court put it, the Governor has "issued more than 50 different executive orders changing numerous California statutes since the state of emergency was declared." (III Tab 56, p. 169.) But the existence of other, unspecified executive orders not identified in the complaint does not make Real Parties' challenge to Executive Order N-67-20 justiciable—nor does it justify the trial court's overbroad relief, which sweeps far beyond the case actually before that court.

This case is limited to Executive Order N-67-20. In their complaint, Real Parties challenged the lawfulness of Executive Order N-67-20, and sought "an order and judgment declaring that Defendant's Executive Order is null and void," in addition to broader preliminary relief. (I Tab 15, pp. 83-84.) Real Parties did not challenge any other specific conduct of Governor Newsom, or allege any facts related to any other identified executive order that would give them standing to challenge such an order. (I Tab 15.) And despite purporting to base justiciability on "50 different executive orders," the trial court did not identify those orders or analyze why any of them were unlawful. (III Tab 56, p. 169.)

Factual and legal issues relevant to other, unspecified executive orders were simply not before the trial court.

The trial court's vague invocation of other, unspecified executive orders was particularly improper because Real Parties' separation-of-powers arguments cannot be resolved in the abstract. The California Constitution's separation of powers "does not command a hermetic sealing off of the three branches of Government from one another." (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 338). Thus, courts should not assume "that we can in every instance neatly disaggregate executive, legislative, and judicial power"—and the mere fact that the Governor exercises power with seemingly legislative features does not necessarily mean that the Governor has contravened the separation of powers. (*United Auburn Indian Cmty. of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538, 558–59.) In the absence of such a bright-line rule, separation-of-powers concerns cannot be addressed in the abstract: they must be addressed "from a realistic and practical perspective." (*Marine Forests Soc'y v. California Coastal Comm'n* (2005) 36 Cal.4th 1, 45.) This would require examining the particular circumstances of the Executive Order, the relevant legal framework, and additional considerations—such as whether there is a "substantive conflict . . . between the Governor's emergency authority and the Legislature." (*Newsom*, *supra*, 51 Cal.App.5th at 1100.)

In short, the validity of other, unspecified executive orders was not properly before the trial court, and cannot be assessed in the abstract. The existence of those other, unspecified executive

orders thus provides no support for the trial court's overbroad injunction, which sweeps far beyond Executive Order N-67-20 to enjoin any other executive order that "amends, alters, or changes existing statutory law or makes new statutory law or legislative policy"—without identifying those orders, or even explaining how they could be identified. Likewise, the existence of those other, unspecified executive orders provides no basis for the trial court's continued exercise of jurisdiction over this case.

4. No Exception to Mootness Applied

In passing, the trial court stated that even if the challenge to Executive Order N-67-20 were moot, it would be proper to decide the lawfulness of Executive Order N-67-20 under several discretionary exceptions to mootness. (III Tab 56, p. 170.) The trial court erred in finding that any such exception could apply here.

First, this is not a situation where an issue of broad public interest may be considered because it is likely to reoccur. (III Tab 56, p. 170.) The trial court reasoned that there might be a future special election during the pandemic, and that the Governor might issue a new executive order similar to Executive Order N-67-20 in response. But a potential special election to fill a vacancy in a single legislative seat (for example) is a vastly different undertaking, in scale and scope, from a statewide general election during a presidential election year. The November 2020 election thus "presents fact-specific issues that are unlikely to recur" even during a future special election. (*Bldg.*

a Better Redondo, Inc. v. City of Redondo Beach (2012) 203 Cal.App.4th 852, 867.)

This conclusion is confirmed by the fact that the parameters of a potential future special election remain "wholly undefined" at this point and therefore "[one] cannot conclude on this record that the issues will be same" as the issues raised by the November 2020 general election and Executive Order N-67-20. (Cf. *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1551; see also *Stonehouse Homes LLC v. Sierra Madre* (2008) 167 Cal.App.4th 531, 531 ["At this stage, the court must speculate as to what legislation, if any, the City might adopt and whether and how that legislation might be applied to Stonehouse's property."].) In a potential future special election, whether the Governor might issue an executive order—and what any such order might look like—would depend on numerous variables that cannot meaningfully be addressed here: the nature and timing of the election (and whether the Legislature is in session and otherwise has an opportunity to address the election through legislation), the size and operational capabilities of a particular locality, and the status of the pandemic in that locality, to name a few.

Second, contrary to Plaintiffs' assertion, there are no material issues for the Court to decide. (III Tab 56, p. 170 [citing *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536].) If the Court were to declare Executive Order N-67-20 unconstitutional, it would have no effect because the Order has been superseded and the election has been held. (Contra *Eye Dog Foundation*, *supra*, 67 Cal.2d at 542 [if the

statutory scheme were struck down, "defendant board would be powerless to enforce its provisions against plaintiff Foundation or any other entity similarly engaged."].) Moreover, if the case were dismissed as moot, Real Parties would be no worse off because they have already received the relief they sought: the Executive Order has ceased to have any force or effect. (Contra *ibid.* ["in the event of dismissal for mootness plaintiff . . . will thus be relegated to the very situation which precipitated the present litigation."].) Nor would their substantial rights "be impaired if they do not get what amounts to an advisory opinion," which is effectively what the trial court provided here. (*Friends of Bay Meadows v. City of San Mateo* (2007) 157 Cal.App.4th 1175, 1193.)

For these reasons, the trial court must not be permitted to enter or enforce its overbroad relief, the trial court's decision should be vacated, and the trial court should be directed to enter a new order dismissing the complaint as moot. (*Assn. of Irritated Residents*, (2017) Cal.App.5th 1202, 1224 ["When events render a case moot, the court, whether trial or appellate, should generally dismiss it."].)

B. The Trial Court Erred in Holding that Executive Order N-67-20 Was Unlawful

Because this case is moot, this Court need not reach the merits—which, among other things, implicate the validity of a vast range of emergency-response measures (needed to respond not only to the present health crisis, but also to fires, earthquakes, and other disasters) and raise complex

constitutional questions. If this Court reaches the merits, however, the trial court's erroneous analysis should be rejected.

1. Executive Order N-67-20 Was Authorized by the Emergency Services Act

Contrary to the trial court's conclusion, Executive Order N-67-20 is a valid exercise of the Governor's powers under the Emergency Services Act both to suspend relevant statutes and to issue orders with the force and effect of law to fill the resulting vacuum. Indeed, the Emergency Services Act grants the Governor authority to exercise "all police power vested in the state" where necessary to effectuate the Act's goal of mitigating the impact of emergencies. (Gov. Code, § 8627.) This understanding of the Emergency Services Act is supported by a long history of similar executive orders, which have been made with the knowledge and implicit approval of the Legislature. Limiting the Governor's authority to respond to emergencies in the fashion contemplated by the trial court would impede the State's ability to respond to future emergencies and thereby undermine one of the key purposes of the Act. The trial court's ruling would also cause enormous practical harm by, among other things, threatening the Governor's conditional suspension of the Brown Act and casting doubt on the validity of virtually every legislative action taken by every local government in California since mid-March.

a. Executive Order N-67-20 Is Supported by the Plain Text of the Emergency Services Act

Executive Order N-67-20 is a valid exercise of the Governor's authority under the Emergency Services Act to suspend regulatory statutes and to issue order using the police powers vested in the State.

Executive Order N-67-20 is a valid exercise of the Governor's power under the Emergency Services Act to "suspend any regulatory statute, or statute prescribing the procedure for conduct of state business." (Gov. Code, § 8571.) This power plainly extends to the Elections Code, because the provisions of that Code are both regulatory statutes (*Anderson v. Celebrezze* (1983) 460 U.S. 780, 788 [recognizing "the state's important regulatory interests" in elections, italics added]), and statutes prescribing procedures for the conduct of state business (see, e.g., *Field v. Bowen* (2011) 199 Cal.App.4th 346, 356 [describing "state control over the election process for state offices"] [internal citations omitted].)

Executive Order N-67-20 is a conditional exercise of the suspension power granted by the Emergency Services Act. Indeed, in relevant part, the Order describes itself in precisely those terms—as a "conditional suspension" of Election Code provisions identified in Paragraph 3 of the Order. (I Tab 14, p. 77 [¶ 6].) A county that wished to avail itself of those statutory suspensions would be required to fulfill certain other requirements as a condition of those suspensions. By contrast, 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. (*Ibid.*)

The Emergency Services Act authorizes the Governor's exercise of his suspension power in a conditional fashion. Section 8571 authorizes the Governor to exercise this suspension power when he determines that "*strict* compliance" with the relevant statute would hinder the response to the emergency. (Gov. Code, § 8571, italics added.) This indicates that the suspension power may be exercised when some compliance is possible, which in turn suggests that, in appropriate circumstances, the suspension power may be used to require something less than "strict" compliance, such as the conditions set forth in Executive Order N-67-20.

Any doubt concerning the Governor's authority to issue orders like Executive Order N-67-20 is dispelled by his broad power to promulgate orders and regulations using the police power vested in the State. Under the Emergency Services Act, the Governor has the power to issue orders with "the force and effect of law." (Gov. Code, § 8567, subd. (a).) Moreover, Government Code section 8627 empowers the Governor, to the extent he finds it necessary, to "exercise . . . all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes" of the Act. (Gov. Code, § 8627.) Where necessary "to effectuate the purposes" of the Act, and in the exercise of such power he may "promulgate, issue, and enforce such orders and regulations as he deems necessary" under Section 8567. (Gov. Code, § 8627.) Government

Code section 8627 thus defines the scope of the "[o]rders and regulations" the Governor may issue under Government Code section 8657. And, where necessary to effectuate the purposes of the Emergency Services Act, that power is broad: "The police power is the power of sovereignty or power to govern—the inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare." (*Massingill v. Dep't of Food & Agric.* (2002) 102 Cal.App.4th 498, 504 (internal quotations omitted); see also *Candid Enterprises, Inc. v. Grossmont Union High Sch. Dist.* (1985) 39 Cal.3d 878, 885 [the "police power" is "plenary authority to govern" within the relevant jurisdiction's geographic limits].)[9] This power is more than broad enough to authorize orders like Executive Order N-67-20.[10]

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[9] The trial court inaccurately stated that it had "been provided no authority interpreting the phrase 'police powers' as used in Section 8627," ignoring the Governor's relevant authorities construing the term "police powers." (Compare III Tab 56, p. 172 with III Tab 54, p. 155.)

[10] Indeed, this power would independently suffice to authorize orders like Executive Order N-67-20 even if the Governor could not conditionally suspend relevant state statutes: after the Governor *unconditionally* suspended relevant state statutes (pursuant to Government Code section 8571), the Governor could (pursuant to Government Code sections 8567 and 8627) fill the resulting legal vacuum by issuing new orders with the force and effect of law.

b. Executive Order N-67-20 Is Consistent with Historical Practice Accepted Without Objection by the Legislature

Executive Order is also consistent with historical practice concerning prior governors' use of the Emergency Services Act to modify state elections procedures—historical practice about which the Legislatures is well aware, and which it has not modified.

The Emergency Services Act has long been understood to empower the Governor to suspend provisions of the Elections Code and modify elections procedures. By the time Governor Newsom took office, three of California's last four governors—Governors Wilson, Schwarzenegger, and Brown—had used their authority under the Emergency Services Act to issue Executive Orders suspending various provisions of the Elections Code, and then prescribing new, modified procedures:

(1) In response to the Tubbs Fire in 2017, Governor Brown not only suspended numerous statutes, but then took the affirmative step of prescribing what procedures would fill the gap left by the suspended statute ("legislative" activity, as that term is used in the Statement of Decision). Most relevant here, Governor Brown permitted the County of Sonoma to conduct its November 2017 election "wholly by mail," even though it was not otherwise authorized to do so under existing law. (I Tab 5, p. 23 [¶ 6].) Under the theory embraced by the trial court, Governor Brown would not have had authority to permit the vote by mail election and instead could only have suspended the statutes. At

that point (under the trial court's theory), the Legislature would have had to enact a special statute prescribing what the election procedure should be: Governor Brown could have suspended the Elections Code, but he could not otherwise "alter" statutory law to provide for vote by mail.

(2) In Executive Order S-19-09, Governor Schwarzenegger suspended Elections Code section 14212, which provides that the polls must be kept open until "8 p.m." (I Tab 4; Elec. Code, § 14212.) Governor Schwarzenegger then took the affirmative step of prescribing what the alternative elections procedure would be: he allowed certain emergency personnel to vote until 10:00 p.m. (I Tab 4.)

(3) In Executive Orders W-29-92, W-69-93, and S-17-09, Governors Wilson and Schwarzenegger suspended provisions of the Elections Code and then affirmatively prescribed how voter registrations or ballots should be issued and collected, despite no explicit statutory authority to impose those modified requirements. (I Tab 1-3.)

Similar flexibility has been typical in the non-elections context. To take just one example, in response to the 2018 Camp Fire, Governor Brown: suspended a 30-day deadline prohibiting price gouging and then unilaterally extended the prohibition (I Tab 6, p. 30 [¶ 4]); suspended Revenue and Taxation Code section 20622 relating to property taxes, and unilaterally determined that homeowners should have an additional three-and-a-half months to file their claims, despite no express legislative authorization for homeowners to do so (I Tab 6, p. 33 [¶ 18];

unilaterally allowed local educational agencies to continue to collect average daily attendance fees for students being schooled outside of district boundaries (I Tab 6, p. 36 [¶ 8]); unilaterally allowed charter schools to establish alternative sites within Butte County (I Tab 6, p. 37 [¶ 16]); and unilaterally allowed local educational agencies to exclude November 2018 attendance from their average daily attendance requirements (I Tab 6, p. 37 [¶ 18]).

Although these orders went beyond just "suspending" statutes, no objection has ever before been raised concerning the Governor's authority under the Act to take them. Indeed, to take just one example from that emergency: absent Governor Brown's Executive Order action as he took it, the choices would have been to suspend provision of state funding for schooling for students affected by the fire altogether or to wait for the Legislature to enact a statute specific to that emergency and school conditions to allow students to continue the learning the state otherwise requires of them every day school is in session. Such stark and limited choices are inconsistent with the fundamental purpose of the Emergency Services Act, which recognizes the State's responsibility "to mitigate the effects of natural, manmade, or war-caused emergencies." (Gov. Code, § 8550.)

Although the Legislature has amended other aspects of the Emergency Services Act many times in recent decades, the Legislature has never restricted the longstanding use of the Act (as described above) to suspend provisions of the State's Elections Code and modify the State's elections procedures. Nor, for that

matter, has the Legislature restricted the broader use of the Emergency Services Act to modify (which is to say, "alter"—and not merely suspend) other statutory requirements, as Governor Brown did in response to the Camp Fire. This legislative acquiescence confirms that this use of the Emergency Services Act is correct. (*Save Our Heritage Org. v. City of San Diego* (2018) 28 Cal.App.5th 656, 668 ["The Legislature is presumed to be aware of a long-standing administrative practice. If the Legislature, as here, makes no substantial modifications to the statute, there is a strong indication that the administrative practice is consistent with the legislative intent." [alterations and internal quotation marks omitted]].)

c. The Trial Court's Contrary Interpretation Conflicts With the Statute's Plain Language, Undermines Its Purpose, and Threatens Enormous Practical Harm

Ignoring this text and history, the trial court held that the conditional suspension on Executive Order N-67-20 exceeded the Governor's authority, reasoning that the Emergency Services Act grants the Governor authority to suspend certain types of statutes, but "not to amend any statute or create new ones." (III Tab 56, p. 171.) While the trial court's exact reasoning is vague, its ruling clearly contradicts the text of the Act and undermines its stated purposes. It also threatens enormous practical harm—including potentially voiding virtually every action taken by the legislative body of every local government in California since mid-March.

Although the trial court does not explain the distinction it drew between suspending a statute and temporarily imposing conditions on a statutory obligation, it plainly held that the Emergency Services Act does not grant the Governor the power to exercise any authority to make orders and regulations not already granted by the Legislature. Section 8627 of the Act, however, grants the Governor authority during an emergency to exercise the police power of the State *in addition* to exercising authority over all agencies of state government: "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 law of the State of California in order to effective the purposes of this chapter." (Gov. Code, § 8627, italics added). Thus, the Emergency Services Act cannot be interpreted to limit the Governor's authority to powers already granted state agencies without rendering the grant of the right to exercise the State's police power meaningless and thereby violating the cardinal rule of statutory interpretation that all portions of a statute must be interpreted to have meaning and effect. (See, e.g., *Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260, 1269.)

The Attorney General reached this same conclusion in a written opinion more than forty years ago. In 1977, the Attorney General's Office was asked whether the Emergency Services Act gives Governor authority "to order the mandatory rationing of water during a 'state of emergency'" even in the absence of

specific statutory authority. (60 Cal. Op. Att'y Gen. 99 (1977) 1977 WL 24861.) The Attorney General concluded that authority to exercise the police power under Government Code section 8627 conferred such authority, and in so doing the Attorney General specifically rejected the suggestion the Governor's authority under section 8627 is restricted to authority already granted state agencies because under that interpretation section 8627's grant of authority to exercise the police power "would be redundant as that section grants the Governor "'complete authority over all agencies of the state government.'" (*Ibid.*, fn. 5; see also *Stanley v. Superior Court* (2020) 50 Cal.App.5th 164, 168, review denied Sept. 9, 2020 [the Governor "is authorized to promulgate, issue, and enforce such orders and regulations as he deems necessary"].)

In addition to ignoring long-standing historical practice and rendering half of the authority conferred by section 8627 nugatory, the trial court's interpretation also undermines the purposes of the Emergency Services Act. As noted above, one of the Act's stated purposes is to "mitigate the effects of natural, manmade, or war-caused emergencies." (Gov. Code, § 8550.) The Governor's ability to do that is hamstrung substantially if he is forced to make a binary choice between suspending a statute and allowing it to continue in place when strict compliance is burdensome but substantial or partial compliance is possible, rather than just conditioning the suspension on substantial or partial compliance. In addition, the Emergency Services Act was intended to provide a "clear framework of authorities" so "affected

persons and entities, in both the private and public spheres, know exactly what is expected of them" because "[a] public emergency is not a time for uncoordinated, haphazard, or antagonistic action." (*Macias v. State* (1995) 10 Cal.4th 844, 858 [quotations omitted].) By imposing vague and difficult-to-apply restrictions on the Governor's authority, the trial court's interpretation undermines that objective.

Indeed, the trial court's ruling threatens to cause grave practical harm. As both Real Parties and the trial court appear to acknowledge, the trial court's ruling calls into question numerous unrelated, unspecified, and as-of-yet uncontroverted actions that the Governor has taken to help Californians weather the emergency caused by the COVID-19 pandemic. The universe of executive orders that the trial court's ruling might affect is far from clear—which further underscores the immediate harm caused the trial court's overbroad and inadministrable injunction, as this lack of clarity threatens to further chill the State's emergency response.[11] In at least some cases, however, it is already clear that the trial court's ruling threatens enormous practical harm.

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[11] It *is* clear, however, that the trial court's ruling would leave intact the most contentious aspects of the State's public-health response to COVID-19—for example, the requirements to engage in physical distancing, to shutter certain businesses, and to wear masks. Those public-health measures are independently supported by separate provisions of the Health and Safety Code; they do not depend on the Governor's authority under the Emergency Services Act. (See, e.g., Health & Saf. Code, § 120140.)

To give just one example: consider the Governor's conditional suspension of the Brown Act, which closely parallels the conditional suspension of the Elections Code at issue in this case. (IV Tab 60 [Executive Order N-29-20, ¶3 (March 17, 2020)].) In Executive Order N-29-20, the Governor suspended the physical-meeting requirements of the Brown Act—and thereby "authorized" local legislative bodies to hold public meetings via teleconferencing" technology. (*Ibid.*) And local legislative bodies—city councils and county boards of supervisors alike—have availed themselves of this suspension to hold public meetings remotely (using Zoom or similar teleconferencing technology) since mid-March. But this suspension—like the conditional suspension in Executive Order N-67-20—was only made available to local legislative bodies that complied with a long list of conditions designed to promote public notice and accessibility, consistent with the legislative purpose of the Brown Act. And—like the conditional suspension in Executive Order N-67-20—this conditional suspension would, under the trial court's ruling, therefore seem unlawful.[12]

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[12] This example also highlights another strange aspect of the trial court's ruling. Under the trial court's ruling, the Governor may "suspend" laws completely, and he may (of course) leave them completely intact, but he may not "alter" them. Here, for example, it would appear that the trial court's ruling would have allowed the Governor to completely suspend the Brown Act's requirements concerning in-person public meetings, but would not have allowed him to replace those physical-meeting requirements with new requirements to ensure public access and participation in remote public meetings—potentially depriving

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This is a jarring result. As explained above (see supra, Part II.A), the trial court's ruling would have no effect on the controversy actually before it: that controversy is moot. The trial court's ruling *would*, however, threaten to cause sweeping harm to a potentially vast swath of unrelated, unspecified, and as-yet-uncontroverted executive orders—such as the Governor's conditional suspension of the Brown Act, on which local governments have relied to structure their proceedings for eight months, and on which they continue to rely during this ongoing emergency.

Because the trial court's interpretation conflicts with the text of California's Emergency Services Act, longstanding historical practice backed by Legislative acquiescence, and the Act's purpose—in addition to threatening enormous practical harm—that interpretation should be rejected. If this Court reaches the merits, it should hold that Executive Order N-67-20

(…continued)
the public of the very rights that the Brown Act is meant to protect.

As this example demonstrates, the trial court's standard forces the Governor into a binary, up-or-down, all-or-nothing choice: he may either suspend a state law completely, or not at all. But he apparently may not "alter" a state law to provide for modified, partial, or otherwise imperfect forms of compliance with that law—even if perfect compliance is impossible, partial compliance would adhere as closely as possible to legislative intent, and the alternative is no compliance at all. In this way, the trial court's ruling actually threatens to undermine the statutory enactments of the Legislature.

was authorized by the broad authority entrusted to the Governor in the Emergency Services Act.

C. The Governor's Interpretation of the Emergency Services Act Does Not Violate Separation-of-Powers Principles

Nor was it necessary for the trial court to adopt its erroneous interpretation of the Emergency Services Act to avoid a constitutional problem under the California Constitution's separation of powers, for no such problem is presented here.

As noted above (see *supra*, Part II.A.3), "the separation of powers principle does not command a hermetic sealing off of the three branches of Government from one another." (*Obrien v. Jones* (2000) 23 Cal.4th 40, 48.) On the contrary, California courts have taken a "pragmatic" approach to the separation-of-powers doctrine, recognizing "the significant interrelationship and mutual dependency among the three branches of government." (*People v. Standish* (2006) 38 Cal.4th 858, 879.) "[T]he purpose of the doctrine is to prevent one branch of government from exercising the *complete* power constitutionally vested in another." (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 117 [emphasis added].)

In the absence of such complete impairment, courts routinely allow one branch of government to exercise powers that mirror the powers of another branch. For example, the Legislature may provide for the "legislative appointment of executive officers." (*Marine Forests Soc'y v. California Coastal Comm'n* (2005) 36 Cal.4th 1, 45.) And—directly relevant here—the Legislature may empower the Executive Branch to enact

quasi-legislative rules with "the dignity of statutes"—that is, to add to (and not merely interpret) the substance of legislative enactments in a manner that the California Supreme Court has described as "truly 'making law.'" (*Yamaha Corp. v. Bd. of Equalization* (1998) 19 Cal.4th 1, 10.)

This flexible approach to the separation-of-powers doctrine is especially appropriate in the emergency context. "Defining the locus of power and responsibility during 'conditions of disaster or . . . extreme peril to life, property, and the resources of the state' is a task for which the Legislature is peculiarly well suited." (*Macias*, *supra*, 10 Cal.4th at p. 858.) And the Executive Branch "is the natural and logical repository of such power and responsibility." (*Ibid.*) Indeed, under the California Constitution, "[t]he supreme executive power of this State is vested in the Governor" (Cal. Const., art. V, § 1), and (especially as the Legislature has never been in continuous session and initially met quite infrequently) this power naturally includes within it inherent authority (and responsibility) to respond to emergencies.

Applying this State's flexible and pragmatic approach to the separation of powers to the facts of this case, it is clear—as this Court has previously recognized—that this case presents no "substantive conflict . . . between the Governor's emergency authority and the Legislature." (*Newsom*, *supra*, 51 Cal.App.5th at p. 1100.) On the contrary, the Legislature and Governor worked in concert to implement an agreed-upon framework for the November 2020 election. Far from undermining the Legislature's authority, Executive Order N-67-20 actually

ensured that the Legislature's authority would be given practical effect: Executive Order N-67-20 (which, as previously explained, mirrored SB 423) ensured that the Legislature's framework for the conduct of the November 2020 election would be implemented at a time when counties were already moving to prepare for that election. In order words, Executive Order N-67-20 ensured that the substance of SB 423 would be given practical effect, even though SB 423 could not actually be enacted until mid-August—when preparations for the November 2020 were already well underway.

Nor is there merit to any argument that the Emergency Services Act itself contravenes the California Constitution's separation of powers by impermissibly delegating legislative authority to the Governor. First, as just noted, the California Constitution routinely permits quasi-legislative delegations even in non-emergency contexts, and the separation-of-powers doctrine is not so rigid and impractical that it denies the Legislature the authority to grant the Governor the broad and flexible authority needed to response to the urgent and often foreseen circumstances created by emergencies. Moreover, the Emergency Services Act bears the hallmarks of other legislation upheld under nondelegation principles: the Legislature has defined the fundamental policy underlying the Act, which is to "mitigate the effects of natural, manmade, or war caused emergencies" and "generally to protect the health and safety, and preserve the lives and property of the people of the state. (Gov. Code, § 8550.) It also sets out an intelligible standard for the Governor to apply in

exercising the powers granted to the Governor, which is to exercise the police power to the extent "necessary" to "effectuate the purposes" of the Act (*id.*, § 8627; see also *ibid.* § 8567, subd. (a) [authorizing the Governor to issue orders "necessary to carry out the provision of this chapter"]). In this way, the Act is consistent with the California Supreme Court's requirement that delegated quasi-legislative power is to be exercised in a manner that is "reasonably necessary to implement the purpose of [a] statute." (*Yamaha*, *supra*, 19 Cal.4th at p. 11.) And the Act contains safeguards: the Governor must terminate a state of emergency at the earliest time that conditions warrant, and the Legislature retains separate authority to terminate the state of emergency. (Gov. Code, § 8629.)

Indeed, the Kentucky Supreme Court recently upheld a similar emergency-powers statute against a similar separation-of-powers challenge. (*Beshear v. Acree* (Ky. Nov. 12, 2020) 2020-SC-0313-OA, available at http://opinions.kycourts.net/sc/2020-SC-0313-OA.pdf [last accessed November 16, 2020].) As the Kentucky Supreme Court observed, that emergency-powers statute contained "[t]he enunciation of criteria for use of the emergency powers," required "timely, public notice provided for all orders and regulations promulgated by the Governor," and imposed a "time limit on the duration of the emergency and accompanying powers" by requiring "the Governor . . . state when the emergency has ceased" and allowing Kentucky's General Assembly "to make [that] determination itself" under certain conditions. (*Ibid.*, slip op. at 53.) And as the Kentucky Supreme

Court also explained, these safeguards were sufficient to render that emergency-powers statute "constitutional to the extent legislative powers are delegated." (*Ibid.*) The kinds of safeguards cited by the Kentucky Supreme Court are present in California's Emergency Services Act. And nothing in California law requires a more cramped understanding of the way in which California's flexible, pragmatic separation-of-powers framework functions during emergencies. (Cf. *Macias*, *supra*, 10 Cal.4th at pp. 856–58.)

In sum, this case presents no "substantive conflict between the Governor's emergency authority and the Legislature." (*Newsom*, *supra*, 51 Cal.App.4th at p. 1100.) On the contrary, this case reflects cooperation between the Governor and the Legislature: the Governor and the Legislature worked together to develop the framework governing the November 2020 general election, and the Governor used the Emergency Services Act to implement that agreed-upon framework more quickly than the legislative process allowed—and as quickly as the emergency demanded. These facts pose no actual threat to the California Constitution's separation of powers.

D. The Trial Court Erred by Excluding Items from Evidence

Finally, the trial court erred by excluding from evidence aspects of the legislative history of AB 860 and SB 423—in particular, the May 6, 2020, letter from Assemblymember Berman and Senator Umberg to Governor Newsom (Defendant's Trial Exhibit 3), and an official Senate Floor Analysis for SB 423

(Defendant's Trial Exhibit 17). (III Tab 52.) This evidentiary ruling prejudiced the Governor by excluding evidence showing that Executive Order N-67-20 was the product of inter-branch cooperation, and therefore furthered (rather than frustrated) the power of the Legislature—an issue relevant, as noted above, to the separation of powers.

First, the trial court erred by excluding the May 6, 2020, letter from Senator Umberg and Assemblymember Berman, who were the chairs of the Senate and Assembly elections committees and the architects of AB 860 and SB 423. In their May 6 letter, the Committee Chairs asked Governor Newsom to take prompt executive action regarding vote-by-mail ballots while legislation worked its way through the Capitol. (I Tab 9.) The Governor sought to introduce this correspondence into evidence on the grounds that it explains why and how Governor Newsom issued Executive Order 67-20. (II Tab 50.) The letter demonstrates a lack of actual conflict between Governor Newsom and the Legislature—and its exclusion therefore prejudiced the Governor's argument that (as demonstrated above) there is no actual separation-of-powers problem to avoid in this case. (*Ibid.*)

Although the trial court appeared to believe that this letter was somehow not "authenticated,"[13] it ultimately ruled that

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[13] Even if offered for the truth of matters asserted in it, the letter is "self-authenticating" and admissible as a record by public employees. (Evid. Code, § 1280.) It is a public record that is easily found on official government websites. (See https://sd34.senate.ca.gov/sites/sd34.senate.ca.gov/files/elections_

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neither "whether the Governor and legislature [were] getting along," nor the Governor's "state of mind" were relevant to the "legal authority" extended by the Emergency Services Act. (III Tab 51, pp. 19-20.) Finding that before a jury the "prejudicial effect" of this letter would "far outweigh any probative value," the trial court granted Real Parties' motion in limine to exclude this letter from evidence. (III Tab 51, p. 21.)

That ruling was erroneous. The trial court held that Governor Newsom Executive Order N-67-20 "violat[ed] the separation of powers" (III Tab 56, p. 172) while actively excluding evidence showing exactly the opposite: A request from the Committee Chairs of the California Assembly and the California Senate to the Governor to take emergency executive action in the area of elections satisfies at least the minimal level of relevance necessary to admit this letter into evidence. (See W. Wegner et al., California Practice Guide: Civil Trials and Evidence ¶ 8:116 (The Rutter Group Oct. 202 update) (["Evidence is relevant if it has some tendency in reason, however slight, to prove or disprove an issue in the case"]; (*Center for Community Action & Environmental Justice v. City of Moreno Valley* (2018) 26 Cal.App.5th 689, 710 [recognizing probative value of letter, even if of "limited relevance in assessing legislative history"].) Indeed, this letter is not merely admissible—it should be subject to judicial notice. (*Travelers Indemnity Co. v. Gillespie* (1990) 50

(…continued)
chairs_letter_to_gov_re_nov_2020_election_signed_final_may6.pdf [last accessed November 13, 2020].)

Cal.3d 82, 96 [taking judicial notice of letters sent to the Governor].)

Second, and similarly, Governor Newsom sought to introduce the Senate Floor Analysis of SB 423 to show the absence of actual conflict between Executive Order N-67-20 and subsequent legislation. (II Tab 50.) Specifically, comments to that analysis found that the Executive Order was "almost identical to SB 423 making it possible for the state and counties to begin taking action to ensure that the election is held in a manner that is accessible, secure, and safe." (II Tab 50, p. 235.) These comments also stated that "SB 423 will codify and expand upon the Governor's Executive Order . . . ." (*Ibid.*) Contrary to the trial court's ruling, this exhibit—like other legislative history—was "in the group of . . . documents that [courts] normally take notice of." (See, e.g., *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31-37 [acceptable legislative history included committee reports and analyses].) And this exhibit, too, was relevant to whether there was an actual, functional conflict between the Governor and the Legislature.

The exclusion of these exhibits prejudiced the Governor. Had they exhibits been admitted, they would have bolstered the Governor's argument that there was no such conflict, which should have led to the rejection of Plaintiffs' claims.

III. CONCLUSION

For these reasons, Governor Newsom requests that the Court immediately stay the trial court's November 13 Statement

of Decision, issue an appropriate writ directing the trial court to vacate its November 13 Statement of Decision, and issue a writ directing the trial court to enter a Statement of Decision and judgment dismissing the complaint as moot, or Statement of Decision and judgment entering judgment in favor of Governor Newsom on the merits.

Dated: November 16, 2020

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR EXTRAORDINARY WRIT OF MANDATE, PROHIBITION, OR CERTIORARI; APPLICATION FOR TEMPORARY STAY; MEMORANDUM OF POINTS AND AUTHORITIES** uses a 13 point Century Schoolbook font and contains 13.376 words.

Dated: November 16, 2020

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