IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

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| **GAVIN NEWSOM, in his official capacity as Governor of the State of California,**<br><br>Petitioner,<br><br>**v.**<br><br>**THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SUTTER,**<br><br>Respondent,<br><br>**JAMES GALLAGHER and KEVIN KILEY**,<br><br>Real Parties in Interest. | Case No. C093006 |

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

**RETURN OF REAL PARTIES IN INTEREST, JAMES GALLAGHER AND KEVIN KILEY, TO PETITION FOR EXTRAORDINARY WRIT OF MANDATE, PROHIBITION, OR CERTIORARI; APPLICATION FOR TEMPORARY STAY**

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## INTRODUCTION

This case concerns a limited point of a law: whether the California Constitution countenances a dictatorship.

Putting aside the word's 20th-Century connotations, its Roman origins relate specifically to emergencies and the absolute power the appointed individual could assume for their duration. Petitioner is no Caesar, but his legal theory in this case and ruling philosophy this year are that of *dictator legibus faciendis*. The Executive can make laws at will, and the participation of the Legislature is at his discretion.

The limited point of law presented here thus carries a profound implication: the very structure of our constitutional republic. But it is limited all the same. Not at issue are the broad powers the California Emergency Services Act awards the Governor that are executive in nature and have been used for 50 years to combat fires, earthquakes, and other disasters.

What is at issue is whether, in addition to this duly delegated authority, the Governor may lay claim to a form of "police power" that includes acts of purely legislative creation. Such power, if legitimized by this Court, would admit of no practical limitation. Given the modern multiplication of emergencies and their cascading effects across the landscape of California life, a mandate for executive lawmaking would confer unbridled control over the economic and social character of the state. It would be a reversion to the Roman model, destroying the separation of powers as we know it.

As this limited point of law has evaded review by the courts, it deserves resolution even if the underlying controversy is deemed moot. Since emergencies rarely last the duration of the COVID-19 pandemic, there has never been an appellate opinion addressing a Governor's power to legislate under the guise of the Emergency Services Act. This very legal question has become one of bitter contention, ongoing uncertainty, and unusual relevance to the lives of millions of people.

The length of the pandemic presents not only a rare occasion for review, but a near certainty that the question presented here will repeat itself during the current state of emergency if not others in the near future. Judicial guidance can provide a clearer path forward for all parties and perhaps a palliative for the anxieties and hardships of the moment.

## RETURN BY ANSWER TO PETITION FOR WRIT

Real Parties in Interest answer Petitioner Governor Gavin Newsom's unverified allegations (Pet. pp. 19-36) as follows:

1. Admit.

2. Admit.

3. Admit.

4. Admit that COVID-19 a "novel severe acute respiratory illness" but denied to the extent that currently there are effective therapeutic treatments and there are at least 3 vaccines that are currently on the verge of being approved for distribution.

5. Admit.

6. Admit only that these are select phrases from cases and statutes but not that they support Petitioner's position regarding his executive powers in this case.

7. Denied to the extent that COVID-19 "seriously affected" elections, which is a subjective conclusory statement. California had special elections in the spring that included in-person voting and that were widely seen as being conducted without any serious issues. In fact, recent research shows that "there is no inherent relationship between voting in person in the primaries and the spread of COVID-19." Fetcham, Christakis (Yale University) *Voting in the 2020 Primaries Didn't' Worsen The COVID-19 Pandemic*, FiveThirtyEight (October 15, 2020).

8. Admitted only to the existence of the letter.

9. Admit that the letter stated as such. But the letter also states "…legislation has already been introduced to require all voters be mailed a ballot for this November's election."

10. The writing speaks for itself.

11. The writing speaks for itself.

12. Admit that the letter states as such but denied as to the substance or truth of the matter so asserted. The letter also states: "Three quarters of California voters already receive a mail ballot."

13. Admit only that the date of the letter is May 6, 2020 and that Executive Order N-64-20 is dated May 8, 2020. The factual implication that the Governor issued the Order in response to the letter is denied. There was no evidence introduced at trial

that the Governor actually received and read the letter prior to issuing his order.

14. Admit that the Order states as such.

15. Admit that the Order states as such.

16. Admit that the Order states as such.

17. Denied that the Order "invited further action from the Legislature." Admit that the Order states as such as to the quoted portions.

18. Admit that the Order "specified in-person voting requirements and other requirements"; denied that they were "congruent with parallel legislation."

19. Admit that the Order states as such.

20. Admit that the filing states as such.

21. Admit that the Order states as such.

22. Admit that the Order took the actions described, but denied that the identified Government Code sections give the Governor such power or that actions were merely "suspensions."

23. Admit that the Order states as quoted; denied that such "partnership" or "cooperation" actually occurred.

24. Admit.

25. Admit that they had been advancing it for well over a month prior to the issuance of Executive Order N-67-20.

26. Denied.

27. Admitted except as to the statement that the Secretary of State's vote-by-mail tracking system could only use IMb, which is denied.

28. Admit that no evidence was provided by either party as to the functions of the Secretary of State's tracking system or whether IMb was a required component to conduct ballot tracking; denied that the provisions of AB 860 and Executive Order N-67-20 were "functionally identical". The evidence showed they are not functionally identical, and the lower court specifically found that they are not. (III Tab 56, p. 703-704).

29. Admit.

30. Admit as to the difference between SB 423 and N-67-20 but denied that the difference was "minor" or that "the Legislature opted not to address this requirement, possibly because such plans had already been made." This is speculation and there was no evidence introduced at trial to support this assertion.

31. Admit.

32. Admit.

33. Admit.

34. Admit.

35. Denied.

36. Denied.

37. Admit that the statement stated as such.

38. Admit to the extent that November 3 was the last day to vote in the election. The election was held throughout the month of October beginning when mail ballots were first sent out.

39. Admit.

40. Admit.

41. Admit.

42. Admit that Real Parties Complaint did not allege facts concerning any other Executive Order, but denied that other prohibited conduct was not identified. Specifically, Real Parties alleged that the Governor's *position* regarding his authority to issue the Order was an "usurpation of legislative power" ¶17 and that a declaration of "the rights of the parties under the California Constitution and applicable law is necessary in order to clarify this important constitutional issue and resolve the controversy." ¶20 (I Tab 15 p. 82).

43. Admit as to the quoted section of the Complaint, denied to the extent that Petitioner is claiming that was all Real Parties requested in their Complaint.

44. Admit that an application for temporary restraining order was filed; denied that it requested "broader" relief: it requested the same injunctive relief stated in the Complaint but in a preliminary fashion (prior to a determination on the merits).

45. Admit.

46. Admit.

47. Admit.

48. Admit.

49. Admit.

50. Admit that is a portion of what the ruling stated.

51. Admit.

52. Admit.

53. Admit.

54. Admit.

55. Admit.

56. Admit.

57. Admit.

58. Admit.

59. Admit.

60. Admit. For the full extent of the arguments made therein Real Parties would refer the Court to the documents themselves (II Tabs 47 & 48).

61. Admit.

62. Admit. As to the full extent of what was argued regarding the law and evidence Real Parties would refer the Court to the official transcript of the trial hearing.

63. Admit.

64. Admit. Real Parties would refer the Court to the Tentative Ruling itself (II Tab 53).

65. Admit.

66. Admit.

67. Admit.

68. Admit.

69. Admit.

70. Admit.

71. Admit.

72. Admit.

Real Parties in Interests also allege as follows:

73. In a May 22, 2020 press conference, subsequent to Senator Umberg and Assemblymember Berman's letter and the issuance of Executive Order N-64-20, the Governor stated that

subsequent legislation was not "strictly necessary" and that his Order was on "firm legal ground." (I Tab 20, p. 143.).

74. Despite the stated intent in the Executive Order N-64-20 that his "Administration continue to work with the Legislature and the Secretary of State to determine how requirements for in-person voting opportunities and other details of the November election will be implemented – guided by California's longstanding commitment to making its elections accessible, as enshrined existing California law…" (I Tab 11 p. 59) (emphasis added), the Governor proceeded to issue Executive Order N-67-20 (the "Order") on June 3, 2020 which purported to govern the process for in-person voting opportunities contrary to existing California law. (See I Tab 14). This was done without any formal communication to the Legislature.

75. At the time the Order was issued, the Legislature was already considering SB 423, a bill to govern in-person voting options for California's November 3, 2020 General Election. (I Tab 12 p. 62). The bill had recently passed the Senate and was then sitting in the Assembly Elections & Redistricting Committee. (IV Tab 57, p. 725.).

76. Challenges for the November 2020 election were identified by Secretary of State as "… 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." (I Tab 18, p. 133).

77. N-67-20 did not provide any orders, regulations, or funding for the recruitment of poll workers.

78. N-67-20 did not provide any orders, regulations, or funding for ensuring the safety of polling places, for instance supplying personal protective equipment (PPE) to counties for polling places.

79. Rather, N-67-20 changed the procedures for the number, location, and duration of polling places and voting centers.

80. Pursuant to Elections Code §4005(a)(10), Voter's Choice Act (VCA) counties are required to develop draft plans "for the administration of elections pursuant to this section…" The plans are to be posted publicly and the counties are to have publicly noticed meetings with voting specified voting rights groups.

81. N-67-20 exempted VCA counties from having to conduct any publicly noticed meetings with voting rights groups regarding election planning for the November election which would have included the number, location, and duration of polling places and vote centers. Elec. Code §4005(a)(10). Contrary to existing law, the Order provided that the VCA counties could post the information on a public website and take public comment for 10 days.

82. Any VCA county that changed its total number of vote centers, locations, and/or durations for the November 3, 2020 General Election would have been required to have a publicly noticed meeting with voting rights groups prior to approving any such plan. Elec. Code §4005(a)(10).

83. N-67-20 recapitulated the requirement set out in N-64-20 that mail ballots be mailed to every voter, while directing that inactive voters would not receive such ballots. The Order added requirements that the counites use the Secretary of State's ballot tracking system and that all ballot envelopes contain intelligent mail barcode (IMb). These requirements were contrary to existing law (Elec. Code §3019.5) and the provisions of AB 860, then pending in the Legislature. *See* AB 860 (May 28 version), SEC. 4 §3019.7 (d) at I Tab 13, p. 71.

84. The Legislature passed AB 860 on June 18, 2020. The Governor signed the legislation on the same day but in his announcement he said nothing about the legislation "superseding" Executive Order N-67-20.[1]

85. The Legislature passed SB 423 on August 6, 2020. The Governor signed the legislation on the same day but in his announcement said nothing about the legislation "superseding" Executive Order N-67-20.[2]

86. Real Parties Complaint challenged both the validity of N-67-20 *and* the Governor's purported power to amend statute, which he necessarily had to do in issuing N-67-20. The Complaint, in requesting declaratory relief, stated "there exists an actual controversy between the parties in that the Defendant is contending his Executive Order is valid use of his powers granted under the California Constitution and applicable statute… despite

[1] See https://www.gov.ca.gov/2020/06/18/governor-newsom-signs-legislation-6-18-20/

[2] See https://www.gov.ca.gov/2020/08/06/governor-newsom-signs-legislation-8-6-20/

existing statutory law created by the Legislature to the contrary, and despite the fact that the Legislature is currently considering pending legislation dealing with the exact subject matter of the Executive Order. Plaintiffs contends that the Executive Order is not a valid use of power under the California Constitution and applicable statute; is in fact an usurpation of legislative power, and therefore cannot have the force of law." Complaint ¶17 (I Tab 15, p. 81-82). The Complaint went on to allege: "A declaration of the validity of the Executive Order and the rights of the respective parties under the California Constitution and applicable law is necessary in order to clarify this important constitutional issue and resolve the controversy." ¶20 (Id. at 82).

## ISSUES PRESENTED

Real Parties represent that the issues presented by this Petition are as follows:

1. Whether the case below was moot, when subsequent legislation made no reference to the challenged Executive Order; when the legislation did not as a matter of fact "supersede" the Order; when the Governor never made any formal withdrawal or rescission of the Order; when the evidence showed that in fact the Order did govern certain procedures of the election including the type of barcode to be used on all mail ballots sent to voters and the mode of public presentation and input to be received from protected voting rights groups regarding the conduct of the election; where all agree that the underlying issues (both the validity of the Order itself and the legal interpretation of the Governor's powers under the Emergency Services Act) are a

matter of great public import; and where the evidence showed that this same controversy is "capable of repetition."

2. Whether the Governor has the authority under California's Emergency Services Act to unilaterally amend, alter, or change existing California statutes, or whether the Governor's authority with respect to statutory law consists of an ability to suspend certain statutes, given that a plain reading of Government Code § 8571 specifically only allows for a suspension of certain types of statutes for specified reasons, and makes no mention of "conditional suspensions" or "gap-filling" subsequent to a suspension.

3. Whether Government Code Section 8627 "centralizes the State's power in the hands of the Governor" as Petitioner contends and thereby gives him all powers of the State including legislative and judicial power, or whether that provision allows a consolidation of executive authority Necessary to a determination of this issue is the consideration of whether such a broad interpretation of power as proposed by the Petitioner would render the Act unconstitutional as an unlawful delegation to the executive branch. (Cite case law).

4. Whether Government Code Section 8567 allows the Governor to make "orders and regulations" that are contrary to and supersede any and all existing statutory laws, or whether that power is limited to executive "orders and regulations" (i.e., traditional executive powers) to administer powers expressly granted in the Act.

5. Whether Executive Order N-67-20 was an unconstitutional exercise of legislative powers, and should thereby be struck down, considering the express provisions of the California Constitution, applicable case law, and plain reading of the California Emergency Services Act.

## PRAYER

WHEREFORE, Real Parties pray that:

1. The Petition for Writ of Mandate, Prohibition, or Certiorari be denied;
2. The temporary stay of the Statement of Decision and Judgment be lifted;
3. That the Real Parties be granted their costs in this action.
4. For an award of such other relief as may be just and proper.

## ARGUMENT

### I. The Trial Court's Decision Not to Dismiss the Case as Moot Was Correct and Within the Court's Inherent Discretion.

The court's decision regarding mootness was correct for three distinct reasons. First, the case involved a broader, ongoing controversy regarding the Governor's authorized powers. Second, evidence presented in the trial court showed that the case was not factually moot. And third, the court retained the inherent discretion to decide the issue under applicable exceptions.

#### A. This Case is Not Moot Because It Implicates Not Only the Lawfulness of Executive Order N-67-20 But More Broadly the Governor's Powers Under the Emergency Services Act.

In making its mootness argument, Petitioner attempts to narrow the focus of the litigation (See Petition at 46; "This case is limited to Executive Order N-67-20."). However, it was made clear from the outset of the litigation that this case involved a broader controversy than just the Order itself and the November election.

Specifically, in their Complaint Real Parties alleged as follows:

1. That the "actual controversy" between the parties was that "Defendant is contending that his Executive Order is a valid use of his power granted under the California Constitution and applicable statute and is binding upon counties and their elections officials to act in accordance with his Executive Order, despite existing statutory law created by the Legislature to the contrary…" whereas "Plaintiffs contends that the Executive Order is not a valid use of power under the California Constitution and applicable statute; is in fact an usurpation of legislative power, and therefore cannot have the force of law." ¶17 (I Tab 15 p. 81-82).

2. That a declaration regarding the validity of the Executive Order "and the rights of the parties under the California Constitution and applicable law is necessary in order to clarify this important constitutional issue and resolve the controversy." ¶20 (I Tab 15 p. 82);

Real Parties sought a declaratory judgment that the Order is "null and void" *because* "it is an unconstitutional exercise of legislative powers reserved only to the Legislature, nor is it permitted under the California Emergency Services Act." ¶18 (I Tab 15 p. 82).

In response to Petitioner's motion for judgment on the pleadings based on mootness, Real Parties pointed out these clear allegations in the Complaint and stated that the controversy in the case was *both* over the constitutionality of the Order "and over the underlying principle of whether the Governor has authority to unilaterally amend existing statutory law." (I Tab 31 p. 218). They did so again in their Trial Brief. (II Tab 47 p. 479). The Respondent court, in making its determination that the case was not moot, agreed, finding that the "controversy at issue in this case is broader, specifically whether the Governor has the authority under [CESA] to exercise legislative powers by unilaterally amending, altering, or changing existing statutory law or making new statutory law." (III Tab 56 p. 703). The court went on to outline the contrary positions of the parties on this broader issue and concluded "[n]ot only is this an active and ongoing controversy between the parties, but it is a critically important one for the Judicial Branch to resolve." (Id.). In sum, the court decided the broader controversy that remained even after the occurrence of the November election. There were material issues remaining to be resolved. *Eye Dog Foundation v. State Bd. of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541).

### B. Executive Order N-67-20 Was Not In Fact Superseded by the Legislation.

Nor was the case made moot by the passage of legislation. As was made clear by Real Parties in briefing the lower court on the mootness issue, the Order still remained in effect in substantive ways, specifically (i) to require the use of IMb on all

mail ballot envelopes and (ii) to exempt Voter Choice Act counties from holding publicly noticed meetings with voting rights groups. (I Tab 31 p. 221-224). This was also shown in evidence presented at trial. (III Tab 51 p. 583-584, 593-595). And it was again shown in Real Parties Preliminary Opposition here. *See* Prelim. Oppo. at 8-10. And not that it matters to a factual determination of whether the Order was superseded, these differences are far from "minor" as Petitioner contends. The IMb requirement required county elections officials to incur costs on new envelopes, printing and personnel to provide the requisite barcodes all to do something they were not required to do by statutory law. And the exemption from publicly noticed meetings with voter rights groups surely meant something to the affected groups and undermined, as the Governor stated in Executive Order N-64-20, "California's longstanding commitment to making its elections accessible – as enshrined in existing California law."

That the order was not superseded cannot be denied, but neither was the Order ever formally "withdrawn" or "rescinded" as Petitioner contends. The most that the Governor ever did in this regard is to make a statement that AB 860 and SB 423 had "superseded" his Order. As discussed above, this is factually incorrect. But even more so the statement was likely made only for the purposes of this litigation. One would think that the time to make such a statement would have been when the Governor signed AB 860 and SB 423 on June 18 and August 6, respectively. He did not. *See* ¶84, 85 above. It is also clear that despite this statement, the Executive Order continued to govern the election,

as an October 2, 2020 memorandum from the Secretary of State continued to provide for the exemption from meetings with voting rights groups and require the use of IMb. (II Tab 38, pp. 332 and 337).

### C. Even if the Case Was Made Moot by a Subsequent Act, This Case Fits Squarely Into Applicable Exceptions to Mootness.

Even assuming *arguendo* that the case was factually moot because of events occurring subsequent to the filing of the suit, under long-held California Supreme Court precedent a court may still nonetheless decide the merits of a case when "there remain material questions for the court's determination" (*Eye Dog Foundation v. State Bd. of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541) or the "case poses an issue of broad public interest that is likely to recur" (*In re William M.* (1970) 3 Cal.3d 16, 23-24).

As to the first exception, there remained a huge material issue for the court to determine: the extent of Governor's powers under the California Emergency Act. As explained in I. Sec. A above, this case dealt squarely with the authority of the Governor under the CESA. There is clearly an ongoing dispute about what those powers entail. This is where the multiplicity of executive orders came into play in the evidentiary record. The evidence showed that the Governor has issued over 50 executive orders many of which amend or alter statutory law and that rely on sections 8627, 8567, and 8571 of the Government Code. (IV Tab

58).[3] It was not that these orders were being specifically challenged in this case nor did the court, as Petitioner contends, need to "analyze why [the orders] were unlawful" (Pet. at 46). Rather, as the court pointed out, the fact that the Governor was continuing to act under this disputed broad authority via other orders was evidence that an "active and ongoing controversy" remains. Thus a declaration as to his authority under the Act is both ripe and justiciable. As was the case in *Eye Dog*, without a decision on the merits, the parties "will thus be relegated to the very situation which precipitated the present litigation, a development creating a 'continuing controversy ripe for decision.'" *Eye Dog* supra 542.

As to the second exception, a lower court "may exercise an inherent discretion to resolve [the] issue even though an event occurring during its pendency would normally render the matter moot." *In re William M.* supra, 23-24. Courts commonly decline to dismiss cases on this basis. In one such case, the California Supreme Court explained that "as scores of other reviewing courts in this same posture have concluded, we determine that although the present case is technically moot, it presents an important question affecting the public interest that is 'capable of repetition,

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[3] It is important here to note here that Petitioner did not object to the relevance of the orders and in fact stipulated to them being entered into evidence at trial. *See* II Tab 46 p. 470 (Exh. F). Real Parties pointed out at trial that, though none of the executive orders issued by previous governors (I Tabs 1-5) had invoked Gov. Code sec. 8627 ("police power"), the Governor had invoked the section in 23 of his 57 executive orders issued during the pandemic. III Tab 51, p. 574-575.

yet evading review.'" (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal.4th 1178, 1190 n.6 (Cal. 1999).) In fact, the high court has specifically chosen to decide election-related cases rendered moot by the occurrence of the election. (*Costa v. Superior Court*, 37 Cal.4th 986, 993 (Cal. 2006) ["Although the defeat of Proposition 77 renders moot the legal challenge to the measure, we nonetheless have concluded that we should retain this matter and issue an opinion in order to provide guidance for future cases."])

Factors courts consider in deciding whether to exercise this discretion include whether the issues "affect the public interest," are "capable of repetition," tend to "evade review," and present issues not previously decided by the courts. (*NBC Subsidiary (KNBC-TV*), Inc. v. Superior Court, 20 Cal.4th 1178, 1190 n.6 (Cal. 1999); *In re Anna S.*, 180 Cal.App.4th 1489, 1498 (Cal. Ct. App. 2010).)

Both parties agree that the case greatly affects the public interest. As to the capability of repetition, Petitioner states that resolving the conflict between the parties' legal theories "potentially affect[] not only a single executive order, but potentially dozens of other executive actions." (Pet. at p. 37.) Indeed, he expressly tells the court that he intends to continue acting in precisely the manner Real Parties allege is unlawful, stating that the trial court's injunction will "hamstring future State action in this and other emergencies." (Pet. at p. 15; see also id. at p. 60 [warning the Governor's ability to respond to emergencies "is hamstrung substantially" unless the court embraces his novel "conditional suspension" theory of section

8571.]) The parties also acknowledge that this issue has evaded review, as neither has produced a single California case construing the sections of the Government Code at issue. And this evasion of review is inherent to the controversy presented, given the transiency of emergencies;

The evidence at trial also showed that the controversy presented here was even likely to recur in much the same factual form – with respect to elections. There have been three separate executive orders regarding elections this year alone. (I Tabs 8, 11, and 14; also cited in the Statement of Decision III 56, p. 703). Furthermore, the likelihood of a special election on the immediate horizon was extremely likely. At trial, Real Parties presented evidence that a special election has occurred with within months of every General Election over the last 15 years. (IV Tab 59).[4]

In order to side-step this substantial evidence of re-occurrence in the trial record, Petitioner again attempts to unilaterally narrow Real Parties Complaint to just the Order and the November election, arguing that the November election itself is not likely to recur. Pet. at 45, 48-49. While this is of course obvious, it does not mean that the broader underlying controversy is unlikely to recur, nor that the more specific factual situation at bar is unlikely to recur. There was evidence that the Governor was even establishing new legislative policy by executive order. (FN discussing the gas-powered vehicle order). All of this evidence supported the determination that this controversy is likely to re-

[4] That event is now certain to occur with a vacancy in the 30th Senate District, where Senator Holly Mitchell has been elected to the Los Angeles County Board of Supervisors, creating a vacancy.

cur. It is precisely the type of case "capable of repetition but evading review." *In re William M.* supra fn. 14 (citing Moore v. Ogilvie (1969) 394 U.S. 814, 816).

The Respondent court cited *William M.* in its ruling and exercised its discretion to do just that, on a matter that all sides agree is of great public interest. (III Tab 56 p. 704.) In sum, based on the evidence at trial the court was well within its "inherent discretion" to decide the issue on the merits.

## II. The Emergency Services Act Does Not Confer the Plenary Lawmaking Authority Claimed By the Governor and Exercised with the Executive Order

In an Act with dozens of sections, Defendant cites three of them as authority for the Executive Order: Government Code sections 8571, 8567, and 8627. These provisions do not individually or collectively give a California Governor the power to amend, modify, or create statutory law.

### A. Section 8571 Authorizes the Governor to Temporarily Suspend Statutes, Not Create New Ones

Government Code section 8571 allows for the suspension of certain statutes when "strict compliance" would inhibit the response to the emergency. Where the Governor makes such a finding, he can "suspend" the statute—meaning it will "cease operation temporarily."5 The relevant provisions are then not enforced against the subject group for as long as the suspension

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5 (Merriam-Webster, https://www.merriam-webster.com/dictionary/suspend).

remains in effect. In short, the Governor may decline to enforce a statute if he finds it an impediment to the State's emergency response.

The provisions of the Executive Order go well beyond suspension in violation of the clear terms of the statute:

- Resolution 1) reiterates provisions of a previous order (N-64-20) for the November 3, 2020 election, that all voters (except those who are inactive) shall receive a mail-ballot whether they have requested one or not.
- Resolution 2) states that all counties elections officials shall use the Secretary of State's ballot tracking system.
- Resolution 3) allows counties to opt-out of their statutory obligation pursuant to Elections Code §12286(a)(3) to provide a polling place in each voting precinct for the November 3, 2020 election. If they do, they must provide for voting procedures outlined in subsections (a), (b), and (c) of the Order which are substantively different from those outlined in existing state statute (*See* Cal. Elec. Code §§12280-12288).
- Resolution 5) substantively amends, alters and changes Elections Code §4005(a)(10) which requires that an elections official provide for in-person publicly noticed meetings with Voting Rights Act protected groups and disability rights groups regarding the conduct of an upcoming election and provides instead that an elections official can provide information on-line with public comment.

For starters, Resolution 1 does not suspend any statutes. It is pure policy creation, recapitulating a prior Executive Order and adding new features: mailing millions of ballots to California voters who had not asked for them while specifying that inactive voters would not get a ballot. Petitioner makes no attempt to defend this based on the suspension power or any of his novel theories related thereto.

Petitioner acknowledges that the other provisions also do more than suspend statutes. (Pet. at p. 57.) Yet, at least with respect to Resolution 3, he contends the statute offers the possibility of "conditional suspension," arguing that the term "strict compliance . . . 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. . . ." (Pet. at p. 53.) While the logical conclusion is that the Governor can suspend a particular subsection or provision of a statute while continuing to enforce the remainder, Petitioner makes an inexplicable leap: that allowing something less than strict compliance with all statutory requirements enables him to impose *new and different* requirements, "such as the conditions set forth in Executive Order N-67-20." (*Id.*). This novel argument, not presented to the lower court, conflates *partial* suspension with *conditional* suspension without any textual basis. Support for the latter cannot be derived from section 8571, which contains no affirmative directive that the Governor can introduce new

statutory language to replace the suspended provisions or to be offered as an alternative.

A perverse consequence of Petitioner's strained logic is to produce self-undermining orders, where the Governor on the one hand stipulates that strict compliance with a statute would "hinder" the mitigation of the effects of the emergency, while on the other hand giving affected parties the option of going along with the statute anyway if they prefer it to his new alternative. Here, the Governor did make the required finding as to the hindrance posed by the relevant statutes. But he followed by inviting counties to continue abiding by those statutes if they preferred them to the new provisions he created. A proper suspension, consist with the text of section 8571, would have fulfilled the Order's stated purpose of relieving county elections officials from statutory obligations that would interfere with efforts to curb transmission of the virus.

This is also why Petitioner's parade of horribles with respect to the Brown Act misses the mark. That order, he argues, was also a conditional suspension because nonenforcement of public meeting requirements "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." (Pet. at p. 62.). But Petitioner is assuming that when a state law is temporarily unenforced, anarchy follows. In the absence of his "long list of conditions"—drawn up in secret, very much *against* the spirit of the Brown Act—local legislative bodies could have decided on their

own temporary procedures for conducting remote meetings. If he was inclined to be helpful, Petitioner could have offered model procedures as a resource; if the Legislature was displeased with how things played out (or did not want to wait and see), it could quickly have passed new legislation. In any case, the question of who would do a better job producing new procedures in line with the goals of Brown Act has nothing to do with the emergency response—another reason the power cannot be claimed by the Governor under the ESA.[6]

Petitioner's theory is also incompatible with the nature of the suspension power. To suspend a statute is to decline to enforce it—to forebear from an *executive* action. To amend a statute is to create something new to enforce—to engage in a legislative action. Yet Petitioner calls it "strange" to "force[] the Governor into a "binary, up-or-down, all-or-nothing choice" between suspending a statute or keeping in intact. (Pet. at p. 63, n. 12.) Perhaps he also

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[6] If this Court interprets the ESA as written, Petitioner warns of a "jarring result" that would "call into question virtually every action taken by the legislative body of every local government in California since mid-March." (Pet. at pp. 15, 63.). If that is true, it would only be because of *Petitioner's* decision to create new public meeting rules on his own rather than through any of the other available options. If his order were properly limited to suspension, it would have served its public health purpose of reducing in-person meetings without creating legal difficulties. He cannot now point to the consequences of his own unlawful actions as a reason not to find those actions unlawful. In any event, Petitioner's dire warnings are overblown. Among many other possible solutions, a court reviewing this order could structure relief in a way that accounts for the legality of the act of suspension itself.

finds it strange that a Governor faces precisely this choice with every bill that lands on his desk. In fact, the suspension power allows far greater flexibility than the veto power; the latter requires accepting or rejecting an entire bill, whereas suspension offers infinite permutations of provisions throughout the corpus juris whose enforcement can be selectively paused.

Suspension of statutes pursuant to section 8571 is, indeed, a powerful tool that prior Governors have used in responding to emergencies. But it cannot, as Petitioner contends, be construed as an instrument for rewriting statutes or making new policy.

### B. Section 8567 Specifies the Legal Forms by Which the Governor Acts and Does Not Confer Additional Powers

Defendant next attempts to argue that section 8567 grants him the broad authority to create new election law. In fact, this section provides implementing authority as to the provisions of the Emergency Services Act itself.

Petitioner argues that under this section, "the Governor has the power to issue orders with "the force and effect of law." (Gov. Code, § 8567, subd. (a).) Omitted is the key caveat: that such orders and regulations are only authorized as is "necessary to carry out the provisions of this chapter." (Gov. Code § 8567(a).) This is commonplace implementation language, specifying the legal forms, such as executive orders, by which the Governor is to carry out the Act and requiring that those legal forms be given "widespread publicity." (*Id.*) The section even provides an example, with subsection (c) describing the timing of orders and regulations

"relating to the use of funds"—not any funds, but those whose expenditure is explicitly authorized by Article 16 of the statute. (*Id*. § 8567(c).)

Various provisions of the Act expressly note that "orders and regulations" are needed for implementation. This statutory scheme—with section 8567 specifying the legal forms to "carry out the provisions of this chapter" and the relevant provisions referring back to those forms—is unremarkable. The specification of the legal forms by which to effectuate the provisions of a statute does not provide additional authority over and above the provisions themselves, much less plenary power to enact policy of any kind.

Other textual evidence adds to the certainty that "orders and regulations" refers to implementing authority over the Act itself. Subsection (d) suggests orders and regulations can be issued in advance of a State of Emergency, confirming that they are tools for carrying out the detailed statutory scheme of the Act and are not themselves a separate extraordinary power. Finally, the Act explicitly recognizes that its own provisions limit the reach of the orders and regulations that can be issued, referring to "lawful orders and regulations of the Governor made or given within the limits of his authority as provided for herein." (*Id*. § 8621).

Finally, as an alternative to his "conditional suspension" theory, Plaintiff offers a "vacuum-filling" theory where the Governor can use section 8571 as a statutory eraser and then wield section 8567 as a pen to rewrite the law. (Pet. at pp. 51, 54, n.10.) This interpretation, aside from lacking any textual support and

requiring one to believe the drafters of the Act for some reason located the eraser and pen in different sections, fails for the reasons already discussed: that section 8567 does not provide independent substantive authority and that a suspended statute can, if necessary, be filled by other actors. And it fails for an additional reason. If section 8567 only arrives on the scene once a suspension occurs, the vacuum-filling function of any orders or regulations will be to fulfill the purpose of the suspended statute rather than the purpose of the Emergency Services Act. For instance, once public meeting laws were suspended, Petitioner argues that the role of the subsequent order was to "promote . . . the legislative purpose of the Brown Act." (Pet. at p. 62.) The same is true of the vacuum-filling theory as applied to paragraphs 2 and 3 of Executive Order N-67-20. This violates section 8567's requirement that orders and regulations may only be issued "to carry out the provisions" of the ESA itself.

### C. Section 8627's Reference to Police Power Serves to Coordinate Executive Power, Not Confer Legislative Power

The final authority cited by the Executive Order is Government Code section 8627, which Defendant claims gives him authority 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." (Pet. at p. 53.) While the Act does not define police power, Petitioner quotes case law where it is described as "plenary authority to govern" and "the inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare." (*Id.*).

This is undeniably a broad grant of authority. Yet Petitioner acknowledges, as he must, that it cannot exceed constitutional limitations. The Legislature was mindful of this, expressly including the caveat that the Governor could only exercise the police power "vested in the state by the Constitution and the laws of the State of California." (Gov. Code, § 8627.) This suggests a legislative intent to confer executive authority up to the constitutional maximum—but no further. The text of the statute acknowledges that even during a State of Emergency, the Constitution's constraints remain. Since foremost among these constraints is the separation of powers enshrined in article 3, section 3, this section of the Act does not purport to award legislative authority to the Governor.

Section 8621's reference to police power vested in the state by both the Constitution and "the laws of the State of California" further evidences an intent to maximally concentrate executive power rather than impermissibly confer legislative power. The "laws of the State of California" cannot create legislative power; they are the result of it. Therefore, any police power vested in the state by those laws cannot be legislative in nature. This implication is in line with the most straightforward reading of the section: that during an emergency, the Governor is authorized to unify and direct all executive power that may be scattered through various departments, agencies, and subdivisions. In fact, this is precisely how section 8627 was employed in the one instance in which this Court has referred to it. After quoting the statutory language, the Court in *Farmers Insurance Exchange* v. State of

California (1985) 175 Cal.App.3d 494 noted that the Governor issued a proclamation that "directed all agencies of the state government to employ state personnel, equipment and facilities to alleviate the emergency." (*Id.* at pp. 500-501.)

Consistent with this understanding, section 8627 requires that the police power assumed be exercised through orders and regulations that "effectuate the purposes of this chapter." Looking to the "Purpose" section of the Act, the findings and declarations focus almost entirely on coordinating the executive's emergency response: "To provide for the assignment of functions to state entities to be performed during an emergency and for the coordination and direction of the emergency actions of those entities"; "To provide for the rendering of mutual aid by the state government and all its departments and agencies and by the political subdivisions of this state." (Gov. Code, § 8550.) The actual statement of purpose reads:

> It is further declared to be the purpose of this chapter and the policy of this state that all emergency services functions of this state be coordinated as far as possible with the comparable functions of its political subdivisions [and other entities] to the end that the most effective use may be made of all manpower, resources, and facilities for dealing with any emergency that may occur.

(*Id.)* In fact, the very predicate for declaring a State of Emergency is the inadequacy of dispersed executive resources, that is, conditions of extreme peril that "are likely to be beyond the control of the services, personnel, equipment, and facilities of any single

county, city and county, or city and require the combined forces of a mutual aid region or regions to combat." (*Id.*, § 8558(b).)

Finally, and incredibly, Petitioner invokes the "cardinal rule of statutory interpretation that all portions of a statute must be interpreted to have meaning and effect." (Pet. at p. 59.). Because section 8627 gives the Governor "complete authority over all agencies of the state government" *and* the right to exercise police power, he argues, the latter would be surplusage if interpreted to only encompass the former. (*Id.*) That conclusion is easily avoided: the police power could, for instance, give the Governor greater authority over political subdivisions that are not stage agencies. More to the point, it is *Petitioner's* interpretation of section 8627 that violates this "cardinal rule of statutory interpretation" in the most egregious way, obviating the entire remainder of the Emergency Services Act and rendering dozens of sections surplusage. (*See, e.g.*, Pet. at p. 57 [claiming section 8627 gives the Governor a "plenary authority to govern"]; III Tab 57, pp. 86-87 [referring to section 8627 as a "catchall".])

It is thus only by invoking a definition of "police power" shorn of context that Petitioner has assumed a right to take actions for the "general welfare"—such as mail someone an absentee ballot to spare them the trouble of requesting one. As discussed in Section III, *infra*, this interpretation would render the Act an unlawful delegation of legislative power. But the textual constraints of section 8627 make clear that this is not the kind of power the statute purports to confer. The police power assumed by the Governor must be consistent with the separation of powers and

other constitutional restrictions; it must be drawn from the far-reaching and wide-ranging reserves in the Executive Branch; and it may be deployed only insofar as it effectuates the Act's purpose of a coordinated emergency response.

### D. Previous Orders and Historical Practice are Not Precedent Nor Do They Provide any Authority for the Issuance of N-67-20.

The Governor's reliance on executive orders by previous Governors is even less compelling than his textual analysis. A cursory review of executive orders issued by previous Governors during a State of Emergency reveals narrowly tailored *suspensions* of elections procedures calibrated to meet the exigencies of the moment—in a word, to respond to the emergency. It does not readily produce examples of Governors rewriting the Elections Code applicable to all Californians for an election that was still several months away. Yet grasping for some precedent, the Governor here has produced five past elections-related executive orders that purportedly show that the Emergency Services Act has specifically been understood to empower the Governor to suspend provisions of the State's Elections Code and modify the State's elections. Pet. at 55.

As the trial court stated: the previous executive orders "are not legal precedent and are distinguishable." (III Tab 56, p. 707.). In almost all of the orders cited by the Petitioner at trial, the California Governor suspended statutory rules regarding registration deadlines, mail ballot applications, and polling place closures on Election Day *only* for firefighters and first responders

who were currently responding to a wildfire emergency. Three of the five were issued the day before or day of a special election to facilitate voting by firefighters and EMS workers who were away from home fighting wildfires. (I Tabs 2, 3, and 4). A fourth briefly extended a candidate filing deadline in one county. (I Tab 1). Four of the five invoked *only* section 8571 relating to the suspension of statutes. None invoked section 8627 ("police power"), and only one mentions section 8567 ("orders and regulations")—but the latter is an Executive Order with 20 separate items, whose one elections-related item merely "suspends" and "waives" existing laws; it does not create them.

The order applicable to the 2017 wildfires (I Tab 5), as Real Parties pointed out in their Response to the Statement of Controverted Issues, were also suspensions and not examples of conditional suspensions as posited by Petitioner. (III Tab 55, p. 698-699). For instance, Petitioner argued that this order provided alternate statutory provisions for Sonoma County to conduct an election by mail ballot. In actuality Sonoma County was already authorized by statute to conduct an all-mail election for local elections where certain conditions were present. (*See* Elec. Code §§4000, 4104 and 4108 which were waived by the order (I Tab 5, p. 23)). The order "suspended" the statutory conditions so that it could go forward with the all-mail election. Nor are the other provisions of the order evidence of altering or amending statutes. A statute prohibiting price gouging was suspended as to its statutory timeframe of "30 days" after a disaster. (I Tab 5, p. 23 (sec.5)). The statute for claiming a property tax postponement was

suspended as to the statutory deadline of February 1. (I Tab 4, p. 23 (sec. 9)). These are all targeted suspensions, not a full-scale alteration of the statutory scheme as in the Order at issue here.

In arguments not presented at trial, Petitioner has produced an order issued in response to the Camp Fire of 2018, but it simply contains similar suspensions as were in the order applicable to the Tubbs and other 2017 wildfires. Requirements regarding educational facilities, housing of students, and average daily attendance were similarly suspended. (I Tab 6, pp. 36-37). After all, their school sites were destroyed by the fire.

Nor is the Petitioner's citation to "legislative acquiescence" applicable here. (Pet. at 58.) Even if a statutory line had been crossed, these orders, mainly interceding on the eve of an election to enable first responders to vote, were so targeted in nature that no inference of acquiescence could reasonably be drawn from the Legislature failing to spring to action and revise the Act in response. In scale and impact, such orders are in no way comparable to the one at issue in this case, which changed the reality of voting for millions of people, months in advance, when the Legislature was working on its own policy.

## III. If the Emergency Services Act Authorized Executive Order N-67-20, the Act Violates the Separation-of-Powers Provision of the California Constitution

If the Court is persuaded by Petitioner's statutory interpretation, finding that the Emergency Services Act can only be plausibly interpreted so as to authorize the Executive Order,

then the Act must be held to violate the California Constitution as an unlawful delegation of legislative power.

### a. Executive Order N-67-20 Was a Legislative Act Based on a Presumption of Plenary Authority

#### 1. The Order Created Elections Policy

Executive Order N-67-20 overhauled the 2020 General Election in California. It reshaped the election's broad contours and redefined many of the particulars for how 17 million people exercised their most fundamental right as citizens on choices ranging from the presidential contest to congressional and legislative races to a dozen ballot propositions.

The Order included a new policy, celebrated by Petitioner as the first of its kind nationwide,[7] that every active voter receive an unsolicited absentee ballot. In addition, the Order forbade established methods of tracking ballots that allow voters to verify theirs was counted, reduced the number of polling places so that many people could not vote in person where they were accustomed, and created an alternative and diminished mode of participation for the disability community and non-English speakers.

#### 2. Petitioner Interprets the ESA to Confer a Roving Commission That Authorizes New Policy Across Elections and Other Domains

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[7] Press Release, Office of the Governor, May 8, 2020 (I Tab 10, pp. 55-56.)

The Executive Order did all of this without any statutory authorization in the Elections Code. The Order cites no elections statute as a basis of authority, nor has any been identified in this litigation. Instead, the Order relies on three sections of the Government Code that comprise part of the California Emergency Services Act. These provisions—sections 8571, 8567, and 8627—do not concern elections policy.

Rather, in Petitioner's view, they confer "plenary" lawmaking authority (Pet. at p. 53) that spans elections or any other subject—what courts have called a "roving commission." *Opinion of the Justices* (1944) 315 Mass 761, 767 [striking down emergency powers law used by Governor to change date of primary election during World War II]). Section 8627, in particular, is described by Petitioner as a "catchall" that gives the Governor authority to create policy without subject-matter-specific statutory authorization. (II Tab 48, pp. 208-209; Trial Transcript (III Tab 57, pp. 86-87 ["[T]here might be something that the Governor needs to do that is not within those enumerated powers [of the Act], and that's why it included the catchall in 8627".])). Here, Petitioner continues to argue the Executive Order is lawful because section 8627 gives the Governor "plenary authority to govern," empowering him to replace existing statutory law by "issuing new orders with the force and effect of law." (Pet. at p. 54.)

This conception of the ESA as an all-purpose authorizing statute is not merely a litigation defense offered by Petitioner in this case. It is the legal theory upon which he has taken unprecedented and sustained actions via 58 Executive Orders

throughout the COVID-19 State of Emergency. That is not disputed by Petitioner. He insists that the trial court's injunction, by stopping him from using the Act to "amend, alter, or change existing statutory law or make new statutory law or legislative policy," would "potentially affect[] not only a single executive order, but potentially dozens of other executive actions." (Pet. at p. 37.) Through his actions and legal arguments, Petitioner has advanced conception of the police power that authorizes any type of legislation by a Governor as long as it somehow mitigates any secondary, tertiary, or other effect of an emergency—which in an emergency like the present one, could fairly encompass the totality of economic and social life.

### b. The California Constitution Forbids the Legislature from Delegating Its Core Authority

#### 1. The State Constitution Requires a Clear Division of Authority Between the Branches

Unlike its federal counterpart, the California Constitution explicitly separates powers: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) The provision's purpose "is to prevent the combination in the hands of a single person or group if the basic or fundamental powers of government." *Parker v. Riley* (1941) 18 Cal.2d 83, 89.

Article IV, section 1 of the California Constitution provides that the "legislative power of this State is vested in the California

Legislature." Our Supreme Court has left no doubt about the hard-and-fast limit this imposes on the Executive Branch: "Unless permitted by the Constitution, the Governor may not exercise legislative powers." *Harbor v Deukmejian* (1987) 43 Cal. 3d 1078, 1084.) Legislative power—that is, the "formulation of policy" *Carmel*, *supra*, 25 Cal.4th at p. 299—can neither be seized by the Executive Branch nor awarded to it by a willing Legislature; a statute that gives the Governor "discretion as to what [the law] shall be" violates the separation of powers. *Id.* at p. 301 [quoting *Loving v. United States*, *supra*, 517 U.S. at pp. 758-759].

Petitioner tries to reduce the separation-of-powers to a "pragmatic doctrine" that does not require a "hermetic sealing off" of each branch from the others. (Pet. at p. 64.) This principle is correct as far as it goes. But it does not permit "one of the three branches of government to arrogate to itself the *core functions* of another branch." *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 297 [emphasis added]. And there is no question that legislating is *the* core function of the legislative branch. *Harbor*, *supra*, 43 Cal.3d at p. 1084. The California Supreme Court has repeatedly affirmed that the power "to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature and cannot be delegated by it." *Dougherty v. Austin* (1892) 94 Cal. 601, 606-07. And courts "have not hesitated to strike down provisions of law that . . . undermine the authority and independence of one or another coordinate Branch.'" *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 493 [quoting *Mistretta v. United States* (1989) 488 U.S. 361, 382].

### 2. The Constitutional Separation of Powers Forbids the Delegation of Legislative Authority

Legislative power is the power "to make Laws, and not to make Legislators." A Legislature has "no power to transfer their Authority of making Laws, and place it in other hands." (Locke, Two Treatises of Government (New York: New American Library, Laslett ed, 1963), pp 408-409.)

This "doctrine prohibiting delegation of legislative power" is "well established in California." (*Kugler v. Yocum* (1968) 69 Cal.2d 371.) It requires that "the Legislature as the most representative organ of government should settle insofar as possible controverted issues of policy." Since the Legislature "must itself effectively resolve the truly fundamental issues," courts will not allow it to "escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions." This preserves "the representative character of the process of reaching legislative decision." (*Id.*)

The Legislature may, on the other hand, give the executive branch "authority or discretion as to [a law's] execution." (*Carmel*, *supra*, 25 Cal.4th at p. 299.) To distinguish proper delegations from those that abdicate legislative responsibility, the California Supreme Court looks to whether a statute (1) resolves the fundamental policy questions, (2) "provides sufficiently clear standards," and (3) contains "safeguards adequate to prevent [] abuse." (*Gerawan Farming, Inc. v. Agric. Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1150-51); *Monsanto Co. v. Office of Envtl.*

*Health Hazard Assessment* (2018) 22 Cal.App.5th 534, 551 ["As our Supreme Court recently recounted, where the fundamental policy issues have been resolved the further delegation of quasi-legislative power is generally constitutional provided there is adequate direction for implementation of the policy and sufficient safeguards to prevent arbitrary or abusive implementation of the policy."]

### c. Petitioner's Theory of the ESA Renders the Act an Unlawful Delegation

#### 1. The ESA Does Not Resolve any Fundamental Issues With Respect to the Executive Order

The Legislature impermissibly delegates its exclusive legislative authority if it confers "an unrestricted authority to make fundamental policy determinations." (*Clean Air Constituency v. California St. Air Resources* (1974) 11 Cal.3d 801, 816.) In a case granting the Air Resource Board discretionary authority to suspend clean air standards, the California Supreme Court held this "would constitute an invalid delegation of powers if its scope were not limited to reasons relating to the purposes of the act." (*Id.* at p. 813.) The Legislature, the court explained, had to "limit the ARB's discretion . . . and to reserve for itself the power to determine fundamental policy matters, particularly an issue as basic and formidable as the competing values of clean air and energy." (*Id.*)

There is no conceivable argument that the Legislature had made any such "fundamental policy determination" with respect to

the subject matter of Executive Order N-67-20. At the time the Order was issued, the Legislature had not decided anything at all related to changes for the upcoming election. It had not weighed "competing values" such as access, integrity, and safety. The statutory authority cited in the Order, the ESA, does not mention elections once. If the Act nevertheless authorizes elections-related policymaking, it leaves the fundamental policy decisions fully to the discretion of the Executive Branch.

Yet Petitioner contends 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.'" (Pet. at p. 66.) In fact, this is prefatory language stating what "the State has long recognized" as "its responsibility." (Gov. Code, § 8550.) It neither purports to be a statement of the Act's purpose nor amounts to what the California Supreme Court considers a fundamental policy determination; indeed, a decision to protect health and safety in the abstract could spawn virtually any policy choice. Put another way, it does not "limit the [Executive's] discretion . . . and to reserve for [the Legislature] the power to determine fundamental policy matters" and adjudicate "competing values." (*Clean Air Constituency*, *supra*, 11 Cal.3d at p. 813.) Petitioner's attempt to convert vague prefatory language into a fundamental policy determination covering any conceivable policy change would render the nondelegation doctrine a nullity.

Another appellate district recently noted that arguments that a "contested statutory scheme delegates a fundamental policy determination to others . . . have rarely succeeded because the relevant analysis considers motivations broader than the specific mechanism challenged." (*Monsanto*, *supra*, 22 Cal.App.5th at p. 552.) However, the level of generality courts will accept has never become so abstract as to escape the subject matter at issue entirely and cross over into various unrelated policy domains. In *Gerawan,* for example, the Supreme Court concluded that "the 'fundamental policy determination' was made by the Legislature when that body decided, after much study and discussion, to grant to agricultural workers throughout California the rights of self-organization and collective bargaining." *Gerawan Farming, supra*, 3 Cal.5th 1118 at p. 1147; s*ee also Sims v. Kernan* (2018) 30 Cal.App.5th 105, 112 ["[T]he Legislature has made the fundamental, crucial policy decisions to impose the penalty of death in specified circumstances and to have the penalty imposed through lethal gas or lethal injection. *Clean Air Constituency* does not prevent the Legislature from delegating authority to make subsidiary decisions to carry out that policy."])

### 2. The ESA Does Not Contain a Yardstick That Could Have Guided the Executive Order

In addition to making the fundamental policy determinations, a statute must contain "sufficient legislative guidance." *Gerawan Farming, supra*, 3 Cal.5th 1118 at p. 1148. This requires a reviewing court to examine whether the

Legislature set forward in the statute a "primary standard" or "an adequate yardstick for the guidance of the administrative body empowered to execute the law.'" (*Id*. at p. 1150.)

Before the trial court, Petitioner never attempted to identify any such standard or yardstick. Here, for the first time, he proposes the ESA "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." (Pet. at pp. 66-67.)8 As if to prove this purported standard lacks content, Petitioner then notes it is consistent with the requirement in *Yamaha Corp. v. Board of Equalization* (1998) 19 Cal.4th 1 that delegated power "be exercised in a manner that is "reasonably necessary to implement the purpose of [a] statute." (Pet. at p. 66; *Yamaha*, *supra*, 19 Cal.4th at p. 11.). This is not consistency, but identicality; Petitioner has proposed a statutory yardstick that simply repeats a general principle of law nearly verbatim. It would be impossible to veer farther from the "sufficient legislative guidance" required by the California Supreme Court.

The notion that the word "necessary" provides any meaningful guidance was recently rejected by the Michigan Supreme Court in striking down an emergency powers law whose breadth matches that which Petitioner's "catchall" interpretation

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8 Petitioner appears to be applying the U.S. Supreme Court's more permissive "intelligible principle" standard rather than the more demanding nondelegation jurisprudence of our state's high court.

of section 8627 gives the ESA. Even under that state's more lenient "intelligible principle" non-delegation standard, the court concluded:

> The contagions, accidents, misfortunes, risks, and acts of God, ordinarily and inevitably associated with the human condition and with our everyday social experiences, are simply too various for this standard to supply any meaningful limitation upon the exercise of the delegated power. Simply put, the [emergency powers law], in setting forth a "necessary" standard . . . neither supplies genuine guidance to the Governor as to how to exercise the authority delegated to her by the [the law] nor constrains her actions in any meaningful manner.

(*In re Certified Questions from U.S. Dist. Court*, No. 161492, 2020 WL 5877599 (Mich. Oct. 2, 2020). Similarly, in *Opinion of the Justices, supra*, the Massachusetts Supreme Judicial Council struck down an emergency powers law invoked to change election laws, holding that a "necessary" and "expedient" standard in a wartime emergency statute was "a limitation so elastic that it is impossible to imagine what might be done within its extent in almost every field of administration and of jurisprudence." 315 Mass at p. 767. Such elasticity is clear from the facts of this case, where the Governor claimed it necessary to unilaterally overhaul an election five months away with policies whose connection to the ongoing emergency was tenuous at best.

#### a. Petitioner's Reading of the ESA Gives It an Immense Scope

This lack of any substantive standard identified as a guide for executive action is particularly problematic given the enormous

scope of authority the Governor claims the Act awards him. Our Supreme Court has required that a statutory yardstick "must be as definite as the exigencies of the particular problem permit, *Cal. State Auto. etc. Bureau v. Downey* (1950) 96 Cal.App.2d 876, and the U.S. Supreme Court has explained that "the degree of agency discretion that is acceptable varies according to the scope of the power . . . conferred." *Whitman v American Trucking Associations*, Inc, 531 US 457, 475.) As that scope "increases to immense proportions . . . the standards must be correspondingly more precise." *Synar v. United States* (1986) 626 F.Supp. 1374, 1386 ["[A] critical component of the scope of the delegated "power" is the breadth of subjects to which the power can be applied."].

If there is one thing the Governor would like this Court to know, it is that his powers under the ESA are "broad." (See, e.g., Pet. at pp. 20, 53, 54.) Yet the authority he has claimed far exceeds even what he represents in the Petition. Governor Newsom has issued orders (including N-67-20) not merely to respond to the COVID-19 pandemic—that is, to "mitigate the effects of natural, manmade, or war caused emergencies"—but to address the pandemic's secondary and tertiary effects and even the consequences of the Governor's own Executive Orders. For instance, Governor Newsom designed and decreed his own program for paid sick leave related to contraction of the virus. He also imposed an eviction moratorium on the premise that workers displaced by his own business shutdown orders would be unable to pay rent. This presumed prerogative, to make policies cascading all along the causal chain, leads ineluctably to a mandate to

regulate and reorder the totality of economic and social life. This singular breadth of authority requires the Governor to identify a "more precise" standard. *Synar*, *supra*, 626 F Supp. at p. 1386. Yet he has failed to identify any substantive standard at all.

### b. The Powers Conferred by the ESA Have an Indefinite Duration

In addition to the broad scope of the power claimed by the Governor under the ESA, that power is conferred for an indefinite duration. Unlike the emergency powers law in many other states, the ESA does not provide for the expiration of a State of Emergency after a fixed time period. Several federal cases have considered the duration of a grant of authority relevant to the non-delegation analysis. *See, e.g.*, *Gundy v. United States* (2019) 588 US ___; *United States v Touby*, 909 F2d 759. The Michigan Supreme Court recently cited this is a relevant factor in striking down that state's emergency powers law as an unlawful delegation, holding that "the indefinite exercise of emergency powers for perhaps months—or even years—considerably broadens the scope of authority conferred by that statute." *SDMIH*, *supra,* at p. 30.

In sum, Petitioner claims the Emergency Services Act indefinitely grants him a breadth of authority that spans limitless and cascading subjects, yet provides no more precise standard to guide the exercise of that authority than his subjective judgment of what is "necessary." Such an arrangement is incompatible with the constitutional separation of powers.

### 3. The ESA Lacks Adequate Safeguards Against Abuse of the Authority Claimed by Petitioner

Alongside "sufficiently clear standards, a statute delegating legislative power must be accompanied by 'safeguards adequate to prevent its abuse.'" (*Gerawan Farming*, *supra*, 3 Cal.5th 1118 at pp. 1150-51.) Both are required: it is not enough for the Legislature to provide "guidance by way of policy and primary standards" if it "fail[s] to establish an effective mechanism to assure the proper implementation of its policy decisions." *Kugler*, *supra*, 69 Cal.2d at pp. 376-377); *see also Monsanto*, *supra,* 22 Cal.App.5th at p. 558 n.9 (2018) [recognizing *Gerawan* 's statement that sufficiently clear standards must be *accompanied* by safeguards]. Such safeguards must serve to protect against "arbitrary or unfair action." (*Gerawan Farming, supra*, 3 Cal.5th 1118 at p. 1151.)

The Governor's interpretation of the ESA is notably bereft of any safeguards. Orders of any kind, impacting any person, in any way, may issue from his pen without any process, notice, time requirement, evidentiary showing, basis for decision, or opportunity for appeal. This absence of built-in safeguards is particularly concerning because orders issued during a State of Emergency are inherently less likely to receive judicial review, making the courts less of a bulwark against abuse than in almost any other context. Since an emergency is by its nature temporary—or at least it is supposed to be—timely relief from arbitrary actions is difficult to procure. Indeed, in fifty years of the

Act's operation, this appears to be the first case challenging the overreach of emergency authority to reach this Court.9

### a. The Governor's Responsibility to Terminate an Emergency is Not an Adequate Safeguard

Since the Act contains no procedural safeguards of any kind to prevent abusive executive action, and presents little (or no, as Petitioner would have it) occasion for judicial review, the Governor can only point to two proposed 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." (Pet. at p. 67.).

The Governor's ability to terminate the emergency, of course, is no safeguard at all: It relies on the discretionary judgment of the very person who has been awarded the authority, and in any case, amounts to nothing more than a tautological

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9 To make matters worse, the Governor has argued that the Act does not admit of judicial review at all. He has argued it would be "inconsistent with the Emergency Services Act" for the Court to "second-guess the Governor's determination" that his Order was necessary to address the emergency. (Opposition to Plaintiffs' Motion for Judgment on the Pleadings at p. 14.) To that end, the Governor previously told this Court that "the basic balancing" inquiry for injunctive relief "required no evidence at all" because "the exigencies of the COVID-19 pandemic and the need to provide guidance for the conduct of a safe election are readily apparent." (Reply to Palma Notice at p. 10.). Therefore, even if the proposed "necessary" standard were sufficient to guide the ESA's uniquely broad delegation of authority, the Governor would deny the judicial branch any opportunity to enforce this standard, rendering it meaningless.

directive that the emergency must be declared over when the emergency is over.

**b. The Legislature's Ability to Terminate an Emergency is Not an Adequate Safeguard**

The second proposed safeguard involves a different actor, the Legislature. But this procedure fares no better as a realistic check against abuse. As an initial matter, the provision presents constitutional questions of its own, as a potential legislative veto.10 Beyond that, Petitioner's argument proves too much: By this theory, there could be no such thing as an unlawful delegation, because the Legislature could always repeal the law providing the delegation and then override any veto by the Governor.

Furthermore, it is hardly a safeguard if the Legislature must declare a clear-and-present emergency "at an end" in order to disapprove any particular action taken by the Governor. The Legislature can both believe there is a continued need for a declared emergency and expect the Governor to stay within the confines of his powers under the Emergency Services Act. Indeed, since declaring the emergency at an end terminates every emergency order (Gov. Code, § 8567(b)), this provision forces the Legislature to nullify multiple orders it believes are appropriate in

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10 *See, e.g.*, *California Radioactive Materials Management Forum v. Department of Health Services*, 15 Cal.App.4th 841 (1993). An unconstitutional delegation of legislative power is not saved by an unconstitutional ability to unilaterally retract that power.

order to obviate a single order that goes too far. A Governor, knowing full well the Legislature will not terminate an emergency that all agree is ongoing, is entirely unconstrained. It is not even clear that the language of the statute allows the Legislature to declare the emergency over simply to rebuke the Governor. As Petitioner points out, Section 8629 refers to the emergency being declared over at "the earliest possible date that conditions warrant," which suggests that declaring an end to the emergency is a matter of fact-finding.

* * *

In sum, the Emergency Services Act, as interpreted and applied by Petitioner, fails all three prongs of the California Supreme Court's unlawful delegation test. It does not resolve the fundamental policy questions, confers unbounded authority without any substantive standard as guidance, and fails to include any meaningful safeguards against abuse. If this does not amount to an unlawful delegation of legislative authority, no statute ever would.

#### d. The Subsequent Passage of SB 423 Has No Bearing on the Separation-of-Powers Analysis

##### 1. Pending Legislation Cannot Serve as Authority for Executive Action

Petitioner attempts to use the pendency and ultimate passage of an elections-related bill, SB 423, as a bridge to the Court's prior ruling in this case and as evidence that there was no "substantive conflict" between the branches. This effort offers him

no reprieve from the California Supreme Court's nondelegation doctrine, and fails for several reasons.

First, the Court's previous ruling did not address whether the Governor acted in violation of the California Constitution, nor did it otherwise "weigh in on the scope or breadth of the Governor's emergency powers." *Newsom v. Superior Court of Sutter County* (2020) 51 Cal.App.5th 1093, 1094. That question, now before the Court, cannot be informed by evidence relating to SB 423: Even if all 120 legislators had joined Senator Umberg's bill as co-authors, that still would not change the analysis. The Constitution affords the status of law to enactments that have cleared the hurdles of bicameralism and presentment, and extraneous words or deeds cannot compensate for a lack of authority established through that "finely wrought" procedure.

Moreover, this Court specifically noted in its prior opinion that a substantive conflict "between the Governor's emergency powers and the Legislature[] could present issues requiring careful consideration and ultimate resolution by the courts." *Newsom*, *supra*, 51 Cal.App.5th at p. 1094. Despite the manifestation of several such conflicts—between the Governor's unilateral actions and the Legislature's constitutional prerogatives; between the Executive Order's requirements and SB 423's enacted provisions; between the Governor's presumed policymaking and what the Legislature has authorized in the Emergency Services Act—Petitioner argues these were all dissolved by the Governor's perfunctory statement that his Order did not "limit the enactment of legislation."

Petitioner is correct that it would have been worse if he had said the opposite, not only seizing legislative power but also purporting to order the Legislature not to exercise it. But that is no justification for the seizure itself, of a power exclusively belonging to a coordinate branch; the California Supreme Court has made it clear that "a Governor may not exercise legislative powers." *Harbor*, *supra,* 43 Cal. 3d at p. 1084.). The Governor's assurance in Executive Order N-67-20—essentially, "I am commandeering your power, but nothing stops you from using your power later"—would be akin to the Legislature taking it upon itself to appoint an appellate court judge while assuring the Governor he could still use his own inherent and statutorily authorized authority to make an appointment later.

Even if superficial indicia of cooperation between the two branches were somehow relevant to the separation-of-powers inquiry, Petitioner provides scant evidence of it. While alluding to an "agreed-upon framework" between the Governor and the Legislature for the November election, one is hard-pressed to find anything resembling this in the evidentiary record. There is no evidence that the Legislature as a whole ever expressed any cooperative intent to allow the Governor to issue his Order and then to "ratify" that Order with its own legislation. At the time the Order was issued, the Governor could not possibly have known what *the Legislature's* framework was, as it had yet to pass any bill related to the election. The vast majority of legislators, including Real Parties, had yet to vote on any such legislation. All that Petitioner can point to is that a bill had been *introduced*. But the

introduction of legislation is a power held in equal measure by all 120 legislators and amounts to a proposal by a single member.

Ultimately, the Legislature passed a bill that, though similar, was substantively different and in places contradictory from the Governor's Order—an Order that the bills' lengthy legislative intent language does not even mention.[11] And the passage of the legislation occurred in the context of significant conflict between the Governor and the Legislature.

### 2. Petitioner's Novel Preemptive Authorization Argument Undermines Separation of Powers

If Petitioner's purpose truly was assist with planning by elections offices while awaiting passage of the legislation, that rationale assumed the Legislature would arrive at the same policy as the Executive Order. If the Legislature had crafted a much different policy, then the Order would create chaos, not certainty. The Governor's Order therefore forced the Legislature's hand

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[11] Even the letter to Governor Newsom from Senator Umberg and Assemblyman Berman, hailed as critical evidence by Petitioner of a cooperative framework, provides no link to an agreement. It states only the thoughts and request of two legislators. There was no evidence that the Governor received or even read the letter, no confirming letter back from the Governor, nothing that shows any kind of "meeting of the minds" evidencing an agreement. And Petitioner attempts to weave is blown out of the water by Petitioner's own public statement immediately after the fact (on May 22) that his Order was "on firm legal ground" and subsequent action by the Legislature was not necessary. "We appreciate their work and, to the extent they want to codify it, I think that could help as well. Why not?" (I Tab 200, pp. 138-145.)

towards his preferred policy outcome by assuring that deviations from it in the legislation would be a source of turmoil for elections offices that the Legislature would want to avoid.12

Even if we assume Petitioner's only object in issuing the vote-by-mail Executive Orders was to preemptively honor legislative intent—giving "practical effect" to what he surmised would be the final substance of legislation that he predicted would ultimately pass—that is no argument for producing binding law in the form of an Executive Order. If county elections offices truly needed "direction" or a "signal" sooner than the Legislature could complete the legislative process,13 that could be found in the language of SB 423 itself, which had the goal of providing flexibility and options for in-person voting for the November election. Stakeholders commonly take preparatory action based on their expectation as to a law's passage.

#### e. The Constitutional Avoidance Canon Counsels Against Petitioner's Interpretation of the ESA

##### 1. The Avoidance Canon Favors Constructions That Minimize Constitutional Doubt

The California Supreme Court has long adhered to a canon of constitutional avoidance, where unconstitutional interpretations of a statute are disfavored: "It is settled that statutes are to be so construed, if their language permits, as to

render them valid and constitutional rather than invalid and unconstitutional . . . and that California courts must adopt an interpretation of a statutory provision which, consistent with the statutory language and purpose, eliminates doubt as to the provision's constitutionality." *People v. Amor* (1974) 12 Cal.3d 20, 30 [internal quotation marks and alterations omitted]. If possible, the Court should therefore construe the Emergency Services Act so as to render it valid and constitutional. In the following section, Plaintiffs offer such a construction, which follows directly from the text of the statute and puts it on firmer constitutional footing than Petitioner's plainly unconstitutional reading.

While the Governor may argue that his theory of the Act is consistent with the separation of powers, he cannot reasonably claim that theory does not present a constitutional *question* or raise any constitutional *doubts*, which is the predicate for invoking the avoidance canon. *Amore*, *supra*, 12 Cal.3d at p. 30.) Indeed, the Petition acknowledges that the merits of the case "raise complex constitutional questions" (Pet. at pp. 50-51.), and the Michigan Supreme Court has just invalidated an emergency powers statute whose breadth matches that which Petitioner's "catchall" interpretation of section 8627 gives to California's law.

### f. Recent Decisions in Other States Confirm The Constitutional Problems With Petitioner's Interpretation of the ESA

#### 1. The Michigan Supreme Court's Separation-of-Powers Decision

**Applies with Equal Force to Petitioner's Reading of the ESA**

As discussed above, under clearly established California Supreme Court precedent Defendant's interpretation of the Emergency Services Act would render it an unlawful delegation of legislative power. To the extent that the Court relies on the recent Michigan decision as additional persuasive authority, the case is directly on point.

There is nothing to distinguish the constitutional analysis in the Michigan decision from that which would proceed here under Defendant's interpretation of the Emergency Services Act. California and Michigan have essentially identical separation-of-powers provisions in their Constitutions. *Compare* Mich. Const 1963, art 3, § 2, *with* Cal. Const. Art. 3, § 3. Both the Michigan statute and Defendant's interpretation of California's "exhibit a sweeping scope, both with regard to the subjects covered and the power exercised over those subjects," resting on an "assertion of power to reorder social life." (SDMIH, *supra*, at p. 29; California's law, like Michigan's, also authorizes an "indefinite exercise of emergency powers for perhaps months—or even years—considerably broaden[ing] the scope of authority conferred by that statute." (*Id.* at p. 30.)

**2. The Kentucky Supreme Court's Decision Is Inapposite**

Petitioner attempts to muddy the waters with reference to a recent decision by the Kentucky Supreme Court reaching a different result with respect to that state's emergency powers law.

Even if here were successful at this, muddy waters would still be occasion to invoke the constitutional avoidance canon. Yet he is not successful, because the Kentucky Supreme Court distinguished its decision from the outcome in Michigan on a basis that puts California on the Michigan side of the distinction.

Specifically, the court explained: "Our case differs from the Michigan case in several important ways but most notably our Governor does not have emergency powers of indefinite duration, . . . and our legislature is not continuously in session, ready to accept the handoff of responsibility for providing the government's response to an emergency." *Beshear v. Acree* (Ky. Nov. 12, 2020) 2020-SC-0313-OA.

## CONCLUSION

The die is cast and the Governor Newsom is on the road to Rome. That is the context we find ourselves in with a runaway executive who continues to push the envelope outside his clearly delineated powers. We face a serious emergency in the COVID-19 pandemic, but even during an emergency our form of government does not change.

The time for a judicial check on runaway executive power has come. It begins with this case. The lower court's ruling is based on sound legal principles and its discretion was supported by the factual record. Upholding their ruling confirms that the Governor has overstepped his constitutional authority but more importantly, restrains him from doing so again. That injunction gives clear guidance to the Governor, namely that he can suspend

statutes as may be necessary in the emergency but he cannot "amend, alter, or change" them. Make no mistake: if this alternative writ is ultimately granted, if this important case is not considered and dismissed as moot, if the limits of the Governor's emergency power are not defined, this Governor will continue to act, in his own words, as if all powers of the State are "centralized in his hands."

Dated: December 4, 2020

Respectfully submitted,

/s/ James Gallagher
JAMES GALLAGHER

/s/ Kevin Kiley
KEVIN KILEY
*Real Parties in Interest*

## CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the text of this Opposition, including the Table of Contents and Authorities, Memorandum of Points and Authorities, and this Certificate, is proportionately spaced, uses a typeface of 13 points, and consists of 13,986 words.