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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SUTTER

JAMES GALLAGHER and KEVIN KILEY Plaintiffs, v. GAVIN NEWSOM, in his official capacity as Governor of California Defendant.	Case No. CVCS20-0912 PLAINTIFFS JAMES GALLAGHER AND KEVIN KILEY'S NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF KEVIN KILEY Date: October 19, 2020 Time: 9:00 a.m. Judge: Hon. Sarah Heckman Action Filed: June 11, 2020

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NOTICE OF MOTION FOR JUDGMENT ON THE PLEADINGS

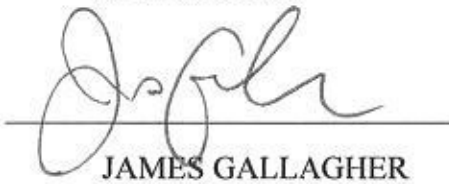
TO EACH PARTY AND COUNSEL OF RECORD FOR EACH PARTY

YOU ARE HEREBY NOTIFIED THAT ON October 19, 2020 at 9:00 a.m., before the Honorable Sarah Heckman of this Court, located at 1175 Civic Center Blvd., Yuba City, CA 95993, Plaintiffs James Gallagher and Kevin Kiley will move for an order entering judgment on the pleadings awarding Plaintiffs declaratory and injunctive relief. The motion is based on this notice, the attached motion, the attached memorandum of points and authorities in support thereof, the attached Declaration of Kevin Kiley, Plaintiffs' Request for Judicial Notice, and the pleadings and other documents in this case, and any further evidence the Court will receive at or before the hearing on the motion.

DATED: September 16, 2020

Respectfully Submitted,

KEVIN KILEY



JAMES GALLAGHER

MOTION FOR JUDGMENT ON THE PLEADINGS

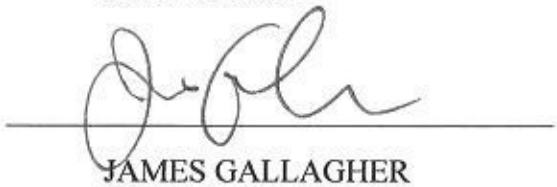
Plaintiffs James Gallagher and Kevin Kiley move for Judgment on the Pleadings on their Complaint for a Declaratory Judgment and Injunctive Relief on the ground that the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint. (Code Civ. Proc., § 438(c)(1)(A).)

WHEREFORE, Plaintiffs James Gallagher and Kevin Kiley pray that this motion be granted and Plaintiffs be granted a Declaratory Judgement and Injunctive Relief as specified in the complaint.

DATED: September 16, 2020

Respectfully Submitted,

KEVIN KILEY



JAMES GALLAGHER

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

In the case before the Court, Defendant Gavin Newsom argues that the six-month-and-counting State of Emergency "centralizes the State's powers in the hands of the Governor." This disquieting claim belies California law and defies America's first principles. As James Madison wrote in Federalist No. 47, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."

It was no era of tranquility that produced this founding principle. The statesmen who fashioned it had just led the emerging nation through an eight-year war, on American soil, that killed one percent of the population. Even as they drafted a Constitution whose primary object was to unify, centralize, and enhance political authority, a separation of legislative and executive power was what most distinguished the new country from the monarchy left behind. It is this principle that compels the Court to grant Plaintiffs' motion.

The authors of California's Constitution learned the lesson of America's founding even better than the Founders themselves, enshrining an explicit separation-of-powers provision not found in the U.S. Constitution: "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." (Art. III, § 3.) A California Governor is constitutionally forbidden from doing the very thing the Governor has done here: exercise legislative powers. Without review and resolution by this Court, the fundamental constitutional question presented in this case will continue to arise without the benefit of judicial guidance.

Emergency Powers

It is beyond dispute that emergencies can temporarily change the form and functions of state power. In particular, expanded authority for the executive branch during moments of crisis is in the very design of constitutional government; the public response occasioned by war, rebellion, natural disaster, or pandemic is inherently within its domain. When crisis strikes, energy in the executive is not forbidden by separation of powers, but required by it.

This is why courts are traditionally reluctant to second-guess even sweeping actions during emergencies. As elaborated in precedents of the U.S. Supreme Court, the Constitution gives a governor or president broad latitude to act swiftly, aggressively, and expansively to protect a populace under siege.

But it is precisely for this reason – because the structure of our Constitution allows for executive power that is scarcely checked or balanced during emergencies – that maintaining the *constitutional structure itself* is a juridical imperative of the highest order. An executive who becomes accustomed to acting unilaterally where appropriate can soon fall into the habit of acting unilaterally where inappropriate. Even a well-meaning Governor, once licensed to discard some intermediate steps between inspiration and action, may come to discard them altogether as a default mode of operation.

The COVID-19 State of Emergency

This risk is heightened in the unusual emergency through which we are living. California has entered its seventh month of the COVID-19 pandemic, with no apparent end in sight. The State of Emergency has extended through the year's legislative calendar, wreaked havoc on the customary political process, and imposed itself on all facets of California life. When the totality of governance is consumed by an extended emergency, the totality of governing is all-too-easily assumed by the official charged with managing it.

Such is our present predicament. In addition to sweeping "guidance documents" that close schools and shutter businesses, Governor Gavin Newsom has issued 53 Executive Orders that span 15 different California Codes and change over 400 state laws.[1] *See* Plaintiff's Request for Judicial Notice ("RJN"), Exhibit G. These include the creation of completely new policy for paid sick leave and workers compensation and alteration of statutes, all of which were created, undone or remade with a stroke of the Governor's pen. The Executive Order at issue in this case, Order N-67-20, changed at least eight laws itself.

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[1] A compendium of every executive order the Governor has issued and every law he has changed during the State of Emergency is at https://ad06.asmrc.org/sites/default/files/files-uploaded/COVID-19ExecutiveOrders09142020.pdf Plaintiff's RJN, Exh. F.

Judicial Review

This particular order presents a natural occasion for the judiciary to assert itself as the guardian of California's constitutional structure. The Court need not second-guess the Governor's judgment, as he has effectively *admitted* the Order exceeded his powers by claiming subsequent legislation has "superseded" or "corrected" it and is seeking dismissal of this lawsuit on that basis. That is an indictment, not a defense.

The direct policy implications are not "minor" as the Governor asserts. But even if they were, that would not make this case less important. There is perhaps no action more offensive to the rule of law, no threat to liberty more menacing, than the use of extraordinary emergency powers for ordinary political purposes. That is precisely what was done here. History shows that the decline of republican government comes not just from the sudden arrival of Caesar but from a steady erosion of institutions and traditions through habits and practices that may have had a legitimate starting place.

The best safeguard that enlightened statesman have conceived is an independent judiciary. That is why the appropriate posture of courts during an emergency is to faithfully defend the structure of the Constitution even if they must grant the executive the fullest benefit of its penumbras. As commentators at UC Berkeley's California Constitution Center observed:

> In an emergency, practical reality governs, and a court would be reluctant to restrict . . . flexibility and disrupt the government's good faith crisis response. In contrast, in a bad faith or abuse of discretion scenario, a court likely would enforce the inter-branch boundaries, uphold the legislature's core powers, and order them restored.[2]

That is the relief sought here: enforcement of the inter-branch boundaries and restoration of the Legislature's core powers. If the executive branch can openly assume the powers of a

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[2] Duvernay and Stracener, *The Governor's Powers Under the Emergency Services Act*, scocablog.com (March 19, 2020). Daniel M. Kolkey, a former Associate Justice on the California Court of Appeal's Third Appellate District who served as Legal Affairs Secretary to Governor Pete Wilson, also recently noted that the Legislature "cannot abdicate its power to legislate during an emergency and transfer it to the governor." (Phil Willon, LA Times, *California's Mask Order Tests the Limits of Newsom's Executive Power* (June 29, 2020).)

second branch of government without correction by the third, then our Constitution is reduced to parchment.[3]

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The First Vote-by-Mail Executive Order

On May 8, pursuant to his March 4 emergency declaration, Governor Gavin Newsom issued Executive Order N-64-20 providing that all registered voters would be sent a vote-by-mail ballot. The Governor's release announcing the order included a quote from California's Secretary of State, Alex Padilla, heralding that "[t]oday we become the first state in the nation to respond to the COVID-19 pandemic by mailing every registered voter a ballot." *See* Plaintiff's RJN, Exh. A, which includes a true and correct copy of the release announcement and the order. That Order provoked several lawsuits.

B. Executive Order N-67-20

Having won headlines for making California the "first" state to adopt vote-by-mail, the Governor was faced with the practical realities of such a scheme – a host of other policy choices that his Executive Order did not address. The November General election was still five months away and there were two bills in the Legislature on this topic, Assembly Bill 860 and Senate Bill 423. The versions of those bills as they existed on June 3, 2020 are included in Plaintiffs RJN as Exhs. C and D. Rather than allowing for legislative action, on June 3 the Governor set the election policies himself by promulgating the Executive Order at issue in this case, N-67-20. (RJN, Exh. B)

C. The Present Action

A week after Executive Order N-67-20 was issued, on June 11, Plaintiffs filed this action seeking a declaration of this Court that the Order is "null and void as an unconstitutional exercise of legislative powers" along with injunctive relief. (Compl. ¶18.) On June 12, the Sutter County Superior Court issued a temporary restraining order. The appellate court subsequently vacated the order on procedural grounds but did not assess the trial court's

[3] The Governor has filed his own Motion for Judgment on the Pleadings on the ground of mootness. A full treatment of this flawed defense is given in Plaintiffs' opposition brief.

judgment that the Governor had 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*, 51 Cal.App.5th 1093, 2020 WL 3887752 at *2.)

On July 13, the Governor filed an answer consisting of a general denial and six boilerplate affirmative defenses.

III. LEGAL STANDARD

A plaintiff may move for judgment on the pleadings if the "complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint." (Code Civ. Proc., § 438(c)(1)(A).) In an action for declaratory relief, such a motion is appropriate to adjudicate the rights of the parties "if those rights can be determined as a matter of law from the face of the pleading attacked, together with those matters of which the court may properly take judicial notice." (*Allstate Insurance Company v. Kim* (1984) 160 Cal.App.3d 326, 330.)

IV. ARGUMENT

Executive Order N-67-20 (the "Executive Order") was not within the Governor's power to issue. As an act of discretionary policymaking, it performed a quintessential legislative function in violation of the California Constitution. The Order was not authorized by the terms of the Emergency Services Act [Cal. Gov. Code §8550 et. seq.], nor could any statute or act of the Legislature confer on the Governor authority to enact its provisions. These arguments, each an independent basis to invalidate the Order, are confirmed by the Governor's own conduct and admissions. Since they do not depend on the resolution of issues of fact apart from those of which the Court can take judicial notice, judgment on the pleadings is appropriate.

A. <u>The Executive Order Was an Unconstitutional Exercise of Legislative Power</u>

1) The California Constitution Prohibits the Executive Branch from Exercising Legislative Power

The California Constitution contains an explicit separation-of-powers provision: "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 California Supreme Court has explained that the "separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch." (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 297.)

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."[4] (*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" amounts to an unlawful delegation. (*Id.* at p. 301 [quoting *Loving v. United States*, *supra*, 517 U.S. at pp. 758-759]).

2) The Executive Order Was an Impermissible Exercise of Legislative Power

The Executive Order enacted several policies that later became subject matter for statutes with related provisions:

- Resolution 1) reiterates provisions of a previous order (N-64-20) for the November 3, 2020 election, that all active voters receive a mail-ballot. This substantively amends, changes, and alters the provisions of Elections Code section 3001 et. seq. which provide that a mail-ballot is an elective process by which a voter may request to vote by mail.
- Resolution 2) states all counties' elections officials shall use the Secretary of State's ballot tracking system. This substantively amends, changes, and alters Elections Code

[4] The "unless permitted by the Constitution" qualification accounts for the Governor's one authorized legislative power: vetoing legislation. (*Deukmejian*, *supra*, 43 Cal.3d at p. 1086 [quoting *State* v. *Holder* (1898) 76 Miss.158 ["[T]he executive, in every republican form of government, has only a qualified and destructive legislative function, and never creative legislative power."]]).

sections 3019.5 and 3019.7, which provide counties with other methods of tracking ballots.

- Resolution 3) allows counties to opt out of their statutory obligation pursuant to Elections Code section 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 statutes (Elections Code §§12280-12288).
- Resolution 5), by permitting an elections official to only provide information online with public comment, substantively amends, alters, and changes Elections Code section 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.

The Legislature can, to be sure, delegate to the executive branch "authority or discretion as to [a law's] execution." (*Carmel*, *supra*, 25 Cal.4th at p. 299.) But there is no claim that this is what was done here; the Governor cites no elections statute, either in the Order or in this litigation, pursuant to which he was merely executing a duly legislated policy. The only statutory authority cited is in the Government Code, discussed *infra*.

In cutting new law from whole cloth, Executive Order N-67-20 incontestably amounts to the "formulation of policy." (*Carmel*, *supra*, 25 Cal.4th at p. 299.) In such circumstances, 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].)

B. <u>The Executive Order Was Not Authorized by the Emergency Services Act</u>

The Governor's only claim to the authority he exercised with the Executive Order is the California Emergency Services Act [Cal. Gov. Code §8550 et. seq.]. But the Act neither authorizes nor could authorize the Executive Order at issue here. The Executive Order's directives create new law rather than just suspending existing law, exceeding the authority granted by the Act and usurping the role of the Legislature.

1) The Emergency Services Act Confers Broad Powers With Distinct Limits

The California Emergency Services Act "confers upon the Governor broad powers to deal with . . . emergencies." (*Cal. Corr. Peace Officers Ass'n v. Scharzenggger* (2008) 163 Cal.App.4th 802, 811.) This includes enhanced authority to seize property, avoid liability, and spend from state funds. It also gives the Governor an otherwise unheard-of ability to temporarily erase portions of the corpus juris: "the Governor may suspend any regulatory statute. . .where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency." Gov. Code § 8571. This authority, while exceptional, is not a mandate for unilateral policymaking. It allows only the "suspension" (not creation) of a "regulatory statute" (not any law) for purposes connected to the emergency.

Yet Defendant asserts, without qualification or caveat, that the Act "centralizes the State's powers in the hands of the Governor." (Def. JOP Mot. at p. 8.) This claim is as dangerous as it is outlandish. While the Act gives the Governor "considerable power" (*Macias v. State of California* (1995) 10 Cal.4th 844, 857), that power is cabined by the text of the statute itself, by the structural constraints of the Constitution, and by the specific purpose for which it is conferred: coordinating the emergency response. (*See generally id.*) Contrary to the Governor's claim, the Emergency Services Act does not and could not inaugurate an autocracy in the State of California. Such a wild misapprehension of his own authority is precisely why this case demands a resolution on the merits.

2) The Order Creates New Law Rather Than Suspending Existing Law

As discussed in Section IV.A.2, *supra*, the Executive Order does not merely suspend multiple statutes. It creates new laws for the upcoming election by (1) replacing the existing opt-in system for receiving a vote-by-mail-ballot with a requirement that all registered voters receive one; (2) replacing the existing laws for ballot tracking with a requirement for a specific ballot tracking system and specific type of barcode for ballot mail envelopes; (3) replacing existing election process laws with new requirements for the number of polling places and

ballot drop-off locations as well as the days and hours they are to be open; and (4) replacing the procedure for getting input from the disability community and voting rights groups with a specific new procedure.

At no point in the Executive Order or the papers filed with this Court or the appellate court does the Governor explain how the language of Government Code section 8571 authorizes this kind of policymaking. If the Act did confer such authority, it would be plainly unconstitutional. (*Carmel*, *supra*, 25 Cal.4th at 299.)[5]

3) The Executive Order Usurped the Role of the Legislature

All powers granted by the Emergency Services Act, including those relied on by the Governor in issuing the Executive Order, come with a natural limitation: they can only be wielded as is necessary to address the declared emergency. Government Code section 8571, for instance, confers the power to suspend regulatory statutes "where the Governor determines that the statute would "prevent, hinder, or delay the mitigation of the effects of the emergency." Similarly, the authority conferred by sections §§8567 and 8627 may only be used to effectuate the "purposes" of the Act. While a Governor's judgment as to the scope of an emergency may appear to be a matter for deference by the courts, it is not beyond judicial review.[6] But for purposes of this motion, the fact that the Governor clearly exceeded the natural limits of the Act serves to confirm that the Executive Order was an ordinary act of policymaking within the domain of the Legislature, not a proper exercise of executive power to mitigate the effects of the emergency.

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[5] The Executive Order also cites Government Code sections 8567 and 8627. The Governor has never explained how these provisions supply any relevant authority, and neither is even mentioned by courts in outlining the powers afforded by the Emergency Services Act. (*See, e.g.*, *Schwarzenegger*, *supra*, 163 Cal.App.4th 802.)

[6] While there is little precedent to guide judicial review as to the sufficiency of a nexus to the declared emergency, in *Schwarzenegger* the court undertook a searching review of whether the Governor "exceed[ed] his powers in declaring a state of emergency." (163 Cal.App.4th at p. 811.) If a Governor's judgment as to the *existence* of a state of emergency is subject to judicial review, so too must be his judgment as to the emergency's *scope*. Substantively, the same question is presented in both cases: whether the Governor acted under the color of emergency powers in a manner not authorized by law.

a. There was no urgency given that the election was five months away.

The Governor's first vote-by-mail order was issued on May 8, nearly six months before the General Election, and the Executive Order at issue here came on June 3, five months before. One problem this raises is that the Governor was making policy for a world in which the State of Emergency may or may not have still been in effect. More importantly, there was no reason election policy could not be made via the deliberative process specified in the Constitution.

The Governor asserted in June that it was "critical – given counties' pressing need to take action to prepare for the November election" to give orders on requirements for voting details and procedures. See RJN, Exh. B. But his own prior orders show this to be untrue. On March 20, he issued an Executive Order for two upcoming special elections, one for State Senate and one for the House of Representatives, where voting was to begin in less than *four weeks*. (RJN, Exh. E.) That Order required that ballots be mailed to every registered voter, just like the one at issue here that purportedly needed several additional months of lead time. The Governor has not suggested or provided any evidence that these special elections were plagued by problems or adverse public health consequences. Similarly, even supposing five months' advance notice as to new election procedures for November were desirable to some county elections offices, the Governor never explained why without this notice they would have had to carry out the procedures in a manner that would "prevent, hinder, or delay the mitigation of the effects of the emergency" (Gov. Code § 8571) or why Legislative action that was already in process was inadequate.

b. The Legislature was fulfilling its constitutional role.

Even if setting policy five months ahead of the election were advisable, the proper constitutional channel for doing so was legislation. In the four weeks between the Governor's May 8 vote-by-mail Order and the June 3 Order, the Legislature was in session. AB 860 and SB 423 were in substantial form and quickly advancing in the Legislature, with each bill having already passed its first house. *See* RJN, Exhs. C and D; Legislative History for both bills at RJN Exh. F.) It is certainly not beyond the ken of the Legislature to pass a bill in a matter of

weeks; legislation commonly gets passed in a much shorter time frame. In any case, the Legislature did in fact pass these bills four months prior to the election. (See RJN, Exh. F.)

Even if, for some reason, county elections offices needed "direction" or a "signal" sooner than the Legislature could complete the legislative process, that is no justification for an unlawful executive order – which is a binding command, not a "signal." If guidance were needed, it might have been provided by a statement by the Governor that he supported AB 860 and SB 423. It is quite common that stakeholders must take preparatory action based on their expectation as to a law's passage.

By opting instead to make binding law himself, the Governor crossed a constitutional line with important policy consequences. If his purpose truly was to "facilitate necessary planning" (Def. JOP Mot. at p. 10) by elections offices while awaiting passage of the legislation, that rationale would of course assume 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 stated rationale here for issuing the Order therefore presupposed a legislative process that was *preordained*. It forced the Legislature's hand towards the Governor's 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. Recognizing this fact, the Governor now argues that the legislation "ratified" his Order – denying the Legislature its own agency in the legislative process and effectively acknowledging a violation of the separation-of-powers provision in California's Constitution. (See *Butt v. State of California* (1992) 4 Cal.4th 668 [the separation-of-powers inquiry "focuses on the extent to which" a challenged action prevents another branch "from accomplishing its constitutionally assigned functions" [quoting *Nixon v. Administrator of General Services*, *supra*, 433 U.S. 425, 443]]).

Other similar statements by the Governor confirm that legislation, not a unilateral executive order, was the proper constitutional vehicle for setting election policy. Recognizing the deficiency of his Order on its face, he has variously stated that the legislation "superseded" it, "corrected" it, "ratified and superseded it" and "essentially ratif[ie]s and supersede[s] it."

(Def. JOP Mot. at pp. 7, 14). He has also stressed that the Order was "an interim measure . . . until the pending legislation can be enacted" and that "to the extent there are minor differences between the Executive Order's requirements and SB 423 or AB 860, Defendant acknowledges that these statutes control." (Def. JOP Mot. at pp. 13, 14.) The Governor even suggests that the enacted legislation superseded his Order *automatically*: "the Legislature's enactment of SB 423, not any unilateral act of Governor Newsom, rendered this controversy moot." (*Id.* at p. 15.).

If the Executive Order was a valid exercise of emergency powers, why would the statute override it without the Governor first withdrawing it? After all, the Emergency Services Act gives the Governor the power to *suspend* statutes. Thus, an Executive Order issued under its authority would presumably be the paramount form of law, if lawfully issued. By suggesting that his Order was automatically trumped by an ordinary act of legislation, the Governor has conceded that the issuance of the Order was not a proper exercise of emergency powers.

Finally, if the rationale of "direction" or "preparation time" is accepted as a basis for exercising emergency powers on matters far in the future, this rationale admits of no limiting principle. Almost all policies require preparation of some kind to implement – and most are in some way affected by the existence of the pandemic.

c. The appellate court's opinion suggests the Executive Order was outside the scope of the emergency

The appellate court's opinion in this case, while granting relief to the Governor as to the temporary restraining order, also provides strong support for the present motion. First, the court reversed the superior court as to irreparable harm precisely because election preparations were *not* shown to be urgent. The appellate court found there was a lack of evidence of "irreparable harm or immediate danger" because Plaintiffs "did not point to any impending election timelines or deadlines affected by the Executive Order, which is not surprising since the ballot materials had not been finalized and the Executive Order did not shorten the timeline for doing so." (*Newsom, supra*, 2020 WL 3887752 at *5.) Accepting the truth of this conclusion, it cuts equally against the requisite necessity for the exercise of the emergency powers. If the court could find no urgency for the temporary restraining order in

July of 2020, how could there have been such urgency in June of 2020 when the Executive Order was issued?

Second, the appellate court observed that "if a substantive conflict does arise between the Governor's emergency authority and the Legislature, that could present issues requiring careful consideration and ultimate resolution by the courts." *Id.* at p. 8. That scenario has come to pass, as even the Governor acknowledges his Executive Order and the enacted legislation have differences – and larger differences were suppressed by the preemptive Order itself.

C. The Governor Tries to Compensate for the Unlawfulness of His Order by Referencing One Letter From Two Legislators

In all briefing to date, the Governor's main defense of his Executive Order is that it was issued with the approval of two individual legislators: Assemblyman Marc Berman and Senator Tom Umberg. The Governor takes greats pains to adorn the two with importance, variously referring to them as "key members of the Legislature," "Committee Chairs," "Legislative Chairs," and members of "the majority party." (*See, e.g.*, Def. Motion JOP, pp. 7-8. ["At the request of the Committee Chairs of the majority party, Governor Newsom used his broad emergency powers to ensure that local officials had enough time to prepare for unprecedented Contingencies."])

As an initial matter, this information is irrelevant to the case at bar and should not be admitted as any kind of evidence in support of a defense. The Defendant offers no authority for the proposition that two legislative committee chairs can authorize him to exercise legislative power. The fact that the Chairs (2 members of a 120-member Legislature) wrote him a letter is meaningless as to the constitutional question presented: whether the Governor had the power to issue the Executive Order. If he did have that authority, why does it matter what two particular legislators thought about it?

The Governor's eagerness in this litigation to cite their approving comments conveys an implicit recognition that the Executive Order cannot stand on its own. And if it cannot stand on its own, it of course cannot be propped up by the words of individual legislators, who have no power to make law of any kind outside of the legislative process specified in the Constitution.

It is, indeed, an absurd notion: that the Governor can confer on hand-selected legislators an extra-constitutional power to legislate via direct communication with him rather than via consensus with their legislative colleagues.

D. <u>The Governor's Pleading Contains No Factual Averments or Applicable Defenses</u>

The Governor's answer consists of a general denial and six boilerplate affirmative defenses. Three of the defenses could not present any question of fact: failure to state a claim, reserving a right to amend, and that the complaint is uncertain. The Governor agrees that a fourth defense, mootness, is resolvable on the pleadings, having filed his own motion on that basis. The other two listed defenses – "estoppel, laches, unclean hands and/or waiver" and lack of standing – do not contain any supporting factual allegations raising any material issue constituting a defense. This boilerplate pleading presents no obstacle to Plaintiffs' motion. (*See Allstate Insurance Company, supra*, 160 Cal.App.3d at p. 332 [upholding trial court's ruling granting plaintiff judgment on the pleadings where the defendant's answer "failed to raise a material issue or set up affirmative matter constituting a defense"]).

V. CONCLUSION

For the foregoing reasons, judgment on the pleadings should be granted in favor of Plaintiffs.

DATED: September 15, 2020

Respectfully Submitted,

KEVIN KILEY

JAMES GALLAGHER

DECLARATION OF KEVIN KILEY

I, KEVIN KILEY, hereby declare as follows:

1. I am an individual residing in and registered to vote in Placer County. I am an elected member of the California State Assembly representing the 6th Assembly District.

2. My co-plaintiff James Gallagher and I are representing ourselves in this matter, in pro per.

3. On September 2, Assemblyman Gallagher and I spoke by telephone with attorneys for Defendant Governor Gavin Newsom, including Benjamin Glickman, Jay Russell, and John W. Killeen. During that conversation, Plaintiffs indicated an intention to file a motion for Judgment on the Pleadings on the ground that the adjudication of the parties' rights could be determined as a matter of law from the face of the pleadings.

4. The parties were not able to reach agreement, as confirmed in an email from Assemblyman Gallagher to Attorneys for Defendant on September 4, 2020.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: September 16, 2020

By 
KEVIN KILEY

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My place of business is Rice Lawyers, Inc., 437 Century Park Dr. Ste. C, Yuba City, CA 95991. On September 16, 2020, I served the within documents:

1. **MOTION FOR JUDGMENT ON THE PLEADINGS**

___ BY FAX: by transmitting via facsimile the documents(s) listed above to the fax number(s) set forth below on this date before 5:00 pm.

___ BY PERSONAL DELIVERY: by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

___ BY MAIL: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Yuba City, California addressed as set forth below.

_X_ BY OVERNIGHT MAIL: by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

_X_ BY ELECTRONIC SUBMISSION: submitted electronically to the e-mail of the attorney listed in the pleadings for a represented party in the action.

John W. Killeen
Deputy Attorney General
1300 I Street, Suite 125
Sacramento, CA 94244-2550
John.Killeen@doj.ca.gov

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 16, 2020 at Yuba City, California.

JENNIFER MCMULLEN