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 (Main: (530) 822-3300)

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT OF MANDATE, PROHIBITION, OR CERTIORARI

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Pursuant to California Rules of Court, rule 8.487(b), Petitioner Governor Gavin Newsom submits this reply in support of his petition for writ of mandate:

INTRODUCTION

This case is not about dictatorship in ancient Rome: this case is about inter-branch cooperation during the most serious crisis in modern California history. It is, moreover, about inter-branch cooperation that culminated in legislation that completely superseded the only executive order actually at issue here, to govern the administration of an election that has already taken place (and that was unlike any that is likely to recur). In short, this case is moot; even if it were not, it concerns acts that pose no threat to the California Constitution's separation of powers.

In purporting to defend the California Constitution's separation of powers, Real Parties in fact threaten grave harm to it. Real Parties—unlike the vast majority of their fellow legislators—opposed the enactment of the legislation (SB 423) most relevant here. But, notwithstanding how the Legislature has spoken through that legislation, and the relevant Senate and Assembly Committee Chairs *supporting* the Governor here, Real Parties now purport to speak for the Legislature. And they have persuaded the trial court to enjoin, in sweeping and ill-defined terms, the Governor's exercise of his statutory authority under the Emergency Services Act as to other executive orders not properly before that court—without analyzing the substance or context of those other executive orders, or even identifying (or

explaining how to identify) which other executive orders are actually enjoined.

Nothing in California law compels this result. On the contrary, the trial court should have dismissed this case as moot. It is absolutely clear that AB 860 and SB 423 (not Executive Order N-67-20) governed the administration of the November 2020 General Election. There is no reason to expect the extraordinary circumstances of that mid-pandemic statewide presidential election to reoccur. And there are no material issues remaining for the trial court to decide about Executive Order N-67-20—the only executive action that Real Parties have actually challenged in their complaint.

The trial court's ruling fares no better on the merits. The text, history, and purpose of the Emergency Services Act all confirm that Executive Order N-67-20 was within the scope of authority conferred by the Act, and Real Parties offer no good reason to conclude otherwise. (Nor, for that matter, do Real Parties offer any practical strategy to ameliorate the immense practical harms that their theory would cause.) And neither Executive Order N-67-20 (which reflects cooperation, rather than conflict, between the Governor and the Legislature) nor the Emergency Services Act itself (which easily satisfies the nondelegation doctrine) pose any separation-of-powers problem to avoid.

The Court should enter an appropriate writ.

ARGUMENT

I. THE TRIAL COURT ERRED BY NOT DISMISSING THE CASE AS MOOT

A. Real Parties' Challenge to Executive Order N-67-20 Is Moot

By the time the trial court issued its final Statement of Decision on November 13, this case was doubly moot—first because of the enactment of AB 860 and SB 423, and second because of the occurrence of the November 3, 2020 General Election. (Pet. at pp. 41-45.) In their complaint, Real Parties challenged only Executive Order N-67-20, not any other specific actions taken by the Governor. (Pet. at p. 46.) After the enactment of AB 860 and SB 423, Executive Order N-67-20 had no further force or effect. And even if that were not the case, both Executive Order N-67-20 and its companion legislation concerned only the November 2020 election—and so, after that election took place, neither the executive order nor the legislation had any further work to do.

There is no merit to Real Parties' argument that Executive Order N-67-20 remained in effect because of a supposed conflict between that executive order and SB 423.[1] As previously

[1] Contrary to Real Parties' suggestion, this question does not turn on "a factual determination" on which deference might be due to the trial court. (Return at p. 21.) Rather, the interpretation of Executive Order N-67-20 presents a question of law for this Court's independent review. (See *City of Morgan Hill v. Bay Area Air Quality Mgmt. Dist.* (2004) 118 Cal.App.4th 861, 877 ["The construction of an executive order presents an issue

(continued…)

explained, this supposed conflict was illusory. (Pet. at p. 44; see also Amicus Brief of Committee Chairs at p. 2 [supporting the Governor's interpretation].) And any doubt whatsoever on this score was dispelled more than a month before the election: the Governor and Secretary of State expressly stated that Executive Orders N-64-20 and N-67-20 were "superseded" and had "no further force or effect as of that legislation's effective date" (II Tab 37, pp. 323-324), and 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. 330, fn. 1). These statements unequivocally confirmed that AB 860 and SB 423—not Executive Order N-67-20—governed the administration of the November election. Real Parties present no contrary evidence from any time after the enactment of SB 423. (Pet. at p. 44, fn. 9.)

Nor do Real Parties dispute that their complaint challenged no executive order other than Executive Order N-67-20. (See, e.g., Return at p. 23 ["It was not that these [other] orders were being specifically challenged in this case"].) Instead, Real Parties seem to argue that their case is not moot because, in addition to challenging Executive Order N-67-20, they sought an abstract, advisory opinion about the scope of the Governor's authority under the Emergency Services Act—untethered from any actual exercise of that authority or any other specific facts. (See, e.g., Return at p. 20 ["the controversy in the case was both over the

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(…continued)
akin to an issue of statutory interpretation—one that presumably presents a question of law our independent review on appeal."].)

constitutionality of the Order 'and over the underlying principle . . . .'"].) But basic justiciability doctrines—rooted in the same kinds of separation-of-powers concerns that Real Parties purport to seek to vindicate—prevent the judicial branch from issuing such advisory opinions untethered to any concrete controversy. (See, e.g., *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.) Here, the concrete controversy before the trial court concerned only the validity of Executive Order N-67-20. It was error for the trial court to use that controversy to opine on—let alone enjoin—other, unidentified executive orders not before that court, particularly after Real Parties' challenge to Executive Order N-67-20 had become moot.

B. No Exception to Mootness Applied

Contrary to Real Parties' contention (Return at pp. 22-26), no exception to mootness applied here. (Pet. at p. 48.)

First, there were no material issues remaining for the trial court to decide. As previously noted, the complaint challenged only Executive Order N-67-20—and Executive Order N-67-20, in turn, concerned only the November 2020 General Election. (Pet. at p. 49.) Once Executive Order N-67-20 was superseded and the election occurred, an order invalidating Executive Order N-67-20 could have no effect. This is thus not a case where the actual controversy before the trial court "necessarily affects [the parties'] rights in the future." (*Contra Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 542.) And as to abstract legal questions that stretch beyond that controversy

(such as "the extent of the Governor's powers under the California Emergency Services Act" in other contexts, Return at p. 22),[2] Real Parties' substantial rights will not "be impaired if they do not get what amounts to an advisory opinion." (*Friends of Bay Meadows v. City of San Mateo* (2007) 157 Cal.App.4th 1175, 1193.) Indeed, if this case were dismissed as moot, absolutely nothing would change: Executive Order N-67-20 would have no further force or effect, having been replaced by legislation duly enacted by the Legislature on the same subject.

Second, there is no evidence that this controversy is likely to reoccur. This case is not a typical elections case, which might concern how enduring Elections Code procedures will affect similarly situated candidates or measures in the future. (Cf. *Costa v. Superior Court* (2006) 37 Cal.4th 986, 994, 1005 [concluding that that case was not moot because both procedural and substantive questions concerning preelection review of certain challenges to initiative measures were likely to reoccur]; Return at p. 24 [citing *Costa*].) On the contrary, this case was a function of the confluence of two utterly extraordinary events—a once-in-a-century pandemic, and the statewide administration of a presidential election marked (even amidst that pandemic) by

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[2] Indeed, Real Parties do not even confine themselves to abstract questions about the Emergency Services Act. Real Parties have twice suggested that this case somehow implicates an executive order concerning certain policies toward, and rulemaking regarding, zero-emissions vehicles. (Return at p. 25; see also III Tab 51, p. 601.) That executive order, however, has nothing to do with the Emergency Services Act. (See I Tab 33 [Executive Order N-79.20].)

the highest turnout in American history. These extraordinary events cannot reasonably be expected to reoccur together.

It makes no difference that a special election is likely to occur in 2021. (Cf. Return at p. 25.) There is no evidence to suggest that any special election will be comparable in scale or scope to the November 2020 General Election—a statewide general election in a presidential election year. Indeed, as Real Parties agree (Return at p. 25, fn. 4), only one such special election is now apparent—in State Senate District 30, to fill a vacancy created by Senator Holly Mitchell's election to the Los Angeles County Board of Supervisors.[3] But a special election to fill a single vacancy in a single legislative district simply does not present the same issues (operational or legal) as a statewide general election in a presidential election year. In fact, existing law already allows the special election in SD-30 (like other elections in Los Angeles County) to proceed as an all-mail ballot election, using centralized vote centers rather than precinct-level polling places—thereby covering much the same ground as Executive Order N-67-20, and further diminishing the likelihood that the controversy over Executive Order N-67-20 will reoccur. (See Elections Code, § 4007.)

Nor, contrary to Real Parties' suggestion (Return at p. 24), does the breadth of the trial court's injunction suggest that the actual controversy here is subject to repetition even if Executive Order N-67-20 is not. (Return at p. 24.) To the extent that the

[3] See https://results.lavote.net/#year=2020&election=4193 (last accessed December 14, 2020).

trial court's order affects executive action other than the particular order that was before it, that is a function of the trial court's failure to confine itself to the controversy actually before it—not an indication that that controversy (i.e., the controversy over Executive Order N-67-20) is likely to reoccur.

For these reasons, this case is moot, and no mootness exception applies. This, alone, is sufficient to establish that the trial court's injunction should be vacated, and that this action should be dismissed.

II. THE TRIAL COURT ERRED IN HOLDING THAT EXECUTIVE ORDER N-67-20 WAS UNLAWFUL

Even if this case were not moot, the trial court also erred on the merits. As discussed in this Section II, Executive Order N-67-20 is supported by the text, history, and policy behind the Emergency Services Act—leaving no ambiguity to resolve through the canon of constitutional avoidance. And as discussed in Section III below, this construction of the Emergency Services Act presents no constitutional problem to avoid.

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

The plain text of the Emergency Services Act empowers the Governor to suspend certain statutes and to issue orders with the force and effect of law—orders backed, if necessary, by the full police power of the State. (Pet. at pp. 52-54; Gov. Code, §§ 8567, 8571, 8627.) These powers amply support Executive Order N-67-20, and Real Parties offer no good reason to conclude otherwise.

For one thing, Real Parties offer no good reason to conclude that Executive Order N-67-20 may not be justified as a conditional exercise of the Governor's power to suspend relevant statutes. (See Gov. Code, § 8571.) Real Parties make sweeping statements about "the nature of the suspension power"—but those statements are unsupported by citation to authority, and dubious on their face. Real Parties assert, for example, that "[t]o suspend a statute is to decline to enforce it—to forebear from an *executive* action." (Return at p. 30.) Nothing in the Emergency Services Act suggests that this is so. And if it were, the suspension power would be both superfluous and useless—superfluous, because executive authorities (including the Governor) often retain enforcement discretion even without the Emergency Services Act; useless, because few statutes are enforced directly by the Governor, many are not enforced by executive officials subordinate to the Governor, and many more (including every statute enforceable by a private right of action) are not enforced by executive action at all.

Nor do Real Parties seriously grapple with the Governor's power to issue "orders and regulations [with] the force and effect of law" (Gov. Code, § 8567, subd. (a))—backed, if necessary, by "all police power vested in the state." (Gov. Code, § 8627.) Instead, Real Parties offer a novel and unsupported definition of "police power"—one that seems to describe little more than executive power already vested in the Governor even without the Emergency Services Act. (See Return at pp. 33-37; cf. Cal. Const.,

art. V., § 1.)[4] This idiosyncratic definition ignores longstanding history and settled precedent.

The police power—that is, the power of the *polis*, or the polity—has long been understood as "the power of the state and its political subdivisions to impose such restraints upon private rights as are necessary for the general welfare." (6A McQuillin, The Law of Municipal Corporations, § 24:2 (3d ed. 2020 update).) It "is essential and difficult to limit, as it includes all matters of public welfare." (*Ibid.*) It is, in short, "the power to govern people and things"—a power "inseparable from legislative power." (*Ibid.*) Real Parties' idiosyncratic definition of "police power" ignores this longstanding and widely shared understanding.

More to the point, Real Parties' idiosyncratic definition of "police power" flouts settled precedent. "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.) That is, "[t]he police

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[4] In support of their idiosyncratic definition of police power, Real Parties suggest that the Act's "findings and declarations focus almost entirely on coordinating the executive's emergency response." (Return at p. 35.) This is indeed *one* stated aim of the Act—but the relevant section of the Act also expressly lists five other objectives of the Act (see Gov. Code, § 8550), including "[t]o confer upon the Governor . . . the emergency powers provided herein." (Gov. Code, § 8550, subd. (a).) As relevant here, those emergency powers include the powers set forth in sections 8567, 8571, and 8627.

power is the authority to enact laws to promote the public health, safety, morals and general welfare." (*Cmty. Mem'l Hosp. v. Cty. of Ventura* (1996) 50 Cal.App.4th 199, 206.) "It is of the essence of the police power to impose reasonable regulations upon private property rights to serve the larger public good." (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 146.)

"It is a venerable principle that when a word or phrase appearing in a statute has a well-established legal meaning, it will be given that meaning in construing the statute." (*Brown v. Superior Court* (2016) 63 Cal.4th 335, 351 [internal quotation omitted]; see also Civ. Code, § 13; Code Civ. Proc., § 16 [same].) Therefore, the Legislature's use of the phrase "all police power" cannot plausibly be construed to refer to only the powers of executive-branch agencies to implement statutes, as Real Parties urge. On the contrary, that phrase confirms that the Emergency Services Act grants the Governor quasi-legislative authority to issue orders and regulations with the force and effect of law to mitigate the effects of the emergency.

Real Parties' theory is also at odds with the text of the Emergency Services Act in other respects:

First, Real Parties theory would cause section 8627 to violate the rule against surplusage. Section 8627 expressly grants the Governor two categories of authority during a state of emergency—"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 laws of the State of California in order to

effectuate the purposes of this chapter." (See *In re C.H.* (2011) 53 Cal.4th 94, 101 [explaining that the Legislature's use of the term "and" means "'an additional thing,' 'also' or 'plus.'"].) Real Parties' theory that the Governor is limited to exercising complete authority over state agencies would render all language after the initial "and" meaningless, thus violating the cardinal rule that the Court must construe the statute to avoid rendering any of its parts surplusage. (*Rodriguez v. Sup. Ct.* (1993) 14 Cal.App.4th 1260, 1269.)

Second, Real Parties' theory would cause the Emergency Services Act to violate the presumption that the same words, used in the same statute, carry the same meaning—and that the Legislature uses different words to mean different things. The Act specifically defines the term "state agencies" to mean executive-branch agencies. (See Gov. Code, § 8557, subd. (a).) Therefore, the first phrase of section 8627, granting the Governor complete authority over "agencies" of the state, clearly refers to the Governor's control over executive-branch agencies. The second phrase, however, does not use the defined term "agencies" (or "executive branch"), and instead grants the Governor "all police power vested *in the state*." (*Ibid.*, § 8627, emphasis added.) In adopting the distinct term "the state," rather than the defined term "state agency," the Legislature indicated that the latter phrase—the police power of "the state"—is not limited to the statutory powers of executive-branch agencies. (See *People v. Hardacre* (2001) 90 Cal.App.4th 1392, 1398 ["When the

Legislature uses different words in the same statute, we must presume it intended a different meaning"].)

Third, Real Parties' theory is improbable in light of other provisions of the Emergency Services Act concerning state-of-war emergencies. One such provision mirrors section 8627 almost verbatim, conferring upon the Governor "all police power vested in the state." (Gov. Code, § 8620.) Real Parties' cramped reading of section 8627 would thus imply that the Governor would possess only modest powers even if California soil were threatened by a foreign enemy—a result that seems unlikely. On top of this, during a state-of-war emergency, the Governor holds separate, express authority over "every political subdivision, county, city and county, or city, public district, and public corporation of or in the state." (Gov. Code, § 8621.) Real Parties' suggestion that "the police power could, for instance, give the Governor greater authority over political subdivisions that are not sta[t]e agencies" (Return at p. 36) would render this provision superfluous.

There is no merit to Real Parties' argument that construing section 8627 according to its plain text—as granting the authority to exercise "all police power" of "the state" in order to effectuate the purposes of the Act—would render other provisions of the Act redundant. (Return at p. 36.) As an initial matter, even assuming this construction causes some overlap between section 8627 and the more specific provisions of the Emergency Services Act, this is no reason to resist section 8627's plain meaning. (See *Voters for Responsible Ret. v. Bd. of Supervisors*

(1994) 8 Cal.4th 765, 773 [explaining that the canon against surplusage does not require the Legislature to use "the most economical means of expression in drafting a statute"].) And in fact, this construction actually harmonizes the various provisions of the Act. Several sections of the Act describe the former category of authority, namely the Governor's role coordinating activities of state agencies in an emergency. (See, e.g., Gov. Code, §§ 8595, 8569-8570, 8628.) Several sections also describe the latter, namely the Governor's own powers to mitigate the effects of an emergency, independent of the statutory authority of any other state agency. (See, e.g., *ibid.*, §§ 8567, 8571, 8566, 8645.) Section 8627 makes clear that, in a proclaimed state of emergency, the Governor has the right to exercise both categories of powers.

This interpretation also is consistent with the longstanding understanding of the Governor's emergency powers. As previously described (Pet. at 60), in 1977, the Governor's Office requested a formal opinion from the Attorney General regarding whether the Act grants the governor the authority to "order the mandatory rationing of water during a 'state of emergency,'" even in the absence of any specific statutory authority. (60 Cal. Op. Att'y Gen. 99 (1977) 1977 WL 24861.) The Attorney General concluded that the authority to exercise the police power under section 8627 conferred such authority. (*Ibid.*) The opinion specifically considered and rejected the construction of the Act that Real Parties urge here because, as shown above, it would have rendered section 8627's grant of authority to exercise the

police power redundant. (*Ibid.*, fn. 5.) Attorney General opinions are entitled to "great weight," because courts "presume that the Legislature was cognizant of the Attorney General's construction" and "would have taken corrective action if it disagreed with that construction." (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 717, fn. 14.)

For all of these reasons, the text of the Emergency Services Act is clear. And where statutory text is clear, there is no role for the canon of constitutional avoidance—even if there would otherwise be a constitutional problem to avoid (which, as discussed in Section III below, there is not). (See, e.g., *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373.) The clear text of the Emergency Services Act—backed by, among other things, the longstanding and well-settled understanding of "police power"—amply supports Executive Order N-67-20.

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

As previously explained (Pet. at pp. 55-58), the Emergency Services Act has long been understood to empower the Governor to suspend provisions of the Elections Code and fill the resulting vacuum with new elections procedures. (Pet. at p. 55.) Real Parties' characterization of these orders as only "narrowly tailored *suspensions*" simply is not accurate. (Return at p. 37.)[5]

[5] In particular, Real Parties misunderstand the effect of Governor Brown's order allowing the County of Sonoma to conduct its November 2017 election "wholly by mail." (I Tab 5, p.

(continued…)

On the contrary, in each of those orders—as in Executive Order N-67-20—the Governor not only suspended relevant state election procedures, but also prescribed new requirements to take their place. (Pet. at pp. 55-57.) In fact, it is noteworthy that Real Parties cannot find a single historical example of the procedure they envision, in which the Governor suspends statutes completely (which Real Parties concede he has the authority to do), but then everyone waits months for the Legislature to fill the gap while the emergency is raging.

Real Parties also argue—without citation to authority—these prior orders "were so targeted in nature" that they do not support an inference of legislative acquiescence. (Return at p. 39.) But the Emergency Services Act does not give the Governor *more*

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23 [¶ 6]; Return at p. 38.) Even if, following the suspension of conflicting statutes by Governor Brown, Sonoma County was allowed to hold an all-mail election (which is not obvious—see *Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 297 ["The elections authorized by Proposition 218 may be conducted by mail alone, while most other elections may not be."]), the noteworthy aspect of the order is that local officials clearly viewed Governor Brown as having the prerogative and authority to allow ("may conduct") and then order ("will be held") such an election; under Real Parties' view, Sonoma County would not have needed such an order from the Governor. Other components of Governor Brown's executive order follow the same "suspend and prescribe" formula. For example, paragraph 9 waives a statutory filing deadline, and prescribes a different one, and paragraph 11 suspends various "statutes, rules, regulations and requirements" pertaining to housing, while paragraph 12 directs the Department of Housing and Community Development to prescribe alternative standards..

power to meet *lesser* emergencies. If the Emergency Services Act empowers the Governor to suspend provisions of the Elections Code and fill the resulting vacuum with new elections procedures when an emergency strikes a single county, it is unclear why it does not empower the Governor to do the same when an emergency strikes the entire state. Indeed, under Real Parties' theory, it would have been unlawful for Governor Brown to set educational policy, tax policy, and insurance policy in the Camp Fire area. (Pet. at pp. 56-57.) Yet even Real Parties do not now contend Governor Brown's conduct was illegal, and there is no evidence that the Legislature has ever rejected such forms of emergency response. (Cf. *Save Our Heritage Org. v. City of San Diego* (2018) 28 Cal.App.5th 656, 668.)

C. The Trial Court's Contrary Interpretation Threatens Enormous Practical Harm and Undermines the Purposes of the Emergency Services Act

As previously explained (Pet. at pp. 61-62), the trial court's ruling threatens enormous practical harm. Real Parties suggest that the trial court's ruling may implicate "over 50 executive orders"—or, at least, those that (in Real Parties' view) "amend or alter statutory law." (Return at p. 22.) But neither Real Parties nor the trial court have identified the executive orders that (in their view) are implicated by the trial court's injunction. And neither Real Parties nor the trial has explained how those executive orders may be identified. It is unclear, for example, how to distinguish reliably between exercises of the Governor's powers to suspend certain statutes and to issue orders with the

force of law (which appear to be permissible under the trial court's injunction), and orders that "alter" statutory schemes in other ways.

This uncertainty chills the Governor's exercise of his authority under the Emergency Services Act—and therefore hinders the State's ability to respond to emergencies, contrary to the purposes of the Emergency Services Act. Indeed, under Real Parties' theory, it appears that Governor's only safe option is to completely suspend a statute, wholesale—without imposing conditions on regulated parties' invocation of that suspension or otherwise issuing orders with the force of law. (See Return at pp. 28-31.) This makes the Emergency Services Act an exceedingly blunt instrument. To give one very basic example, this theory suggests that the Governor cannot "alter" regulatory deadlines: if a requirement is due within 30 days, for example, he may excuse compliance with that 30-day deadline—but he may not require compliance within 45 days instead. (Never mind that such deadline extensions have long been utterly routine in the emergency context.) And that is not the worst of it: Real Parties do not dispute that their theory (and the trial court's ruling) calls into question the Governor's conditional suspension of the Brown Act—and thus, in turn, calls into question virtually every action taken by the legislative body of every local government since March. (Return at p. 30, fn. 6.) Real Parties may be sanguine about this possibility (*ibid.*), but this Court (and Californians living with this risk) should not be.

Real Parties offer no practical strategy to ameliorate these harms. Real Parties suggest that once the Governor has suspended relevant statutes, the solution is for the Legislature to "quickly . . . pass[] new legislation." (Return at p. 30.) This suggestion is impractical. The Legislature is not always in session; even when the Legislature is in session, it is unreasonable to demand that the Legislature enact legislation within the timeframes that emergencies require. In this very case, for example, the Legislature moved with admirable alacrity, backed by overwhelming support, to enact urgency statutes concerning the administration of a tremendously important election mere months away—and it still took three months for the Legislature to enact AB 860 and SB 423. And even three months was fast, as evidenced by a recent comment made by one of Real Parties' colleagues:

> . . . If I introduced [COVID-19] legislation Monday [December 7], [the Legislature] won't be in session until January. It would have to be referred from [R]ules to a committee to be heard in March. If we urgently got it off the floor and through the other house w/ a 2/3 vote.—we might address it by early May.[6]

The remaining alternative that Real Parties seem to offer is really no alternative at all. Real Parties seem to suggest, in the context of the Brown Act, that it would be sufficient to suspend state laws completely, and then trust the parties previously regulated by those laws to regulate themselves voluntarily.

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[6] See https://twitter.com/LorenaSGonzalez/status/1334968714022699008 (last accessed December 8, 2020).

According to Real Parties, "local legislative bodies"—that is, the very parties regulated by the Brown Act—"could have decided on their own temporary procedures for conducting remote meetings." (Return at pp. 29-30.) But there is no reason to believe that parties ordinarily regulated by state law can regulate themselves in an emergency—much less that they will do so in a manner that is uniform and therefore provides fair access to government for residents across all jurisdictions. More importantly, there is no evidence that the Legislature has intended this result.

On the contrary, the purpose of the Emergency Services Act was to centralize the responsibility and authority to respond to emergencies into a "clear framework of authorities" so "affected persons and entities, in both the private and public spheres, know exactly what is expected of them." (*Macias v. State* (1995) 10 Cal. 4th 844, 858.) "A public emergency is not a time for uncoordinated, haphazard, or antagonistic action." (*Ibid.*) But that is exactly what will result if the Governor is compelled to suspend statutes wholesale, and then rely on the parties regulated by those statutes to decide what rules they will (or will not) adhere to in their place.[7]

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[7] Real Parties seek to downplay the extreme nature of their position by comparing the stark-up-or-down choice for which they advocate to a veto of regular legislation. (Return at pp. 30-31.) But there are key differences between the veto power and the suspension power—even beyond the obvious differences between emergency and non-emergency contexts. For example, the Governor's veto of prospective legislation does not upset any established reliance interests—reliance interests that will often be disrupted by the suspension of existing statutes, and which

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For all of these reasons, Real Parties' argument (and the trial court's ruling) is inconsistent with the text, history, and purpose of the Emergency Services Act.

III. THE GOVERNOR'S INTERPRETATION OF THE EMERGENCY SERVICES ACT DOES NOT VIOLATE SEPARATION-OF-POWERS PRINCIPLES

Contrary to the trial court's ruling and Real Parties' position (Return at pp. 59-60), Executive Order N-67-20—like the understanding of the Emergency Services Act on which that order relied—presented no constitutional problem to avoid.

A. Executive Order N-67-20 Presented No Conflict Between the Legislature and the Governor

Executive Order N-67-20 presented no problem under California's flexible, pragmatic separation-of-powers doctrine: Executive Order N-67-20 did not come close to "defeat[ing] or materially impair[ing]" the core constitutional functions of another branch. (*Marine Forests Soc'y v. Cal. Coastal Com.* (2005) 36 Cal.4th 1, 15; Pet. at pp. 64-66.) Far from demonstrating a "substantive conflict" between the Governor and the Legislature (*Newsom v. Superior Court of Sutter County* (2020) 51 Cal.App.5th 1093), the facts of this case demonstrate that

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might in fact be particularly important during an emergency. And by the time the Governor is faced with the choice to sign or veto legislation, he has also (as this very case demonstrates) had opportunities to shape that legislation in other ways—opportunities that are not present when the Governor is considering whether to suspend a statute enacted years ago.

Executive Order N-67-20 was part of a process of inter-branch cooperation to prepare for the November 2020 election.

The substance and history of AB 860 and SB 423—beginning with the May 6 letter from Senator Umberg and Assemblymember Berman—confirm this inter-branch cooperation.[8] As Assemblymember Berman and Senator Umberg have now reiterated in this proceeding, given the "monumental effort required," "it was necessary that the Legislature collaborate with the Governor as a precursor to enacting AB 860 and SB 423." (Amicus Brief of Committee Chairs at p. 2.) The Governor always intended that nothing in his Order would "limit the enactment of legislation" regarding the November 2020 election. (I Tab 11, p. 59.) Once AB 860 and SB 423 passed and were signed by the Governor, he stated publicly, and well in advance of the election, that Executive Orders N-64-20 and N-67-20 were "superseded" and had "no further force or effect as of that legislation's effective date." (II Tab 37, pp. 323-324.) In light of these statements, no reasonable observer could have concluded that the Governor was somehow enforcing the Executive Order in derogation of SB 423 or AB 860. Yet this is precisely what the trial court concluded here.

Real Parties, who had the burden of proof in the trial court, presented no evidence of actual conflict between the Governor

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[8] Real Parties suggest—ludicrously—that the May 6 letter should be disregarded because "[t]here was no evidence that the Governor received or even read the letter." (Return at p. 58, fn. 11.) This suggestion strains credulity and contravenes California law. (Evid. Code, § 641.)

and the Legislature. They presented no evidence that any elections official was constrained to follow the Executive Order instead of SB 423 or AB 860.[9] Indeed, they presented no evidence at all of any conduct after SB 423 was enacted (August 6).

Instead, Real Parties relied on a May statement of the Governor in which he defended the legality of Executive Order N-67-20. (Return at pp. 12-13.) But that statement (which predated the enactment of AB 860 and SB 423) did not reflect any conflict with, or hostility toward, the Legislature's efforts: it simply reflected the Governor's position (which he adheres to in this litigation) that Executive Order N-67-20 was lawful. Moreover, when the Legislature *did* act, the Governor made absolutely clear Executive Order N-67-20 had no further force or effect. (II Tab 37, pp. 323-324.) The Secretary of State did the same. (II Tab 38, p. 330, fn. 1). Real Parties and the trial court are alone in asserting otherwise.

For these reasons, this case presents no "substantive conflict" between the Governor and the Legislature (*Newsom*, *supra*, 51 Cal.App.5th at p. 1100), and no threat to the California Constitution's separation of powers.

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[9] As discussed in the Petition, Real Parties' fixation on the two aspects of the Executive Order that were not perfectly mirrored in the text of AB 860 and SB 423 (Return at pp. 20-21) does not establish inter-branch conflict here: there is no evidence that these two textual discrepancies had any practical significance. (See Pet. at p. 44.) Notably, Senator Umberg and Assemblymember Berman agree with this Governor on this point. (See Amicus Brief of Committee Chairs at p. 2.)

B. The Emergency Services Act Is Not an Unconstitutional Delegation

Although the trial court's Statement of Decision did not address whether the Emergency Services Act constitutes an unconstitutional delegation of legislative authority to the Governor, Real Parties rely heavily on that theory in their return. (Return at pp. 33-59.) But the Emergency Services Act easily satisfies the requirements of the nondelegation doctrine.

"An unconstitutional delegation of authority occurs *only* when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation." (*Carson Mobilehome Park Owners' Ass'n v. City of Carson* (1983) 35 Cal.3d 184, 190 [emphasis added].) Except in these two scenarios, the Legislature "properly may delegate some quasi-legislative or rulemaking authority": "[f]or the most part, delegation of quasi-legislative authority . . . is not considered an unconstitutional abdication of legislative power." (*Gerawan Farming, Inc. v. Agric. Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1146.) Indeed, "delegation by legislative bodies is essential to the basic ability of government to function" (*Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1515), and it is often the case that "delegation by the Legislature is viewed as a positive and beneficial way to implement legislation." (*Salmon Trollers Mktg. Assn. v. Fullerton* (1981) 124 Cal.App.3d 291, 300.) Therefore, "courts are understandably reluctant to interfere with such delegations." (*Ibid.*)

In this light, the Emergency Services Act poses no nondelegation problem: the Legislature has established the

fundamental policy behind the Emergency Services Act, and prescribes adequate standards for its implementation. On top of this, the Emergency Services Act also contains additional safeguards to guard against abuse.[10]

1. The Legislature Determined the Fundamental Policy

The Legislature established the fundamental policy that underpins the Emergency Services Act. The Act expressly states its fundamental purpose, which is to "mitigate the effects of natural, manmade, or war-caused emergencies that result in conditions of disaster or in extreme peril to life, property, and the resources of the state," and to "protect the health and safety and preserve the lives and property of the people of the state." (Gov. Code, § 8550.) The Legislature thus made the fundamental policy decision, namely to fulfill the State's "responsibility" to mitigate the effects of emergencies and to protect the people of the state in an emergency. (*Ibid.*)

The fundamental policy is to allow the State effectively to respond to emergencies. The Legislature validly may leave to others resolution of judgments that may arise in the course of implementing that policy and applying it to specific

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[10] The subject matter of the Emergency Services Act further counsels against excessively stringent application of the nondelegation doctrine to that legislative enactment. "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.)

circumstances. (*Kugler v. Yocum* (1968) 69 Cal.2d 371 [after declaring the fundamental policy, the legislature may "confer upon executive or administrative officers the 'power to fill up the details'" via rules and regulations].) As such, the Legislature made the policy judgment to assign authority to the Governor to determine what steps are needed in an emergency context to protect Californians from the emergency—a task that the Legislature itself may not be able to address in time. And in making the fundamental policy determination that the Governor has primary authority to lead the State's emergency response, the Legislature also made the fundamental policy determination that the Governor required flexibility in order to respond to the many of types of emergencies that may occur.

The courts have upheld statutes based on far more general policy goals than these. For example, courts have held that a "general welfare standard" adequately establishes the fundamental policy of a law. (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 510.) A policy of conferring "significant community benefit" also has been found to suffice. (*Sacramentans for Fair Planning v. City of Sacramento* (2019) 37 Cal.App.5th 698, 717.) Here, the Legislature likewise clearly and expressly established the fundamental policy goals that underpin the Act.

2. The Emergency Services Act Prescribes Adequate Standards

The Legislature also provided adequate standards to guide implementation of the Act's policy objective. As the Supreme

Court has admonished, to satisfy this requirement, the Legislature need not "articulate a formula" or impose "rigid standards." (*Gerawan Farming*, *supra*, 3 Cal.5th at pp. 1149, 1150, quotation omitted; *Carson Mobilehome Park Owners' Assoc. v. City of Carson* (1983) 35 Cal.3d 184, 191.) To the contrary, the Legislature may provide the flexibility needed to carry out the fundamental policy it has determined (*Gerawan Farming*, *supra*, 3 Cal.5th at p. 115), and therefore the "yardstick" it provides need only be "as definite as the exigencies of the particular problem permit." (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 168, quotation omitted.) The Act easily satisfies this requirement.

The Act defines when the Governor may exercise the powers granted in section 8627, identifies the purpose for which he may do so, and requires a close nexus with that purpose. In particular, the statute provides that the Governor may exercise the police power vested in the State "[d]uring a state of emergency." (Gov. Code, § 8627.) It also requires that this power be exercised "in order to effectuate the purpose of this chapter" (*ibid.*), which has expressly stated purposes (see *ibid.*, § 8550). And the statute requires a nexus with those purposes: that the exercise of the power shall be only as "necessary" and pursuant to orders issued "in accordance with the provisions of Section 8567" (*ibid.*, § 8627), which authorizes the Governor to make orders and regulations "necessary to carry out the provisions of this chapter" (*ibid.*, § 8567, subd. (a).)

"[W]ith the breadth of potential emergencies" that might confront California, such standards—"the standards of protection of life, property," and so forth, "along with the 'necessary' qualifier"—"are sufficiently specific to guide discretion while appropriately flexible to address a myriad of real-world events." (*Beshear v. Acree* (Ky. Nov. 12, 2020) No. 2020-SC-0313-OA, 2020 WL 6736090, at *22.) California courts have found adequate guidance where a statute established a fundamental policy of "promotion of 'public . . . welfare" without identifying any factors to be considered. (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 509-510 [explaining that "[t]his, in itself, can be construed as a guideline (to the promotion of public welfare"].) By expressly requiring the Governor to effectuate the purposes of the Act, which themselves are expressly stated, and requiring a nexus (necessity), section 8627 provides even more guidance.[11]

Real Parties' most dire warnings seem to stem from their refusal to acknowledge that the Emergency Services Act contains this nexus requirement. Real Parties warn, for example, that Governor's powers under the Act "lead[] ineluctably to a mandate to regulate and reorder the totality of economic and social life." (Return at pp. 50-51.) Not so: as just explained, the Governor

[11] The formulation "necessary" to effectuate the "purposes" of a "chapter" is used repeatedly throughout California codes. (See, e.g., Pub. Util. Code, § 132354; Food & Agric. Code, § 62724; Pub. Res. Code, § 5090.78; Educ. Code, § 84674; Gov. Code, § 7001; Welf. & Inst. Code, § 19755, etc. etc.) Accepting Real Parties' argument would thus call into question a large number of other California statutes.

may exercise his powers under the Act as "necessary" under the Act, and no further. And, as will be next discussed, the Act also contains additional safeguards—including, in particular, a temporal limitation on the Governor's authority—to ensure the Governor's powers do not sprawl beyond these limits.

3. The Emergency Services Act Includes Sufficient Safeguards

On top of this, the Legislature also enacted additional safeguards to protect against misuse of the power it conferred to the Governor.

First, the Governor's orders and regulations must be in writing, and the Governor "shall cause widespread publicity and notice to be given" of such orders and regulations. (Gov. Code, § 8567, subds. (a)-(b).) Such requirements that measures taken under the Act be conducted openly "provides a check on the [Governor's] power." (*Alexander v. State Pers. Bd.* (2000) 80 Cal.App.4th 526, 538.)

Second, as previously explained, the Legislature provided standards to cabin the Governor's exercise of the State's police power by providing that the Governor shall act, to the extent necessary, "in order to effectuate the purposes of" the Act. (Gov. Code, § 8627.) Therefore, the Legislature did not merely convey all of the State's police power without limitation or confer unbridled authority to the Governor, but rather authorized the Governor to exercise the State's police power during a proclaimed state of emergency only as reasonably necessary for that purpose.

Third, unlike typical legislation enacted by the Legislature and signed by the Governor, the Governor's emergency authority is inherently temporary and subject to immediate curtailment by the Legislature. The Legislature provided that the Governor "shall proclaim the termination of a state of emergency at the earliest possible date that conditions warrant." (Gov. Code, § 8629.) In addition, the Legislature also retained for itself the authority to terminate a state of emergency by concurrent resolution—i.e., without the Governor's signature—and thereby to terminate "[a]ll of the powers granted the Governor by this chapter with respect to a state of emergency." (*Ibid.*) Contrary to Real Parties' contention (Return at p. 54), this authority is an important safeguard for purposes of the nondelegation doctrine. (See *Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1517 [explaining that "[c]learly" there was no total abdication where the legislative body retained the power to rescind the delegated authority, among other safeguards].)

And contrary to Real Parties' argument (Return at p. 61), this safeguard does in fact distinguish California's Emergency Services Act from the emergency-powers statute recently considered by a sharply divided Michigan Supreme Court. Under that statute, the Michigan governor's emergency powers endured "until a 'declaration by the governor that the emergency no longer exists.'" (*In re Certified Questions From United States District Court, Western District of Michigan, Southern Division* (Mich., Oct. 2, 2020, No. 161492) 2020 WL 5877599, at *16 [quoting Mich. Comp. Laws, § 10.31].) In other words, unlike

California's Emergency Services Act, the Michigan statute left the Michigan legislature with no authority to terminate the governor's emergency authority. (See Mich. Comp. Laws, § 10.31.)

Real Parties are thus wrong to suggest that the Kentucky Supreme Court's reasoning in *Beshear* "puts California on the Michigan side of the distinction" in that case. (Return at p. 62.) As just discussed, the Michigan statute contained no mechanism allowing the legislature to terminate an emergency—unlike the relevant Kentucky statute, which "allows the General Assembly to make [that] determination itself" if Kentucky's governor has not terminated the emergency before the next regular legislative session. (*Beshear*, *supra*, 2020 WL 6736090, at *21.) In fact, in this respect, California's Emergency Services Act appears even more protective than its Kentucky counterpart: the Emergency Services Act allows the Legislature to terminate an emergency at any time. (Gov. Code, § 8629.)

And although the California Legislature (unlike its Kentucky counterpart) may almost always be in session as a formal matter (Cal. Const., art. IV, § 3, subd. (a)), there are long periods of time when the Legislature is—as a practical matter—not readily able to conduct business. (See, e.g., Cal. Const., art. IV, § 8, subd. (c)(2) [noting the existence of a legislative recess between the first and second years of a legislative session].) Indeed, the COVID-19 pandemic itself has already twice prevented California legislators from meeting according to their regular schedule. In this light, it is not clear that California's Legislature differs in a constitutionally significant respect from

Kentucky's: neither is guaranteed to be "ready to accept the handoff of responsibility for providing the government's response to an emergency such as the current global pandemic." (*Beshear*, *supra*, 2020 WL 6736090, at *22.)

For all of these reasons, the Emergency Services Act does not contravene the nondelegation doctrine.

IV. THE TRIAL COURT ERRED BY EXCLUDING ITEMS FROM EVIDENCE

The Governor has demonstrated that the trial court erred by excluding two public records from evidence. (Pet. at p. 68.) Real Parties offer no argument to the contrary, and have therefore waived any such argument. (See, e.g., *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 624.) The trial court's evidentiary ruling should be reversed.

CONCLUSION

For these reasons, Governor Newsom requests that the Court issue an appropriate writ directing the trial court to vacate its November 13 Statement of Decision and November 25 judgment,[12] and issue a writ directing the trial court to enter a Statement of Decision dismissing the complaint as moot, or a Statement of Decision and judgment entering judgment in favor of Governor Newsom on the merits.

[12] The trial court entered judgment on November 25, notwithstanding this Court's November 24 Order staying "all proceedings."

Dated: December 14, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT OF MANDATE, PROHIBITION, OR CERTIORARI** uses a 13-point Century Schoolbook font and contains 8,045 words.

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DECLARATION OF ELECTRONIC SERVICE

Case Name: **Gallagher v. Newsom (Third DCA Writ II)**
No.: **C093006**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On December 14, 2020, I electronically served the attached **PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT OF MANDATE, PROHIBITION, OR CERTIORARI** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on December 14, 2020, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 14, 2020, at Sacramento, California.

Lindsey Cannan
Declarant

Signature

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