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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SUTTER
STATE OF CALIFORNIA
YUBA CITY

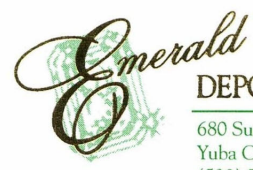
JAMES GALLAGEHR AND)
KEVIN KILEY,)
)
 Plaintiffs,)
)
 vs.) Case No. CVCS20-0000912
)
 GAVIN NEWSOM, in his official)
 capacity of Governor of)
 California,)
)
 Defendant.)
 -----)

COURT REPORTER'S TRANSCRIPT
HEARING RE: MINUTE ORDER

OCTOBER 21, 2020

Before the HON. SARAH H. HECKMAN

Tamara L. Houston, Certified Shorthand Reporter No. 7244



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WEDNESDAY, OCTOBER 21, 2020

TRANSCRIPT OF PROCEEDINGS

--oOo--

THE COURT: Court will call CV CS2912, Gallagher versus Newsom. The record will reflect that the attorneys -- the parties and the attorneys are here, and I would like for you to formally announce yourselves on the record.

Mr. Gallagher first.

MR. GALLAGHER: James Gallagher, plaintiff.

MR. KILEY: Kevin Kiley, plaintiff.

MR. KELLEHER: Tim Kelleher.

THE COURT: Thank you.

MR. KILLEEN: John Killeen, Your Honor, and could I ask who Mr. Kelleher is?

MR. KELLEHER: Oh, I'm sorry. I'm Mr. Gallagher's law partner.

MR. RUSSELL: Jay Russell, Your Honor, for Defendant.

THE COURT: Welcome. Good morning. So today the matter -- this matter has long -- long been ready to be set for the trial, and we're here today on the trial itself but the preliminary rulings on the Plaintiffs' and Defendant's motions in limine that were filed respectively on October 15th and October 20th

1 having to do with the admissibility of exhibits --
2 Defense Exhibits Nos. 3 and 17. You have briefed them
3 thoroughly. I have read them. I have researched them
4 and considered them. We've discussed them in the
5 courtroom as well as on the phone yesterday. And unless
6 there's anything to add, I'm prepared to rule on Nos. 3
7 and 17.

8 Is that -- that is what I was understanding
9 you asked for yesterday, Mr. Gallagher.

10 MR. GALLAGHER: Yes, Your Honor.

11 THE COURT: Okay.

12 MR. GALLAGHER: We don't have anything
13 further to add.

14 MR. KILLEEN: Nothing further from us,
15 Your Honor.

16 THE COURT: Okay. So as to No. 3, this is
17 the May 6, 2020, letter from Senator Tom Ueber to
18 Assemblyman -- and Assemblyman Marc Berman to Governor
19 Gavin Newsom. We were talking about it yesterday, and I
20 felt that even by parties submitting that certainly
21 No. 3 could have been authenticated, maybe even the
22 hearsay objections could have been overruled, but that
23 offer was not taken, and so I received Exhibit 3 exactly
24 as it is with your arguments.

25 In -- but even if we could get over the

1 authentication and the hearsay objection, one of the --
2 one of the arguments that the Defense used is in trying
3 to defend the relevance of Exhibit 3 says that, in part,
4 it was to show that there really wasn't a conflict
5 between the legislature and the Governor, but truly that
6 argument has no bearing on the legal analysis. Whether
7 or not the Governor and the legislature are getting
8 along doesn't change the underlying enabling statutes as
9 to the ultimate order, executive order in 67-20.

10 And that -- that authority is coming, of
11 course, out of the California Emergency Services Act
12 which I'll call ESA. Is that how you all refer to it?
13 Or ESA? ESA or ESA?

14 MR. KILLEEN: We call it ESA.

15 THE COURT: Okay. I'll try to call it ESA.

16 And so since it doesn't speak to the legal
17 analysis, the Court finds it's irrelevant for that
18 point. It was further being offered to demonstrate
19 its -- and I'm reading from your brief, demonstrate the
20 effect on the Governor, the effect that the letter or
21 the request had on the government -- Governor, and
22 that's in your footnote one on page three of your most
23 recent motion in limine. And we can't know what the
24 Governor's state of mind is, and it would be -- even if
25 we did, it would be irrelevant to the legal authority

1 because the legal authority does not come from the
2 legislature, it does not come from a letter, it does not
3 come from anything other than the Emergency Services Act
4 and the statutes attended thereto.

5 So as to relevance, I concluded yesterday,
6 and I told -- I told you yesterday on the phone that
7 sometime -- you know, that I've read this. I can't
8 unring the bell. I've read 3 and I've read 17 --
9 Exhibit 17 as well. You can't really unring the bell,
10 but if we had a jury, I wouldn't allow 3 or 17 to go to
11 the jury because I don't believe that their probative
12 value of -- that actually the -- what I want to say, the
13 prejudicial effect and the confusion that 3 and 17 could
14 cause the jury would far outweigh any probative value
15 that 3 or 17 would have even if there were some moniker
16 of relevance that would have otherwise allowed you to
17 bring them in.

18 Did I state that in a way that you
19 understood?

20 MR. KILLEEN: We understand, Your Honor.

21 MR. GALLAGHER: Yes, Your Honor.

22 THE COURT: Okay. Any other explanation as
23 to 3? Exhibit 3?

24 MR. GALLAGHER: No, Your Honor.

25 THE COURT: Okay.

1 MR. GALLAGHER: So this is not being
2 admitted is my understanding?

3 THE COURT: And so the ultimate question is
4 the Plaintiffs' motion to deny 3 is granted and the
5 Defendant's motion to admit 3 was denied.

6 Now, as to 17, I think that 17 has the same
7 kinds of problems as 3. And I think that although
8 there's a lot of discussion about the appellate court's
9 considering legislative history and notes from the floor
10 and that kind of thing, I don't know -- I couldn't
11 really -- in sorting through your brief, I couldn't
12 really determine whether those were items that the Court
13 of Appeal had asked for to supplement the file or
14 whether they were documents that the trial court had
15 found relevant and had admitted for other purposes, and
16 there may be a distinction, but I -- as to this case and
17 the facts of this case, I am -- I don't see where they
18 constitute the -- I don't see them in the group of
19 similar types of documents that we normally take
20 judicial notice of. So the public records and of
21 other -- other commonly disseminated documents that are
22 not truly in dispute, and I don't see it as serving in
23 that -- that role and being something that the trial
24 court would normally take given -- give -- take as
25 judicial notice unless the parties all stipulated to it.

1 And I think there's a distinction.

2 In terms of -- in terms of your B,
3 headline -- or headline B, alternatively the senate
4 floor analysis is admissible even if it were not subject
5 to judicial notice, senate floor analysis would be
6 relevant as evidence at a minimum as to its probative
7 value as to the issue of whether or not there is a
8 conflict between the executive order and the subsequent
9 legislation.

10 I think all of you have analyzed that and
11 you agree that although there is significant duplication
12 between much of the language in the executive order and
13 in 67-20 and SB43, but I think your -- but I think that
14 you both agreed in court previously that there was some
15 language that -- in the executive order that exceeded
16 either of the bills.

17 Is that not so?

18 MR. KILLEEN: There were differences between
19 the executive order and the legislation.

20 THE COURT: Okay. Okay. And so even if it
21 was the legislative intent to somehow -- I don't see how
22 the legislative intent changes the authority that's
23 vested in the Governor. So that -- that was a concern
24 that I had as to 17.

25 The Plaintiffs' misperception of the purpose

1 of these exhibits and cites several cases for the
2 proposition that the news of legislature and the
3 legislative history as to the meaning of the statute.

4 I don't think it's the legislative history
5 so much. I think it's really the -- the enabling
6 statutes that I think are at issue. And so I -- the
7 17 -- if there's probative value of 17, it's lost in me,
8 and if you want another chance to tell me why I'm wrong,
9 I'll certainly hear that, but I --

10 MR. KILLEEN: We were taking two shots at
11 it, Your Honor. I don't think further argument is
12 necessary, and if this means that the Court will not be
13 striking down the ESA, then we will be thrilled to
14 accept these rulings.

15 THE COURT: Okay. I will be addressing the
16 ESA in my tentative ruling that I'll submit in a few
17 days to you, and I'll hear your arguments today, of
18 course. But I will be addressing the ESA, and having
19 done that -- and then Mr. Gallagher, you wanted some
20 limited weight for No. 18. I'm not sure I've seen 18.
21 But I have the exhibit -- my exhibit book here. But
22 I'll let you -- I can -- sometime during break or
23 something I can look at 18 unless you want me to make a
24 decision on 18 right now.

25 MR. GALLAGHER: I think that's fine. We did

1 brief it, and I think we can discuss that exhibit as we
2 go through this trial today.

3 THE COURT: And I did -- I do have --

4 MR. GALLAGHER: I didn't object to it. I
5 mean, if it's part of our stipulation that these are
6 documents that come in, I just think that what is being
7 proposed could be limited and we can deal with all that.

8 THE COURT: Okay. That was my
9 understanding, and now that I look at 18 I did see it in
10 another format, so I do recognize it and I have read it.

11 All right. Are we ready to proceed? Any
12 other preliminary business before we hear from counsel?

13 MR. KILLEEN: No, Your Honor.

14 THE COURT: Okay.

15 MR. GALLAGHER: As far as the exhibits, so
16 we had a joint stipulation that we submitted. So are we
17 just kind of -- are those in evidence? Or do you want
18 us to formally submit them into evidence? What would be
19 the posture for that?

20 THE COURT: I think -- so that's a good
21 question because I haven't seen them. I don't know what
22 they are. But if you're stipulating that all but 3 and
23 17 should be moved in, and you're in agreement that they
24 can be moved in, I don't know why they couldn't be moved
25 in now. And if that makes your jobs easier, then that's

1 fine. Probably makes my job easier.

2 MR. GALLAGHER: Yeah. I think what we said
3 is if we filed them in evidence we might obviously have
4 disagreements over the weight of the evidence and what
5 the evidence says, obviously, and potentially objections
6 to specific parts within the exhibits, but otherwise
7 that they could be -- that the documents could be
8 admitted.

9 MR. KILLEEN: That's right, Your Honor.

10 THE COURT: I think that that is a good
11 plan, and I'd be willing to support. And so I will, at
12 the stipulation of the parties -- requested stipulation
13 of both of the parties, Exhibits A through J are moved
14 in, and Exhibits 1 through 19, save and except 3 and 17
15 are moved in.

16 (Whereupon Exhibits A through J and Nos. 1,
17 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15,
18 16, 18, and 19 are admitted into evidence.)

19 MR. GALLAGHER: And subject to the
20 objections and --

21 THE COURT: Subject to any objections. Any
22 portions of them that might be stricken for some reason
23 or -- and obviously raise the issue of the weight on 18,
24 and that might be true to many of the exhibits,
25 actually.

1 MR. KILLEEN: Your Honor, I'd say that my
2 understanding was that the exhibits would be moved in in
3 their entirety except for 3 and 17. If we are going to
4 be raising new objections to the admissibility of
5 portions of the other exhibits, that's contrary to my
6 understanding or stipulation. So we can argue over the
7 weight of the exhibits, but -- and --

8 THE COURT: You can argue about the weight,
9 you can argue about what they mean.

10 MR. KILLEEN: Right, but --

11 THE COURT: And you may disagree.

12 MR. KILLEEN: Right. But we are not going
13 to be seeing new objections to the admissibility of
14 portions of the exhibits?

15 THE COURT: I -- I don't know the answer to
16 that, but I would think that if there were a line here
17 or they were to be stricken, that that would be
18 something that could be raised, and I would consider --

19 MR. GALLAGHER: I think the only thing that
20 I was thinking of was -- and I -- I don't think this
21 involves very many of the documents, but to the extent
22 that there is something stated by a third party, there
23 might be a hearsay objection as to something that is
24 stated in that document. But obviously the document
25 itself, we're agreeing to be admitted into evidence.

1 But to the extent if somebody is proposing that maybe
2 a -- something that is said in that document by a third
3 party -- and obviously things said by the Governor,
4 well, that would be admission of a party opponent or
5 something said by myself or Mr. Kiley, same thing. But
6 to the extent we're trying to bring in third party
7 statements, there might be -- that was the only thing I
8 was thinking of.

9 MR. KILLEEN: Your Honor, I think maybe on
10 break we can revisit as the terms of our joint statement
11 because my understanding -- in entering that joint
12 statement is that the parties were agreeing that
13 everything except 3 and 17 would be admitted as a whole
14 into evidence, so if there were -- if that's not what we
15 agreed to, we need to figure that out.

16 THE COURT: Okay.

17 MR. GALLAGHER: That is my understanding, so
18 I mean, I'm fine with that. So, I mean, that they would
19 be admitted into evidence. So I think that is our
20 stipulation.

21 THE COURT: Okay. Thank you.

22 We spoke yesterday as well about -- let me
23 get to the document. About the amicus brief.

24 Those of you who see these more than I do,
25 do you call them amicus or amicus?

1 MR. GALLAGHER: I say amicus.

2 MR. KILLEEN: It goes both ways, Your Honor.

3 MR. GALLAGHER: Tomato, tomatoe.

4 THE COURT: Potato, potatoe.

5 So Mr. Sharma filed the amicus -- requested
6 leave to file an application for leave to file an amicus
7 brief, and the brief was attached to his application.
8 As I told you yesterday, I hadn't read it because I
9 wanted to understand your objections, if any, and I
10 wanted to be sure that you had a chance to read it as
11 well.

12 I read it last night, and I feel that the
13 arguments, for the most part, are somewhat attenuated
14 from the issues that are at bar, and I think that this
15 is a com- -- a serious enough question that is before
16 the Court and that I need to focus on what it is you're
17 asking for and that I decline to be distracted by other
18 issues. And ultimately I do think that one of the
19 things that Mr. Sharma is asking for is not totally
20 inconsistent with what the Plaintiffs are asking for.
21 But my thought would be to -- to deny the brief being
22 filed and not strike the application. If and when this
23 case does go to the Court of Appeal, the Court of Appeal
24 can make a determination as to whether or not that Court
25 is interested in knowing more. But I elect not to

1 strike it at this time because it's really the
2 application, not the brief itself. So that was my
3 thinking.

4 MR. KILLEEN: So the Court is denying
5 Mr. Sharma's application but not striking the document
6 from the record?

7 THE COURT: That's my -- that was my plan.
8 Uh-huh. Is that sensible?

9 MR. KILLEEN: Yes, Your Honor.

10 THE COURT: Mr. Gallagher?

11 MR. GALLAGHER: Yes, Your Honor.

12 THE COURT: Okay. All right. And Mr.
13 Sharma, you are welcome to stay.

14 MR. SHARMA: Thank you.

15 THE COURT: So -- so when you're ready,
16 Mr. Gallagher.

17 MR. GALLAGHER: So Your Honor, just
18 obviously this is kind of a unique thing. We're not
19 having witnesses. Our posture of thought was that we
20 would -- Mr. Kiley and I would split both of our
21 openings and closing statements and then I guess in the
22 middle where we would normally have witnesses, we would
23 just have -- we would ask for the opportunity to just
24 present what we think that the evidence in these
25 documents shows, so that's how we were planning to

1 proceed. I just wanted to make sure that would be
2 consistent with what the Court expects and --

3 THE COURT: Any other suggestions,
4 Mr. Killeen? That's what I would think.

5 MR. KILLEEN: That's fine, Your Honor. I
6 think that we've interweaved our evidence into our
7 openings as the primary presentation here, but we don't
8 object to that.

9 THE COURT: Yes. Okay. I think -- I think
10 we're all in agreement as to how, at least in broad
11 strokes, how this will go today, and I may have some
12 questions of any of you along the way, but mostly I'd
13 like to hear from you in terms of your opening, middle,
14 and the ends, and whether -- on how you want to break
15 that up. If you want to, I'll leave it up to you,
16 Mr. Killeen, whether you both want to start with opening
17 statements or if Plaintiff wants to go straight through
18 and sort of having a closing statement after you have
19 rebuttal after you have put on your case. So --

20 MR. KILLEEN: We're comfortable with
21 Plaintiffs giving both their opening and their evidence
22 to begin with, if they prefer to. We don't feel
23 strongly either way.

24 THE COURT: Well, I think it flows nicely
25 that way.

1 Do you?

2 MR. KILLEEN: We do. We agree.

3 THE COURT: Okay. All right.

4 MR. GALLAGHER: Okay.

5 THE COURT: Mr. Gallagher.

6 MR. GALLAGHER: Thank you, Your Honor. This
7 is an important case, as you have said. This is a case
8 about the most fundamental cornerstone of our system of
9 government, the separation of powers. As we know well,
10 our founders feared the accumulation and centralization
11 of power, and so they created this beautiful system of
12 separate powers with checks and balances. When one
13 branch invades the power of the other, this system is
14 under threat of disruption.

15 We believe this is a straightforward case.
16 And we have believed that since we filed our initial
17 Complaint. In this case the Governor, Defendant, has
18 invaded the powers of the legislature. As we intend to
19 show today, he did, in fact, legislate. He
20 fundamentally engaged in lawmaking, policy-making
21 activity, altering and amending existing statutory law,
22 which he was not permitted to do under the Constitution
23 or under a plain reading of the California Emergency
24 Services Act.

25 Though the legislature did ultimately act of

1 its own accord to legislate in this arena, their
2 powers -- as we have outlined in our brief, their powers
3 were seriously undermined and their authority continues
4 to be undermined because this order continues to govern
5 contrary to their legislative action.

6 And the legislature acting within its own
7 separate powers, legislative powers, cannot possibly
8 cure or take away or sort of sweep under the rug, as
9 Defendant -- as Defendant asserts, the unlawfulness of
10 his initial action.

11 In order to restore the system, we need the
12 judicial branch to exercise its fundamental and separate
13 power to interpret the law, to set the clear lines and
14 the boundary lines between the branches and thereby
15 check the Governor. That is why we are here today, and
16 we hope that at the submission and end of our case you
17 will find in favor of the Plaintiffs granting us the
18 declaratory relief and injunctive relief that we have
19 requested in our Complaint. And I will turn it over to
20 my co-plaintiff, Mr. Kiley.

21 THE COURT: Mr. Kiley.

22 MR. KILEY: Thank you, Your Honor. And I
23 want to thank the Sutter County Superior Court as well
24 for accommodating the public interest in today's
25 proceedings which I believe are of profound importance

1 to our state right now, and I want to thank as well
2 everyone who has come to the courthouse and who is
3 tuning in. I think it's something of great value. And
4 we have all three branches of our government represented
5 here in this room, which is appropriate in a
6 separation-of-powers case, in this branch, Your Honor.
7 Of course, the Governor and Mr. Gallagher and I, my
8 co-plaintiff are members of the legislative branch,
9 although these days it's starting to feel like we're
10 full-time lawyers again.

11 But in our capacity as legislators, you
12 know, we, of course, have our political views, our
13 opinions, which we fight for, which we advocate for, the
14 same as the Governor does, and everyone here in this
15 courtroom and everyone watching has their own political
16 views as well, their own opinions, sharp differences of
17 opinion, especially perhaps on the issue of the day, or
18 as it's turned out, the issue of the year, and that's
19 the response to COVID-19, the decisions made by the
20 Governor, the path moving forward.

21 But this case is not about any of that.
22 It's not a case about politics; it's a case about law,
23 of course. We're in a courtroom. But it's about
24 something more fundamental as my co-counsel referred to.
25 It's about the separation of powers and it's about the

1 rule of law. And by the rule of law, we mean the vital
2 principle that written words are binding on those in
3 positions of power and constrain their actions. From
4 this comes the basic feature of a free society. Freedom
5 from the arbitrary dominion and control of another.
6 It's what gives life to the audacious premise that
7 citizens, we the people, are not mere subjects of state
8 power, but members of a community of equals and authors
9 of our political destiny. It's what makes possible the
10 great American experiment of self government which, on a
11 historical time scale after all, is still in its
12 infancy, is still fragile. I believe that these
13 foundational principles, separation of powers, the rule
14 of law, Republican government ought to be unifying,
15 ought to cut through the cacophony and the distension
16 and the vitriol that characterizes our politics now more
17 than ever. So it is my hope that having this public
18 debate, resolving this issue in a public forum, can
19 commit us anew to these principles and will have a
20 salutary effect on the state of politics in society in
21 the California of 2020.

22 Because our commitment to these principles
23 doesn't go away when we're in an emergency. The rule of
24 law does not break down during an emergency. That is
25 when it is most important. A well-designed system of

1 government, like ours, has enough give in the joints to
2 meet the exigencies of a crisis, but also has enough
3 structural integrity not to collapse or to be
4 transformed into something entirely different. And that
5 risk that we will lose touch with our form of government
6 is heightened when an emergency is no longer a
7 transitory event but has now lasted nearly eight months
8 with no end in sight, no even abstract discussion of
9 when the state of emergency might end.

10 Over time, deviations from the rule of law
11 start to pile up, and as the norms of democracy take one
12 hit after another, at some point it will put more stress
13 on our civic institutions than they can bear. That is
14 what this case is ultimately about.

15 And we'll be discussing today two sources of
16 law. The first of course, is the California
17 Constitution. And as we have representatives of all
18 three branches, we've all taken an oath to the
19 Constitution which has a specific provision defining the
20 limits of each of our authority. Article 3, section 3,
21 the powers of state government are legislative,
22 executive, and judicial. Persons charged with the
23 exercise of one power may not exercise either of the
24 others except as permitted by this Constitution.

25 And that principle, of course, came directly

1 from the founding of our country. We started our
2 opening brief in this case with a quote from
3 James Madison, the federalist, who said the accumulation
4 of all powers, legislative, executive, and judiciary, in
5 the same hands may justly pronounce the very definition
6 of tyranny. We weren't the only ones who noticed that
7 quote. The Supreme Court of Michigan cited the exact
8 same statement in striking down that state's emergency
9 services law in a case we'll be discussing more later.

10 Now eerily, the Defendant in this case uses
11 almost the exact same words as James Madison did to
12 describe the present state of the U.S. government.
13 Defendant has repeatedly claimed that the Emergency
14 Services Act, the second source of law we'll be
15 discussing today, quote, centralizes the state's powers
16 in the hands of the Governor.

17 So the Defendant maintains that the
18 California of Emergency Services Act does the very thing
19 that the father of the U.S. Constitution described as
20 the definition of tyranny and that our state
21 Constitution expressly forbids.

22 Our case today, Your Honor, is simple. It
23 does no such thing. And if it did, it would violate our
24 own state's Constitution. The laws of the State of
25 California do not countenance an autocracy under any

1 circumstances. They do not allow for one person rule.
2 They do not empower a governor to legislate, not for one
3 day, and certainly not for eight months with no end in
4 sight.

5 Shortly my co-counsel will be delving into
6 the evidence as to the order at issue in this case. But
7 I would, to begin, like to provide some context as to
8 the circumstances under which that order was issued
9 because the state of emergency that we are under is
10 unprecedented in several ways. In at least three ways.
11 The first, which I've just mentioned, is the duration.

12 The second is the sheer volume of executive
13 orders that have been unilaterally issued. Fifty-seven
14 executive orders changing over 400 dually enacted
15 California laws.

16 But the third distinguishing unprecedented
17 feature is the kind of power that has been exercised.
18 Both sides agree -- appear to agree that the executive
19 order in question, N-67-20, was an exercise of
20 legislative power by the Governor. That has never been
21 contested by the Defendant in any of the briefing.

22 We disagree as to whether this is allowed by
23 the Emergency Services Act. In Defendant's trial brief,
24 he states that our interpretation, quote, would leave
25 the Emergency Services Act ardently toothless. The

1 Governor would be sidelined for weeks or months hoping
2 for eventual legislative action while the earthquake,
3 fire, or pandemic is raging.

4 Toothless, that's how our interpretation is
5 described. Yet in all of the evidence before the Court,
6 the Defendant has not identified a single emergency
7 action by any governor, any prior governor, that is
8 inconsistent with our interpretation. And as the
9 Defendant himself says in this same trial brief,
10 California Governor's have used the Emergency Services
11 Act for 50 years to combat droughts, medfly
12 infestations, wildfires, earthquakes, and now pandemics.
13 Apparently they've all used it in a toothless way
14 because in these 50 years of droughts, medfly
15 infestations, wildfires, earthquakes, Defendant has not
16 identified a single governor who created statutory law
17 in the way that the Governor did in this case. He
18 cannot identify any single action of any past governor
19 that our toothless reading of the act would have
20 prevented.

21 The only executive orders in the record that
22 would have been enjoined by the relief we seek today are
23 the Defendant's. It's the Defendant who is using the
24 Act in an unprecedented way. It is the Defendant who is
25 acting on a new theory of the powers granted by the Act,

1 a new and boundless well of authority in the Act that
2 somehow escaped the attention of all prior Governor's
3 that they have referenced as well as the Courts who have
4 adjudicated the case law that's been discussed in the
5 briefing.

6 And so while the legal theory offered by the
7 defense has shifted, to some extent, throughout the
8 course of this case, ultimately they've landed on a
9 particular provision of the Emergency Services Act which
10 has dozens of sections, but they've sort of
11 characterized section 8627 as some catchall which refers
12 to the police powers. And have described this section
13 as affording the Governor, quote, plenary authority to
14 govern which, of course, would literally give him
15 boundless power that would render the other 100 pages of
16 the act superfluous.

17 So I'm going to discuss later why that is
18 wrong as a matter of statutory construction, but right
19 now, I just want to underline what a novel theory of the
20 Emergency Services Act this is. It is just as there is
21 nothing in the record of any prior governor using an
22 executive order to legislate, so to there is nothing in
23 the record of any prior governor ever citing this
24 section, 8627, as the basis for any order. It's not in
25 any of the several elections-related orders that the

1 defense has produced in this case, and it's not in the
2 cases discussed by the Courts. It's not even mentioned.
3 And yet here this section 8627 has been invoked in 24
4 orders by Governor Newsom during the COVID-19 state of
5 emergency, the one at issue in this case, and at least
6 23 others. So out of 57 orders that have been issued,
7 23 of them have cited section 8627 which, again, they
8 have not provided a single example of any other governor
9 citing once. And all of these orders do exactly what
10 the order at issue here does. Exercise legislative
11 powers, unilaterally create policy.

12 So let me just go over a few examples. My
13 co-counsel will be discussing the order at issue in this
14 case directly in 67-20 in great detail. And these are
15 all, Your Honor, in Exhibit G, although it might be more
16 trouble than it's worth to flip through them as I'll
17 just be giving you enough to get a flavor for each one.

18 So N-57-20 deals with debt collection that
19 established that Cares Act's funds were shielded from
20 any debt collectors. N-51-20 deals with paid sick
21 leave. It provides that a hiring entity shall provide
22 COVID-19 supplemental paid sick leave to each sector
23 worker who works -- who performs work for and through
24 the hiring entity and goes through a whole variety of
25 laws and procedures and requirements dealing with that

1 new program.

2 N-62-20 deals with worker's compensation.
3 It says that any COVID-19-related illness of an employee
4 shall be presumed to arise out of and in the course of
5 the employment for the purpose of awarding workers'
6 compensation benefits if all of the following
7 requirements are satisfied and goes into great detail
8 about those requirements. N-66-20 deals with teacher
9 credentialing. It provides that candidates for
10 credential -- the usual test is suspended so they must
11 complete a different one past commission approved --

12 CERTIFIED SHORTHAND REPORTER: Mr. Kiley,
13 would you please slow down just a little bit, please.

14 MR. KILEY: Will do. Thank you. This is
15 our court reporter. Actually I'm putting your fingers
16 through stress, I'm sure.

17 The final one I wanted to reference was
18 N-44-20 which deals with price gouging which is actually
19 a topic the legislature has legislated on specifically
20 to prepare for emergencies. And this provides that in
21 addition to the prohibition set forth in Penal Code
22 section 396, a person or other entity shall not sell or
23 offer to sell any item from among a whole list of new
24 goods and categories. There is a whole bunch of other
25 topics addressed.

1 How is my speed? We good?

2 There is a whole -- there is a whole host of
3 other topics addressed. Reentry proceedings, marriage
4 licenses, tax exemptions, water shutoffs, foster youth
5 placements.

6 Now, we're not contesting the wisdom of
7 these policies per se. I'm sure there are some that we
8 would agree with as a matter of policy and some we would
9 disagree with, but the important point is that none of
10 them went through any legislative process. We don't
11 know what opportunity there was for any stakeholder
12 input. We know there wasn't any opportunity for public
13 presentation. We don't know what special interests
14 might have had a seat at the table. None of it was
15 public. There was no deliberation, negotiation,
16 compromise, veto-gates, the things that characterizes
17 the legislative process in these policies expanding in
18 near every California code.

19 So, Your Honor, this case presents what is
20 truly a question of first impression, and that is
21 whether the Emergency Services Act affords unrestricted
22 police powers, which no governor in the record has ever
23 laid claim to, but which the Defendant here has claimed
24 the basis for 24 different orders effectuating dozens of
25 actions throughout many different wheel codes touching

1 nearly every facet outwardly lying without any
2 legislative process or consideration of those policies
3 in a public forum.

4 We will argue that if this newly discovered
5 bottomless well of authority is not, in fact -- is, in
6 fact, a feature of the Emergency Services Act, then the
7 Act cannot stand under our Constitution. And as a
8 matter of fact, it is that interpretation, which
9 Defendant will give it as acting upon, would put it on
10 par with the law that was just struck down by the
11 Michigan State Supreme Court. The Court there citing an
12 earlier Massachusetts case that actually dealt with a --
13 an executive action pertaining to elections, said,
14 quote, that the law would provide a roving commission to
15 repeal or amend by executive order under unspecified
16 provisions -- under executive order unspecified
17 provisions anywhere -- included anywhere in the entire
18 body of state law.

19 So I want to -- we'll return to that phrase,
20 roving commission, because that's what the Michigan
21 Supreme Court found that the emergency powers of the
22 Governor Act there provides, and that is what the
23 Defendant in this case provides -- argues that our
24 Emergency Services Act provides.

25 So we will argue that these are the two

1 options that are before the Court today. If California
2 law is as broad as the Defendant argues in this case,
3 affording unrestricted police powers and the plenary
4 authority to govern, then it too must be struck down for
5 the same reason that the Michigan law was. But if, on
6 the other hand, California's law is narrower than
7 Michigan's, as we argue, then the Governor's order in
8 this case and many of his other orders was not
9 authorized by the Emergency Services Act or by any
10 statute and should be struck down for that reason, and
11 the Governor should be enjoined from issuing any further
12 such orders as has become a habit during this state of
13 emergency.

14 I'd now like to hand it back over to my
15 co-counsel/co-plaintiff who will run through some of the
16 evidence.

17 MR. GALLAGHER: So, Your Honor, just --
18 would you want them to do their opening at this point,
19 or do you want -- what I was intending to do was go into
20 the evidence, you know, in these exhibits in some
21 detail. I guess sort of as a middle to this. But do
22 you want them to give their opening statements first, or
23 what would be your preference?

24 MR. KILLEEN: I mean, Your Honor, again, we
25 interviewed their evidence into our opening. It might

1 be more coherent to hear them back up their opening with
2 their evidence since that's effectively what we will be
3 doing.

4 THE COURT: I think that's what we were
5 expecting.

6 MR. GALLAGHER: I just wanted to make sure.

7 THE COURT: Absolutely.

8 MR. GALLAGHER: Well, thank you, Your Honor.

9 So now let's deal with what's before the
10 Court, what evidence is before the Court, and I think we
11 should begin with the Complaint itself, our Complaint,
12 which is Exhibit 1 in your -- in your binder. And I
13 would point out, what is it that we alleged to you at
14 the outset of this litigation. And I think in -- I
15 would point out some relevant parts from the Complaint
16 and then go into what the evidence shows and how we
17 actually prove -- we approve in those allegations.

18 So I'll start with Exhibit 1, our Complaint,
19 on page two, paragraph eight, we allege the California
20 State Legislature, though recessing temporarily during
21 the COVID-19 pandemic, had reconvened and has been in
22 session since May 4th, 2020.

23 Paragraph nine, we allege the legislature is
24 currently considering legislative bills dealing with
25 elections procedures for the November 3rd, 2020, general

1 election.

2 Then going to page three, paragraph 13, we
3 allege on June 5th, 2020, Defendant issued executive
4 order N-67-20. Here's the executive order which
5 provides directives related to the conduct of the
6 November 3rd, 2020, general election which directives
7 significantly change the choices voters have with regard
8 to voting and the places and manner of casting votes.

9 On that same page, paragraph 16, by
10 exercising legislative actions in the executive order,
11 the Defendant is currently in clear violation of the
12 separation of powers.

13 Page four, paragraph 18, Plaintiffs
14 therefore seek a declaratory judgment of this Court that
15 the executive order so issued is null and void as it is
16 an unconstitutional exercise of legislative powers
17 reserved only to the legislature, nor is it permitted --
18 is it a permitted action under the statutory framework
19 provided under the California Emergency Services Act,
20 California Government Code 8550 through 8669.7. Then we
21 seek declaratory judgment.

22 And then in paragraph 21, Plaintiff further
23 seeks to restrain and enjoin the Defendant from, one,
24 carrying out or implementing the provisions of the
25 executive order; and two, from further exercising any

1 legislative powers in violation of the California
2 Constitution and applicable statute specifically from
3 unilaterally amending, altering, or changing existing
4 statutory law or making new statutory law.

5 So those, I think, are the relevant points
6 of our Complaint, what we've alleged and what we are
7 asking for.

8 So with the evidence before us, what do we
9 have? We begin obviously with the order itself, which
10 is Exhibit 5. Defendant's Exhibit 5. In that executive
11 order, N-67-20, on page two, halfway down, we see this
12 is the order. It's in evidence. What does it do?

13 Specifically part one, it is hereby ordered
14 that all Californians who are registered and otherwise
15 eligible to vote in the November 3rd, 2020, general
16 election shall receive vote-by-mail ballots.

17 By doing so, this changed portions of the
18 Elections Code that currently provide the current
19 statute at that time provided that it was an elective
20 process to get a mail ballot. A voter would have to ask
21 for and apply to get a mail ballot. This order
22 summarily changed that and said you will automatically
23 get a mail ballot consistent with a previous order that
24 the Governor had issued.

25 Then we move to number two. Notwithstanding

1 any contrary provision of state law, including, but not
2 limited to, and he calls out the Elections Code sections
3 3019.5 and 3019.7, all county elections officials are
4 required to use the secretary of state's vote-by-mail
5 ballot tracking system created pursuant to
6 Elections Code section 3019.7 and to use intelligent
7 mail bar codes on all vote-by-mail ballot envelopes.

8 Of course, looking at the code at the time
9 it provided that counties could use their own ballot
10 tracking system if they so desired. And it also --
11 there was no requirement whatsoever in statutory law
12 that a county use intelligent mail bar code on their
13 mail ballot envelopes. So, again, substantively altered
14 Elections Code 3019.5 and 3019.7.

15 Section three outlines that contrary to the
16 California Voter's Choice Act that they shall not be
17 required to make available more than one polling place
18 per 10,000 registered voters as long as the county
19 complies with all of the following requirements.

20 Sorry. Excuse me, Your Honor. Strike that.

21 So as regard to provision No. 3, this is in
22 regards to counties that are not Voter Choice Act
23 counties. It changes Elections Code section 12- --
24 12200 to 12286 which specifically provides that every --
25 in a traditional elections county, every precinct shall

1 have a polling place, and says, oh, that's no longer the
2 law, and instead counties you -- as long as you provide
3 one polling place per 10,000 voters and follow the
4 provisions that are stated therein, A, B, and C, that
5 you can essentially operate a different type of voting
6 structure. So, again, substantively alters and changes
7 the relevant Elections Code there, 12200 to 12286.

8 And then No. 4 deals with Voter Choice Act
9 counties and says that instead of having the vote
10 centers open for the required ten days under the
11 statute, which would be in section 4005 of the
12 Elections Code, they only need to have them open for
13 three days prior to the election. So, again,
14 substantively changing the requirements of the Voter
15 Choice Act that is found in Elections Code 4005.

16 And then No. 5, and another critical one
17 that we brought up in our briefing. Voter Choice Act
18 county pursuant to then Elections Code 4005 -- actually
19 existing -- what was and what is existing Elections Code
20 4005(a)(10), Voter's Choice Act counties are required to
21 have publicly noticed meetings with voting rights groups
22 including those in the disabled communities, those with
23 English language access concerns. They are required by
24 that code section to do so.

25 The Governor in this order summarily does

1 away with that publicly noticed meeting and says,
2 instead, county, you can put your information on -- of
3 your plan on a website and for ten days take public
4 comment, and then that will be sufficient to meet your
5 requirements under 4005(a)(10). Not consistent with the
6 Elections Code. Completely changes what that says.

7 So with all that, I think it is very clear
8 that, yes, in fact, the Governor did substantively alter
9 and change, amend the Elections Code. And not in any
10 minor way, but in some very significant ways.

11 In fact, Defendant in his briefing before
12 this Court has admitted that it does not just suspend
13 the Elections Code, but, in fact, actually changes the
14 Elections Code.

15 So now to the issue of what was actually
16 going on at the time this order was issued on June 5th,
17 2020. Was there, in fact, an urgency to provide
18 direction. And the evidence before the Court shows
19 that, no, there was not. And I will go through that.

20 First of all, we know that the legislature
21 was already acting to provide unique procedures for the
22 November election just as we had pointed out, we allege
23 in our Complaint. Well, the evidence shows it. And
24 that's why I move to a different binder. Exhibit B and
25 C, I would draw the Court's attention to. Exhibits B --

1 Exhibit B is a true and correct copy of an 860 as it
2 existed on May 28th, 2020, just before the executive
3 order was issued. And if you look at that, it shows
4 that, first of all, this legislation was in very
5 substantial form of what it was ultimately enacted into
6 on May 28th. And then if we look to Exhibit C, we see
7 the same true and correct copy of SB 423, which as of
8 May 27th, 2020, was in its substantial form of what it
9 was ultimately enacted into, and you can certainly
10 compare that with Defendant's Exhibits 6 and 7 which
11 show the finally enacted legislation.

12 But if we look at both of those, we see
13 clearly that as of the date that this order was issued,
14 the legislature already had bills in substantial form.
15 And then we go to Exhibit E, which shows the legislative
16 history of both of these bills. And in Exhibit E, we
17 see very clearly that on the first page, an 860, on
18 May 28th, 2020, was in the -- was in the senate
19 elections committee. So this bill had already moved
20 from the assembly where it originated and had been
21 passed to the opposite house and was being heard in
22 committee as of May 28th, 2020, before the Governor's
23 executive order.

24 And the next page, we see the same
25 legislative history for SB 423. Again, this is -- this

1 bill at the time had passed its first house, in this
2 case the senate, and was now on the assembly side. And
3 as of May 27, 2020, was re-referred to the committee on
4 elections and redistricting the assembly committee on
5 election redistricting.

6 In that same history in Exhibit E, and we
7 can also look to Defendant's Exhibit 6 and 7, the
8 enacted bills, shows that, in fact, both of these bills
9 were passed, an 860 passed and signed on the same day by
10 the Governor, by the way, for an 860 on June 18th, five
11 months prior to the November election, and SB 423 on
12 August 6, three months prior to the November election.

13 So all of this is evidence that the
14 legislative process was working, it was ongoing, and
15 there is nothing that shows that there was the urgency
16 necessitated to do an order that we should somehow not
17 go through the normal legislative process to establish
18 election law.

19 Other than the Governor's own statements in
20 his executive orders, there is simply no evidence before
21 the Court that this was a necessary action.

22 And as we have pointed out, there is nothing
23 that the Governor can point to in the Emergency Services
24 Act that would have authorized his action. The
25 Defendant can point to no evidence in the records that

1 there was some urgency to enact a policy scheme
2 immediately and unilaterally outside of the normal
3 legislative process to deal with the November election.
4 Those are the facts in the evidence before you.

5 What is also not in evidence -- because I
6 think it's important to point out what is not in
7 evidence. What is not in evidence is any indication
8 from the legislature that it viewed itself as working in
9 tandem with the Governor or that it was ratifying,
10 confirming, or approving his order. It does not exist
11 in the legislation itself, and as we pointed out in our
12 trial brief and in our briefing many times, Exhibits 6
13 and 7 are the officially enacted bills, legislation, an
14 860 and SB 423, very clear that there is nothing in that
15 legislation that expresses such an intent. And, in
16 fact, both of those bills have for us legislative intent
17 language. Official legislative intent language in the
18 precursor to both bills. None of them, nothing in there
19 mentions working in tandem with the Governor. In fact,
20 they do not mention the executive order at all.

21 Then you combine this with Exhibit H, which
22 is an article describing the Governor -- the Governor's
23 response to legislation that was being worked on after
24 he had already issued his first elections order, but
25 let's go to that Exhibit H. Where is that exhibit

1 binder?

2 So in Exhibit H, if we go to the fifth page
3 there, halfway down, wherein it says, "But Newsom has
4 struck a much more confident tone. During a press
5 conference on May 22nd," and I would point out that we
6 know that the first executive order that established an
7 all-mail-ballot election was, I believe, issued on May
8 the 3rd -- I'm sorry, May the 6th of 2020. On May 22nd,
9 he insisted that his order was on firm legal ground, and
10 though it would be nice to have the legislature pass its
11 own version of the new rules, he argued that it wasn't
12 strictly necessary.

13 And then he is quoted as saying, "We
14 appreciate their work, and to the extent that they want
15 to codify it, I think that could help out as well." Why
16 not?

17 That doesn't sound to me like a statement of
18 a planned coordination with the legislature. If there
19 was truly some decision at the outset as the Defendant's
20 contend that this was all in conjunction and
21 coordination, why would he have said here that
22 legislation wasn't strictly necessary?

23 So what were the Governor's actual motives?
24 Well, I think we have that evidence in the record,
25 Exhibit A, and it has the press release from when he

1 issued the first executive order. And again, when I
2 refer to the first executive order, Your Honor, I'm
3 talking about N-64-20, which I believe is -- I believe
4 that would be in Defendant's Exhibit -- Defendant's
5 Exhibit 4, and it's also in our Exhibit A. Sorry,
6 Exhibit A. And that, again, was issued on the 8th day
7 of May of 2020.

8 But looking at our Exhibit A, Your Honor,
9 there's -- you know, there is a press release there that
10 was issued in conjunction with that order, and it's very
11 clear from that press release that the Governor wanted
12 to be the first in the nation to call for an
13 all-mail-ballot election. The issue of mail ballots
14 have become a big issue nationally. There have
15 obviously been a lot of partisan -- I think that we
16 could almost take judicial notice of back and forth
17 about mail ballots. And the Governor wanted to be the
18 first in the nation to have an all-mail-ballot election.
19 And he essentially -- this essentially stated as such in
20 that press release. And, of course, going back to
21 Exhibit H in that article, he again stated on May 22nd
22 that his order was on firm legal ground. He believed he
23 had the power of his own accord to issue this order.

24 It's only after this lawsuit was filed on
25 June 11th, 2020 -- we're moving through the chronology

1 here. Most of these statements are in May. It's only
2 after our lawsuit is filed that we begin to see a change
3 in posture. First, we have this allegation of working
4 in tandem. As we've gone through, there is no evidence
5 of that in the record, and -- that the Defendant's can
6 point to. Then we started to hear in the arguments that
7 the order was superseded or ratified by the legislature
8 in their legislation. Again, no evidence of that and I
9 can go -- I can go into some more detail there. The
10 evidence doesn't show that.

11 So now we have this moot because the
12 election is already ongoing. And so now here we are at
13 this point. It's always been Defendant's intent to wait
14 this out and to hope to avoid a -- a check on his
15 overreach of power. I like to point to Exhibit 10. Our
16 argument has always been the same, Your Honor, and we
17 made it in our first ex parte application for a
18 temporary restraining order that this was a clear
19 violation of the separation of powers. We outlined why
20 the law prohibited this action. And we think that was a
21 key indication of why -- a key part of why a temporary
22 restraining order was initially issued in this case.

23 But getting to this issue of was the
24 Governor's order superseded because the Governor and the
25 Defendant wants to use Exhibit 18 as evidence of that.

1 And Exhibit 18, if we turn to that -- Exhibit 18 is what
2 we were discussing a little bit earlier, and I'll get
3 into a little bit more detail on it in the motion in
4 limine, is a sort of statement of the Governor when he's
5 issuing his last signings of bills on September 30th,
6 2020. It's the last day for him to sign a bill into
7 law, and he makes a statement here of -- of, you know,
8 the things that he is, you know, signing and, you know,
9 what the importance of those measures. And for the
10 first time on September 30th he makes this statement
11 that legislation has superseded -- at the bottom of page
12 two here of Exhibit 18 -- legislation has superseded the
13 following executive orders. And he points out that
14 executive order N-64-20 and executive order N-67-20 have
15 been superseded by an 860 and 423. On September 30th,
16 that is the first statement of the Governor that it has
17 been superseded. Of course, a statement alone doesn't
18 mean that it, in fact, has been superseded. That's just
19 a statement, and we would argue it's a very self-serving
20 statement.

21 But the facts -- we can look to the facts in
22 the record to undermine that contention. And what I'd
23 first say is let's look at Exhibit I and Exhibit 6.
24 Exhibit 6 is, of course, an 860 as it's been fully
25 enacted and signed into law. And if the Court wants to

1 look through the whole thing, but, I mean, I think if
2 you look through the whole thing, you will see very
3 clearly there is no requirement that counties, again,
4 use intelligent mail ballot on their ballot envelopes.
5 That -- that bill, as we know, was enacted on June 18th,
6 2020.

7 Yet on July 14th, 2020, we have Exhibit I,
8 which is the secretary of state telling counties, in the
9 very first paragraph on the first page of Exhibit I, a
10 memo to county elections officials, all county clerks,
11 registrars of voters wherein it states, "Executive order
12 N-67-20 provides that all county elections officials are
13 required to use intelligent mail bar codes on
14 vote-by-mail ballot envelopes." And they are very clear
15 about it. They -- even after 860 is passed on
16 June 18th, the executive branch, the secretary of state,
17 is still requiring and even cites to his authority
18 executive order N-67-20. That doesn't sound like an
19 order that's been superseded by legislation. In fact,
20 in that same paragraph you'll note that they actually
21 note that the state legislature passed Assembly
22 Bill 860, and yet they are still requiring that. Again,
23 in fact, we don't see the superseding of the order
24 despite the Governor's statement.

25 And, of course, the order actually continues

1 to require intelligent mail ballot -- intelligent mail
2 bar code on envelopes, and we look to Defendant's
3 Exhibit 19 for that fact.

4 And in Exhibit 19 we, again, have another
5 memo from the secretary of state, this one dated
6 October 2nd, 2020, earlier this month. And if we go to
7 the eighth page of that document, page eight, there is
8 pages on the bottom of that, the eighth page of that --
9 page eight of that document under "tracking counties
10 using ballot tracks are generally required to use
11 intelligent mail bar codes with exceptions as authorized
12 by the secretary of state." So it's, again, being
13 required regardless of the fact that an 860 had already
14 been passed on June 18th, 2020.

15 Then if we look at SB 423, Exhibit 7, on
16 page three of that exhibit, section 1602 as is described
17 in the legislation makes amendment to section 4005, the
18 election code that I mentioned earlier. But you will
19 see very clearly it does not amend section 4005(a)(10).
20 It only amends that portion of the Elections Code to
21 provide for vote centers to only be open three days
22 before election. It does not do anything with regard to
23 the statutory law that Voter Choice Act counties must
24 have publicly-noticed meetings with voting rights
25 groups. That's what 423 does very clear. It does not

1 amend that Elections Code. But the order does, as we
2 pointed out in Exhibit 5. "By existing statutory law,"
3 and this is important, "the Voter Choice Act counties
4 were required to conduct the notice meetings with voting
5 rights groups." If they did not, it is only because of
6 this order. And again, it is not superseded even now.
7 If we go back to that Exhibit 19, the memo, again, from
8 secretary of state on page three, again, this is
9 October 2nd, earlier this month, October 2nd memo. On
10 page three, they are very clear about it,
11 additionally -- go midway down the page on Exhibit 3,
12 additionally, "VCA counties are not required to conduct
13 any in-person public meetings or workshops in connection
14 with the preparation of plans for the administration of
15 this election as provided for in section 405(a)(10)"
16 [sic], they even quote the statute that still says you
17 have to. But the secretary of state here is saying no,
18 you don't, on October 2nd. That's clearly still the
19 directive. The order has not been superseded no matter
20 what the Governor might say on September 30th.

21 And again, that's a statement on
22 September 30th that the Governor in Exhibit 18 makes
23 that statement and then we have a memo on October 2nd
24 still enforcing this order and its requirements.

25 And also contrary to Defendant's assertions

1 kind of throughout this litigation, there is no evidence
2 that the VCA counties, the Voter Choice Act counties,
3 that their plans had already been finalized. There is
4 no evidence in this record that they can point to. In
5 fact, the lang- -- I would point back again to the
6 language of SB 423 in Exhibit 7, and when we look at
7 that language, the latter part of this -- of this bill,
8 specifically on the fifth page there, there is 1604 on
9 the very bottom, 1604 of 423 describes a waiver process
10 by which counties, if they wanted to use less than the
11 one per 10,000 number for vote centers, could go through
12 a waiver process with the secretary of state to change
13 the number of locations that they were going to have.

14 And then on page seven of the legislation,
15 again Exhibit 7, page seven, we then have subsection
16 (4)(c) where it states, "The secretary of state will
17 establish a strike team to assist counties as needed to
18 acquire suitable locations for vote centers, polling
19 places, and consolidated polling places as well as other
20 assets necessary for the safe conduct of the
21 November 3rd, 2020, statewide election."

22 This bill, again, enacted on August 6, 2020,
23 has these procedures in place to allow counties to, one,
24 get a waiver for how many vote centers they have to
25 have, or polling places that they have to have, and

1 provides for a strike team to help counties with their
2 polling places and locations.

3 Why would you need to have that in the
4 legislation if the plans were already finalized? It
5 doesn't make any sense. They clearly weren't finalized
6 and then we put procedures in place to help them make
7 their final plans for where vote centers were going to
8 be.

9 So again, I mean, it's very clear from the
10 evidence, it wasn't superseded, and there is no evidence
11 in the record for Defendant's assertions that it was
12 except his own self-serving statement on September 30th,
13 2020.

14 Was this -- was this order consistent with
15 previous executive orders? The evidence says no. And I
16 won't delve into it too deeply, but Exhibits 12 through
17 16 that have been submitted by the Defendant are
18 previous executive orders of Governor's and we can see
19 very clearly if we read through them they are very
20 limited in scope. They are often issued a couple of
21 days before the special election, and in most of those
22 cases, they were issued to allow first responders who
23 were away fighting wildfires to vote by mail. It
24 certainly was not a complete change in our
25 Elections Code for everybody throughout the state. So

1 really can't look at those as examples of this same kind
2 of power that the Governor used.

3 Here's a key factor in all of this, and I
4 think very fundamental to many parts of this case. Is
5 this an issue that is likely to recur? I think the
6 Defendant would really like to make this only about
7 executive order N-67-20, and say, hey, you know, this
8 case really only centers on that. And it's either, you
9 know, if you want to say that that's null and void, you
10 know, that almost seemed to be okay with that.

11 But is this an issue -- you know, the key
12 issue here, is this an issue that is likely to recur?
13 And the evidence before you says yes. And I would point
14 to first Exhibits A, D, and 5 are three separate
15 instances this year the Defendant has issued orders
16 relating to elections. And those, again, are the order
17 he issued regarding to a special election earlier this
18 year, the all-mail-ballot election order N-64-20, and
19 then, of course, the one that we have highlighted in
20 this case, N-67-20. Three different times he's done it
21 this year alone.

22 Exhibit J which shows the history, it's from
23 the official secretary of state's website that shows the
24 history of special elections in this state.

25 THE COURT: What exhibit? I'm sorry,

1 Counsel.

2 MR. GALLAGHER: I'm sorry, that's Exhibit J.

3 THE COURT: Thank you.

4 MR. GALLAGHER: And when we look to that
5 public record, we can see that we have had a special
6 election every year for the last 15 years in California.
7 So we are very likely to have another special election.
8 We've had one in every year for the last 15 years. And
9 again, as I mentioned, there is no end in sight to this
10 emergency. And, in fact -- I mean, I think it's
11 relevant just this last week -- just this week the
12 Governor has announced that he will have a state task
13 force review any vaccine approved by the FDA which will
14 further delay any vaccine made available in California.
15 That's going to further delay the need for an emergency.

16 And the Governor has continued to assert
17 throughout this litigation that he has the full power, I
18 think in his reply brief in the Motions on Judgment of
19 the Pleadings, say that it is very clear that he has the
20 power to change elections law. That's very clearly in
21 the base of his power. And he continues to maintain
22 that. So it's very likely that he's going to continue
23 to act in this manner.

24 Exhibit F outlines the 53 orders that -- 53
25 of the orders the Governor has issued during this

1 pandemic -- during this pandemic. And when we look at
2 those orders as, you know, my co-plaintiff has pointed
3 out, I mean, they range many different code sections,
4 but I would just point out that these executive orders
5 issued during this pandemic, many of them do change
6 substantive statutory law. They change statutes, and I
7 would just -- I would just point out to you the order E
8 N-28-20, which changes landlord/tenant law in
9 California. We're very familiar with that that it's
10 fundamentally changed the rules regarding
11 landlord/tenant law.

12 When we look at, as my co-plaintiff pointed
13 out, the changes to paid sick leave, for instance,
14 changes -- what are the statutory rules for when paid
15 sick leave is required. That's N-51-20 in Exhibit --
16 Exhibit F. As my co-plaintiff also pointed out the
17 presumption regarding workers' comp. That is N-62-20
18 which is found on -- in the summary of those provisions
19 are found on page 102 of Exhibit F. We changed the
20 rebuttable presumption regarding workers' comp claims
21 overnight. The Governor did.

22 So these are just a few examples of where
23 the Governor continues to fundamentally change, alter,
24 amend state statutes. And as we've argued throughout
25 this case, it's not permitted under the Emergency

1 Services Act. So, again, all this goes to it is very
2 likely he's going to continue to do so.

3 And then I would point to Exhibit G, our
4 Plaintiffs' Exhibit G which is now he is changing policy
5 with regard to whether or not we can sell gas-powered
6 vehicles in California. You know, very broad overreach
7 of power, and he doesn't even -- he actually doesn't --
8 in this order, if we look at it, he doesn't even
9 reference the Emergency Services Act in doing this. He
10 is now just arbitrarily making policy for the State of
11 California. And, I mean, this is very similar to what a
12 legislature would do. He's establishing a target date
13 of when gas-powered vehicles should be eliminated. Now,
14 look, I understand this isn't the subject of this
15 particular case, but it is evidence of the fact that the
16 Governor continues to overreach his powers, and likely
17 we're going to be in this same situation again.

18 Normally -- and we have had many policies
19 pass through the legislature that, for example, set
20 targets for carbon emissions. The legislature does
21 that. And we have -- this very -- Exhibit G, the
22 Governor's executive order, that very same policy was
23 considered in the legislature twice in the previous two
24 years, and it failed passage of the legislature. And
25 now he does it by executive order. So therein, again,

1 we have continued evidence that this governor is not
2 just doing this in an isolated case. This is likely to
3 recur, and that goes certainly to the opposition to the
4 mootness issue in this case, but it also goes to the
5 need for injunctive relief, which we are also requesting
6 in this case where there is clearly evidence that this
7 is likely to recur and continue to be a problem. We
8 don't want to have to see case after case and
9 multiplicity of proceedings to challenge each and every
10 executive order. No, we should expect that the
11 Defendant stays within the lines of the Constitution and
12 the California Emergency Services Act. And I think
13 absent an injunction, we aren't going to have -- we
14 cannot be confident that's going to happen.

15 And that's why we say that -- you know, that
16 we are -- and when we request the injunctive relief, we
17 are -- if we are determining here today that he doesn't
18 have the power to amend statutes unilaterally, then he
19 must be precluded from doing so in the future. If he
20 does not have the roving power that my co-plaintiff has
21 talked about to enact orders and regulations through any
22 policy change desired, then there must be an injunction
23 that limits his power to some connection with a
24 provision of the Emergency Services Act. They must be
25 necessary, as the Act says, necessary to carry out the

1 provisions of the Act. That is why injunctive relief is
2 necessary here.

3 And so, Your Honor, I would just submit that
4 when we look, you know, there's a lot in these binders,
5 right, and I've just tried to cover, I think, the main
6 points on what the evidence shows, but I think when we
7 look at this universe of evidence that's before us, it
8 is very clear that we are entitled to the relief that we
9 sought -- that we seek here today, that the Governor
10 has, in fact, legislated, he has gone beyond the powers
11 that he has both under the Constitution and under the
12 Emergency Services Act, and not only should his order be
13 struck down, but he needs to be enjoined from doing this
14 again because it is very clear that he is already doing
15 it and will continue to do so unless so enjoined.

16 And with that I would -- I would close.

17 THE COURT: Thank you.

18 Mr. Killeen, it's 20 minutes to 12:00. You
19 certainly may start, but if you'd like to come back,
20 say, at 1:00 to start, you could certainly do that as
21 well.

22 MR. KILLEEN: Your Honor, could we take
23 maybe a five-minute break? My material is only 20 or
24 30 minutes. I think I could knock it out quickly.

25 THE COURT: Sure. We can take a recess.

1 MR. KILLEEN: At scheduled lengths.

2 (Recess: 11:38 a.m. to 11:51 a.m.)

3 THE COURT: The Court will recall Gallagher
4 versus Newsom, CV CS2912. The record will reflect that
5 all parties are present in court as previously
6 announced, and I won't require your formal appearances
7 again, but you certainly may.

8 Are you ready to proceed, Mr. Killeen?

9 MR. KILLEEN: I am, Your Honor.

10 THE COURT: You may.

11 MR. KILLEEN: Your Honor, before I begin my
12 presentation, I want to respond briefly to one point
13 Mr. Gallagher made, and he said, well, what were
14 Governor Newsom's real motives here, and earlier today
15 the Court excluded Exhibits 3 and 17 on the basis that
16 the Court did not need to get into Governor Newsom's
17 motives and could decide the case solely based on
18 looking at the executive order and looking at the
19 applicable law. So, again, if Governor Newsom's motives
20 are in play, then we would ask the Court to consider
21 Exhibits 3 and 17.

22 Your Honor, starting with mootness, we've
23 briefed the issue exhaustively. The Court is familiar
24 with it. The Governor formally withdrew this executive
25 order this month, and while Plaintiffs characterized

1 that as self-serving, however self-serving it is, it is
2 effective. It's an official act of the Governor, and if
3 the Governor were to try to enforce something that he
4 had publicly, in writing, formally withdrawn, this Court
5 or any Court in the state would call him to the carpet
6 on that. So the executive order is withdrawn.

7 Also, even if it were not, an order from
8 this Court would have no effect -- would have no effect
9 on the upcoming election. The ballots have been mailed
10 out; the polling places are set; all of the drop boxes
11 are in place; all of these procedures are governed by SB
12 423 and will be in place no matter what this Court does,
13 so this Court's ruling will have no practical effect on
14 the election. And as we've briefed, it is too
15 speculative to say what will happen in any future
16 special election.

17 Turning to the merits, Your Honor, nothing
18 has changed since the Court denied Plaintiffs' Motion
19 For Judgment in the pleadings two weeks ago. If their
20 arguments lacked merits two weeks ago, they still lack
21 merit now.

22 The point of the Emergency Services Act is
23 to enable the State to respond quickly to an emergency.
24 So as Mr. Kiley read from our brief earlier, if the
25 earthquake hits or the fire starts or the dam breaches

1 or the pandemic explodes, there necessarily is a gap in
2 time between the event and when the legislature is able
3 to pass new legislation. The legislature, by its
4 nature, cannot act as quickly, and so it authorized the
5 Governor to act immediately to deal with emergencies.

6 In that gap between the emergency and later
7 legislation, not only may the Governor suspend
8 regulatory statutes, but affirmatively he may exercise
9 within the area designated all police power vested in
10 the state by the Constitution and the laws of the State
11 of California. Your Honor, it doesn't say all police
12 power vested in the Governor. It says all police power
13 vested in the state. And the other language in that
14 statute is not language of limitation, it's definitional
15 language showing that it's all police power vested in
16 the state.

17 And, of course, under section 8657 he may
18 also make orders and regulations necessary to carry out
19 that police power. Plaintiffs read section 8627 as the
20 Governor's authority being limited to existing laws of
21 the State of California. So the Plaintiffs state that
22 the Governor can suspend statutes, but he cannot
23 affirmatively put anything in their place in an
24 emergency.

25 Your Honor, that's not how the California

1 Supreme Court characterized the ESA in the Macias case.
2 As in the last hearing, I would ask the Court to read
3 Macias closely, and it's telling that the Plaintiffs had
4 not cited or discussed the Macias at all today, because
5 the Supreme Court in the Macias case said that the
6 Governor's emergency powers are, without a doubt, the
7 single most compelling and absolute exercise of
8 sovereign authority that the state, acting through its
9 chief executive, may pursue.

10 And the Supreme Court specifically said that
11 generally individuals cannot, quote, second guess or
12 affirmatively interfere with a state's decision as to
13 how best to respond to the emergency.

14 So the discussion that we're having here
15 today, Your Honor, should the Governor have done
16 something in May or August, all of that is encompassed
17 within the Macias court's claim because in every
18 emergency someone is going to be unhappy. In Macias it
19 was a person that was unhappy with the state's medfly
20 infestation and came into court and said you shouldn't
21 have done that, and that's a simplification of something
22 of a complicated case, but that's the gist of it,
23 Your Honor. And then the Supreme Court said, no, in the
24 middle of an emergency these sort of operational
25 decisions cannot be second guessed. So all of these

1 statements in Macias would make no sense if the Governor
2 was limited to just suspending statutes and sitting on
3 his hands in the hope that the legislature would
4 eventually act. If the Governor can suspend statutes
5 but not direct what will happen next, then you have a
6 vacuum. Local officials are told, while we're
7 suspending this statute, you can't use this, but we're
8 not going to tell you what to do next.

9 And the local officials would then be stuck
10 waiting, hoping that the legislature would act
11 eventually. Is that how an emergency should be
12 addressed? Of course not. That's why the legislature
13 vested all of the police power of the state in the
14 Governor until the legislature itself can act.

15 Your Honor, Plaintiffs keep saying, well,
16 the Governor does not legislate. And that's a truism.
17 It's basically three branches of the government. The
18 Governor cannot legislate. But an emergency is the one
19 situation, maybe the only situation, that a legislature
20 literally cannot legislate quickly enough to address all
21 of the problems that arise from an emergency.
22 Emergencies are different. They are unique situations,
23 and that's why the legislature authorized the Governor
24 to exercise this wide power on a short-term basis.

25 Your Honor, the legislature has acquiesced

1 in this understanding of the Emergency Services Act. In
2 Defendant's Exhibits 12 through 16 a clear pattern
3 emerges. In a public emergency that affects an
4 election, the Governor suspends statutes and then
5 affirmatively prescribes the next step, as the Governor
6 did here. Like in 1992, Governor Wilson suspended two
7 statutes and then directed the local officials to accept
8 registrations by a certain date. In 1993
9 Governor Wilson suspended statutes and then directed
10 elections officials to issue provisional ballots. In
11 2009, Governor Schwarzenegger suspended statutes and
12 directed elections officials to give provisional ballots
13 to the relevant people. Again in 2009
14 Governor Schwarzenegger affirmatively directed that
15 firefighters and emergency workers be able to cast their
16 ballots until 10 p.m. not 8 p.m. That's legislation
17 according to the Plaintiffs. And in 2017, Governor
18 Brown issued an executive order related to the wildfires
19 in Sonoma County. At that time, the ESA was not in
20 effect yet, and the county could only hold an all-mail
21 election under certain circumstances even though Sonoma
22 County otherwise would not have been able to hold an
23 all-mail election, Governor Brown suspended the relevant
24 statutes and said you're voting by mail. So in each
25 case the Governor suspended and then the Governor

1 prescribes.

2 Are there differences in degree between
3 those executive orders and this case? Absolutely. But
4 that's a function of the fact that this is a bigger
5 emergency. And, Your Honor, one thing we have all been
6 grappling with is that there is very little case law
7 interpreting any Emergency Services Act, but that's
8 largely a function of the fact that this may be the
9 first emergency in the State of California that has
10 affected daily life of all of California's 40 million
11 people to this extent. You look back in history, lots
12 of earthquakes, lots of droughts. Drought might be the
13 closest example. Medfly infestations, a key prong in
14 the ESA law. Wildfires. But this is perhaps the
15 biggest emergency that California has had to face. It's
16 not surprising that the emergency authorities would
17 sweep more broadly in this emergency than they have in
18 other emergencies.

19 So the Governor is not limited only to
20 suspending statutes. And if the question is -- and if
21 the question here is, again, should the Governor have
22 acted in May instead of August to secure the election?
23 That is exactly the sort of operational decision in the
24 emergency that the California Supreme Court has said
25 cannot be second guessed by the courts.

1 But even though that decision cannot be
2 second guessed by the courts, it can be second guessed
3 by the legislature. And that brings us to the
4 separation of powers argument.

5 So there are two features of the Emergency
6 Services Act that make it constitutional. First, the
7 legislature can always end the emergency. And as we
8 discussed at the last hearing, like, yes, that's the
9 extreme option, and the Court expressed some discomfort
10 at the idea that the legislature would just be ending
11 the emergency like this all of the time. But that is a
12 critical distinction in terms of preserving the
13 constitutionality of the act, and that's the big
14 difference between this case and Michigan where there
15 was no check. As soon as the Governor declared the
16 state of emergency, there is no -- there is nothing in
17 the statute that enabled anyone to end it, which the
18 Court found problematic.

19 Second, short of that, the legislature can
20 continue to legislate, and that's what happened here,
21 Your Honor. In his executive order, the Governor
22 expressly welcomed legislative activity. He said -- he
23 said that nothing in his order would, quote, limit in
24 any way the enactment of legislation concerning the
25 November 3rd, 2020, general election. That's

1 Defendant's trial Exhibit 5. And once an 860 and SB 423
2 have been passed, he said, quote, legislation has
3 superceded the following executive orders which have no
4 probative force or effect as of that legislation's
5 effective date, referring to an 860 and SB 423. That's
6 Defendant's trial Exhibit 18.

7 So Your Honor, as we said at the last
8 hearing that's exactly how the system is supposed to
9 work. At the beginning of the emergency, the Governor
10 acted and then the legislature deliberated and
11 superseded that executive action. The legislature's
12 ability to legislate also solves any delegation problem,
13 Your Honor. In terms of how this upcoming election will
14 be conducted, the legislature resolved the fundamental
15 policy issues and provided adequate direction for that
16 policy through an 860 and SB 423.

17 Your Honor, there is no evidence that the
18 Governor ever viewed his executive order as being in
19 conflict with an 860 and SB 423 once they passed. Once
20 the legislature enacted an 860 and SB 423, they were the
21 law; the executive order was not the law. Were there
22 minor differences between the executive order and the
23 legislation? Yes, there were, but that's not the
24 relevant question. The relevant question is once the
25 legislation has been passed, which one is the law? If

1 the Governor were here saying my executive order is law,
2 and the legislature were here saying our legislation is
3 law, then we might have a conflict and it would be a
4 very different case.

5 Your Honor, Plaintiffs have the burden of
6 proof here. They can point to minor differences between
7 the executive order and the legislation, and
8 Mr. Gallagher went into exhaustive detail about
9 intelligent, you know, bar codes and that sort of thing,
10 but they have presented no evidence that Governor Newsom
11 did not yield his executive order to an 860 and SB 423.
12 There is no evidence that once that legislation was
13 passed Governor Newsom ever suggested, said anything
14 that his executive order was still in effect. In fact,
15 as we already discussed, he's now formally withdrawn it.

16 Your Honor, Plaintiffs cite their Exhibit I
17 where the secretary of state referred to the executive
18 order in July, but the secretary of state is not the
19 Governor, and he's not a party here, and even if he
20 were, even the secretary of state confirmed recently
21 that, quote, Assembly Bill 860 and Senate Bill 423
22 superseded executive orders N-64-20 and N-67-20 upon
23 their enactment. That's Defendant's trial Exhibit 19 at
24 footnote one. Plaintiffs also rely on the fact that in
25 May Governor Newsom said that the legislation was not

1 strictly necessary. That's the Cal Niner's article that
2 is their Exhibit H. And that was because in May neither
3 executive -- neither an 860 nor SB 423 had been passed.
4 Once they were passed, the executive order gave way to
5 legislation. And again, Your Honor, there is no
6 evidence that after the legislation was passed Governor
7 Newsom ever -- ever did or said anything to suggest that
8 the executive order was still the law rather than the
9 newly enacted an 860 and SB 423.

10 So what evidence is before the Court shows
11 that the Governor intended for legislation to supercede
12 his executive order. He said that explicitly in the
13 executive order itself and that it, in fact, did so. As
14 soon as the executive order was enacted, the Governor
15 withdrew it at the end of the legislative session.

16 Your Honor, there is no evidence in this
17 record that the Governor ever took the position that the
18 executive order trumped an 860 or SB 423.

19 As the third DCA recognized, there could be
20 another case where there is a real conflict between the
21 Governor and the legislature, but this is not such a
22 case. And that is why the legislature is not here
23 challenging the Governor's authority. Two members of
24 the legislature are here, but the legislature as a body
25 is not here and has not expressed any dissatisfaction

1 with Governor Newsom's conduct and has not said, you
2 know, hey, Governor Newsom, we passed SB 423 -- we
3 passed an 860 and SB 423, but you're still asserting
4 that your executive order controls. It's because it
5 hasn't happened.

6 Your Honor, on the facts of this case, there
7 is no infringement on the legislature's authority and
8 there is no delegation problem because the legislature
9 prescribed what exactly would happen in the November
10 election. And that's why on the facts of this case the
11 Complaint must be dismissed or judgment entered in favor
12 of the Governor.

13 And, finally, Your Honor, I want to address
14 the remedy briefly. The Complaint challenges executive
15 order N-67-20. If the Court looks at the Complaint,
16 there are no other executive orders listed in the
17 Complaint. If the Court were inclined to rule against
18 the executive order, it can enjoin the executive order,
19 and it can declare what the law means as part of that
20 ruling, but it would be -- as we explained in our
21 pleadings, it would be unright to enjoin future actions
22 of the Governor that have not occurred yet, and the
23 remedy itself would also raise profound separation of
24 problems -- powers problems, Your Honor. If the Court
25 is issuing an order saying, Governor, don't do bad

1 things in the future, what does that mean? Does that
2 mean that every time the Governor acts in the future he
3 needs to bring it to this Court to -- to -- to check on
4 it before it goes out, or that every plaintiff
5 throughout the state has standing to bring every
6 executive action back to this Court? I think as we
7 briefed specific legal foundation, the other cases we
8 briefed, such a broad order is not authorized under
9 California law.

10 I'm done, Your Honor.

11 THE COURT: Thank you. I did have a
12 question.

13 So you refer in your briefs and today in
14 terms of this broad police power, correct?

15 MR. KILLEEN: Yes, Your Honor.

16 THE COURT: Where is that defined? Where
17 is -- where is the authority of the police -- what
18 constitutes -- what elements constitute police power?

19 MR. KILLEEN: Your Honor, I would draw your
20 attention to our -- I think it's our opposition to the
21 Motion For Judgment on the pleadings. There are --
22 Massengil, maybe, comes to mind. Cases defining what
23 the police power means within the respective
24 jurisdiction, and it's a -- it's essentially plenary
25 authority, but, Your Honor, we did address that in one

1 of our briefs. And we would be happy to provide
2 supplemental briefing on that if the Court wanted to.

3 THE COURT: I -- plenary authority can mean
4 many things, I would think, especially when it comes to
5 mobilizing law enforcement or other larger issues
6 relative to administrative offices or various
7 departments within the state government. Seems like a
8 leap of police power to cover legislative functions, and
9 I'm wondering if that's truly given to the -- your
10 argument that the writing law is given to the Governor
11 once he's declared a state of emergency and has been
12 vested with these broad police powers.

13 MR. KILLEEN: Your Honor, I think given the
14 unique circumstances of the Emergency Services Act,
15 that's the -- that's the necessary result because
16 affirmative action will be needed. The Governor is
17 willing to take affirmative action to solve whatever
18 problem is presented to him. So what -- you know, one
19 can characterize it as writing law, but the Governor
20 needs the ability to take steps beyond simply suspending
21 statutes to solve a problem before him while the
22 legislature is deliberating about the issue and while
23 the legislature may potentially supercede the
24 legislation.

25 THE COURT: So, Counsel, when I look at the

1 emergency authority powers to the Governor, so this is
2 starting at 8565 and specifically 8567 that all have
3 been briefed, correct? Okay. So it speaks really
4 specifically about amending, rescinding orders,
5 regulations, talks about widespread publicity talk,
6 notice given to all such orders, regulations, amendments
7 and recisions. And in many, many places it talks about
8 the -- it vests authority for amending, rescinding,
9 making directives. There's a lot of power. I don't
10 disagree with you at all regarding the power, but I
11 don't see anywhere in any of the enabling statutes where
12 it actually talks about writing law or enacting statute.

13 MR. KILLEEN: Your Honor, it does not use
14 the words "enacting statutes," but it does use the words
15 "making orders."

16 THE COURT: Making orders.

17 MR. KILLEEN: Right. But that's a question
18 of form over substance if the Governor is saying this is
19 how we're going to conduct the election, whether or not
20 that is just writing a statute or making an order, he
21 can put it in an order like he did here today. He made
22 an order. He made an executive order. That's within
23 his authority.

24 THE COURT: But if it amends statute, in
25 your view and your client's view, that is lawful under

1 the state of emergency and ESA?

2 MR. KILLEEN: He already has the authority
3 to suspend statutes, Your Honor. He can just say, we're
4 suspending the statute. So the question is what's the
5 next step? Who makes the decision to fill that gap.
6 And in this case, the legislature ultimately made that
7 decision, but in that gap while the legislature was
8 working, the Governor started the process, and I would
9 direct the Court to the findings the Governor made in
10 the executive orders. The Court can give whatever
11 weight the Court wants to, but in his findings, the
12 Governor was describing the serious challenges the state
13 might be facing in the November election given that we
14 did not know what the pandemic looked like and given the
15 high degree of uncertainty in April and May that was
16 affecting all of our lives, and we just -- we didn't
17 know, Your Honor, and so the Governor was using his
18 emergency authority to start the complicated and
19 difficult and uncertain process of securing the election
20 when it needed to -- when it needed to start.

21 And then, Your Honor, just returning to a
22 point you started discussing with me at the beginning of
23 this. 8627 is in some sense a catchall statute. The
24 Emergency Services Act gives the Governor many
25 enumerated powers. It says the Governor can come onto

1 your property and do all these things, but the
2 legislature wisely anticipated that emergencies come in
3 many different shapes and sizes, and there might be
4 something that the Governor needs to do that is not
5 within those enumerated powers, and that's why it
6 included the catchall in 8627 and vested the Governor
7 with -- with this extraordinary language.

8 THE COURT: Thank you. Anything else at
9 this time?

10 MR. KILLEEN: No, Your Honor.

11 THE COURT: Mr. Gallagher?

12 MR. GALLAGHER: Your Honor, just very
13 briefly.

14 I -- I don't know what Defendant could cite
15 in case law that says that there is no difference
16 between orders and statutes. I think there would be
17 many things we could cite in case law that shows that
18 there is a very big difference.

19 Orders and regulations have always been seen
20 as executive powers to administer. Very clear. They
21 are not -- they don't -- they are not interchangeable
22 with statutes. Statutes are legislative in nature,
23 legislative powers. They are passed by the legislature
24 and then ultimately signed into law by the Governor.
25 There is a very clear distinction. So, you know, if --

1 if that is Defendant's argument, he would need to cite
2 something that says orders and statutes are
3 interchangeable. That's not the case.

4 And to the point about police power which
5 you inquired into, police power is also seen as an
6 executive power. It's not a legislative power. It's an
7 executive power. The police power is the enforcing --
8 enforcing of the law.

9 So to now somehow change that into, no, it
10 includes legislative powers, again, cite to me the case
11 law that says that. I mean, the plain -- again, a plain
12 reading of the statutes, I think very clearly says he
13 has strong executive powers, but they are very clear to
14 draw the distinction that he doesn't have certain
15 legislative powers. Right? And even the suspension
16 statute, Defendant's making this argument that, well, if
17 you have this power to suspend, then you have to have
18 the power to insert something in behind it.

19 Well, just look at the statute itself. It's
20 very clear, 8571, where it says, "During a state of war
21 emergency or a state of emergency, the Governor may
22 suspend --" and this is where it gets specific, "any
23 regulatory statute, or statute described in the
24 procedure for conduct of state business or the orders,
25 rules or regulations," again orders, rules or

1 regulations, executive administrative of any state
2 agency, "including subdivision D of section 1253 of the
3 Unemployment Insurance Code." So it's very specific.

4 And then it clarifies, "where the Governor
5 determines and declares that strict compliance with any
6 statute, order, rule, or regulation would in any way
7 prevent, hinder, or delay the mitigation of the effects
8 of the emergency."

9 The whole intent behind the plain reading of
10 the statute is if something is getting in the way of --
11 of, again, preventing, hindering, or delaying the
12 mitigation of the effects of the emergency, then you can
13 remove that obstacle out of the way. But there is
14 nothing in there that says, oh, but also, you get to put
15 something in there. It is very clear it doesn't allow
16 for that. It allows for you to remove the obstacle by
17 suspending that for the specific statutes. It is very
18 plain reading. We don't need to convolute it. It
19 certainly doesn't say in 8571 that there is the
20 additional ability to put something in place behind the
21 suspension. It's not there. And this is what the
22 Defendant continues to try to do is sort of add
23 something in it where it's not in the statute. Whereas
24 we have very clearly interpreted here is what the
25 statute says and here is what it means. And we have to

1 stick to the plain language and reading of the statute.

2 MR. KILEY: Your Honor, if I may just
3 briefly add. And I have other points I want to respond
4 to, but I can very well integrate that into the close as
5 well depending upon how the Court wants the rest of the
6 day to proceed.

7 But my co-counsel said it exactly right.
8 And if you look at the way that the Emergency Services
9 Act and this provision has been used, that's the way it
10 has been used by past governors. Even the orders they
11 cite only deal with suspension. They don't deal with,
12 you know, creating affirmative policies. And this
13 notion of gap filling is a total fix because look what
14 happened in this case. The Governor declared we were
15 going to have an all-mail election, and then he needed
16 to pass various policies related to that. That wasn't
17 filling in any gaps that were existing. That was
18 creating an affirmative policy, a new policy, and that's
19 what we see with these various other orders that we've
20 been citing throughout the course of today's proceeding
21 is that it involves the creation of affirmative
22 policies, not merely the suspension of statutes that are
23 getting in the way or imposing requirements that get in
24 the way of dealing with the emergency.

25 THE COURT: Counsel, I think everyone in

1 this room would agree that our right to vote and to vote
2 safely is critically important, and if the election
3 statutes as they were written or -- and have been
4 written except for this little window between now and
5 November the 3rd, if it was believed that they could --
6 we could not run a general election as we're accustomed
7 to having them in our community, certainly none of us
8 would have been okay with saying, well, we'll postpone
9 the election, or everyone who is in power right now can
10 stay in power. I don't think any of us would be
11 comfortable with that.

12 So can we agree that something needed to be
13 done in order to help ensure that people could -- that
14 the registered voters could vote and that they could
15 vote safely? I think we could agree to that.

16 MR. GALLAGHER: Right. And again, our main
17 argument is the legislature was already acting to do
18 just that and, in fact, did do that. So again, what was
19 the urgency and where in the evidence in the record is
20 the urgency that the Governor needed to act outside of
21 the legislative process? There is no evidence before us
22 that really proves that point.

23 The evidence that is before us shows the
24 legislature was already doing this and providing those
25 because they did understand that there was a need to

1 respond. But as a secondary, just following the
2 reasoning there, could it reasonably -- could this
3 election reasonably have been conducted safely under
4 existing statute? Everyone who did not want to go to
5 the polls could ask for a mail ballot and could sign up
6 for an absentee ballot. There is nothing in the law
7 that precluded that. So anyone who is concerned about
8 safety and going to the actual polls under the existing
9 statute that was already there could request and get a
10 mail ballot. So the law was no impediment to that.
11 Right? And then otherwise, we provided for in-person
12 voting, which the Governor's order does too. So you
13 could very rationally argue that under the existing
14 statutory structure, yes, you could have had a safe
15 election. You know, that people could have decided to
16 vote by mail, all those that wanted to instead of the
17 polls, and we could have had, you know, polling places
18 like we normally do or vote centers in the case of Voter
19 Choice Act counties.

20 So, again, I mean rationally is there
21 really, again, that -- that you had to get rid of the
22 statutory scheme in order to necessarily deal with the
23 emergency? I don't think there's been any showing of
24 that.

25 MR. KILLEEN: Your Honor, two points. One,

1 that's exactly the sort of second guessing that the
2 Macias Court foreclosed because they said earlier in an
3 emergency where extreme action needs to be taken someone
4 is going to be unhappy. Why didn't you spray my field
5 instead of his field? Why did you put a polling place
6 over there instead of over here? That will happen in
7 every emergency, and the California Supreme Court said
8 the Governor gets to make that call, again, unless the
9 legislature comes in later and supersedes it. But the
10 Governor gets to make that call.

11 Your Honor, going back to the police power,
12 we did address this on page 13 in opposition to
13 Plaintiffs Motion For Judgment in the pleadings. The
14 Court can refer to that, but we did cite the Massengil
15 case --

16 THE COURT: I did see that. Please go
17 ahead.

18 MR. KILLEEN: Right. Massengil 102 Cal.
19 App. 4th 498, and the Candid Enterprises case, 39 Cal 3d
20 878 which describes the police power as the, quote,
21 plenary authority to govern.

22 Again, Your Honor, if you want more briefing
23 on what the police power is, we'd be happy to provide
24 that, but that certainly should get the Court where it
25 needs to go.

1 MR. KILEY: Your Honor, if I may on that,
2 Macias, because this case has been grossly
3 mischaracterized. If you look at what was actually
4 decided in the case, the issue presented to the Court
5 was the liability of a third party to provide warnings
6 that -- in a way that interfered and overrode what the
7 Governor was doing. So he's sort of trying to compare a
8 conflict between a private party and the government
9 somehow is analogous between to the legislative and
10 executive branches.

11 But more importantly, if you look at what
12 actually happened in that case, it illustrates precisely
13 our interpretation of the Emergency Services Act. The
14 Macias Court did not cite 8627. They -- you know, you
15 would think that there was this provision that was a
16 catchall to give the Governor the power to do whatever
17 he wants. They would have mentioned that. It's not
18 cited anywhere in the case. The provision they cited of
19 the Emergency Services Act was 8569 where it says, "the
20 Governor is charged with the responsibility to
21 coordinate the emergency plans and programs of all local
22 agencies. Such plans and programs to be integrated into
23 and coordinated with the state emergency plan, and the
24 plans and programs of the federal government and of the
25 states to the whole extent possible." It goes on to

1 say, "the Governor thereupon implemented the state's
2 peace time emergency plan calling upon all state
3 agencies to utilize the personnel, equipment, and
4 facilities at their disposal to alleviate the emergency
5 invoking a specific type of plan that is specifically
6 authorized in a specific provision of the Emergency
7 Services Act."

8 But moreover, the Court doesn't stop there,
9 it goes on to cite something like eight or nine
10 different provisions of the food and agricultural code
11 that the state's response was being conducted pursuant
12 to. We haven't heard any sections of the Elections Code
13 in this case that the Governor's response was executed
14 pursuant to. So the notion that Macias somehow stands
15 for the proposition that the Governor has just unlimited
16 and unbounded power under the Emergency Services Act is
17 not borne out by the actual text of that decision.

18 THE COURT: Counsel?

19 MR. KILLEEN: Your Honor, I already read the
20 plain text of the decision to the Court earlier. The
21 Court can read it. It's quite broad, and it's one of
22 the, what, three, four, five cases that actually
23 construe the Emergency Services Act, and it, along with
24 all of the others, envisions a very, very broad
25 authority on the Governor's behalf.

1 THE COURT: I don't think any -- I certainly
2 am convinced that the Governor has great authority, very
3 broad authority under the Emergency Services Act. I
4 just don't read anywhere in -- in the legislation, in
5 the enabling statutes that define the authority. I
6 don't find any language regarding amending statutes or
7 writing law. I just don't find that. And I do think
8 that that may be something you'll want to brief that
9 will -- will decide that, I guess, before we finish up
10 today.

11 MR. GALLAGHER: Well, I mean, if I
12 might, Your Honor.

13 THE COURT: Yes.

14 MR. GALLAGHER: Because it's not there is
15 the -- is the problem. It's not in the statute that
16 provides that authority. And again, if indeed this
17 statute is interpreted as -- as Defendant is asserting
18 right now, he's saying they have all power of government
19 in the Governor during an emergency.

20 One, I'd have to ask myself, I mean, looking
21 at the language of the Governor -- I mean the
22 legislature who wrote the law, clearly outlined very
23 specific -- they use specific words. They use statutes
24 here; they didn't use it elsewhere. They were very
25 clear in defining, when you look at the plain language

1 of the statute, what his authority is. So I think it's
2 very clearly outlined there. But if you're saying,
3 as -- if Defendant is really asserting that the
4 legislature said we are going to give you all of our
5 power during an emergency and that's what the Emergency
6 Services Act means, then it must clearly be
7 unconstitutional. It would have to be struck down
8 completely. In a way, the Defendant is being his own
9 worst enemy here with trying to claim that kind of
10 power. It's not in the statute. But if they clearly --
11 if they really want to keep asserting that position,
12 they are going to be -- they are going to be in danger
13 of losing the entire Act based on the very clear
14 reasoning of constitutional law and the recent Michigan
15 case that we have cited to. And that can't possibly be
16 the case that under an emergency we give away all
17 legislative power to the Governor completely because
18 that -- that appears to be what Defendant is arguing
19 right now.

20 MR. KILLEEN: Your Honor, the legislature is
21 not giving away anything. They can still legislate, and
22 in this case, they legislated and superseded the
23 Governor's executive order. In some extreme case where
24 you have a governor going rogue, the legislature can end
25 the emergency just like that.

1 THE COURT: But truly, we talked about this
2 yesterday, I think, or earlier in one of our sessions --

3 MR. RUSSELL: Two weeks ago.

4 THE COURT: -- two weeks ago, clearly that
5 is not a viable option with a pandemic. That is not a
6 viable option with a pandemic. Surely the legislature
7 would -- if those -- given those choices that -- I'm
8 speaking for the legislature here, but if I were a
9 legislature, I would prefer to feed on the issue of the
10 revision of the law or the writing of the law and make
11 sure that the rest of the emergency orders are in place
12 to ensure that the -- however many million we are -- 30
13 million?

14 MR. GALLAGHER: 35 million, almost 40
15 million.

16 THE COURT: 30 million people in California
17 can be as safe as reasonable -- reasonably possible and
18 still go about their work and their -- meeting their
19 needs and for survival. And so I don't -- I don't think
20 that that's even an option. It may be that the
21 Emergency Services Act may need to be amended in some
22 way or may need -- may require some kind of, I don't
23 know, dates when it would expire and then be renewed
24 or -- or a little window, a little authority to work
25 with the Governor for quick legislation if it's, in

1 fact, needed, but I'm not even sure that's allowable at
2 this point. I'm not sure even that would be -- might be
3 violative of the Constitution. I don't know. But for
4 greater minds than mine. I just think this is -- I
5 think this is really an important point of the case, and
6 what's occurred, and I'm not prepared to make my ruling
7 today. I do want to hear closing from all of you. It's
8 12:30. Unless you feel that -- I think I understood
9 that both sides wanted to close. Okay. So do you want
10 to --

11 MR. GALLAGHER: I'm -- I think we're fine to
12 proceed if you wanted to continue, or --

13 THE COURT: Do you need a break? Excuse me?

14 MR. KILEY: Could we have a 20-minute lunch
15 break and then come back and close?

16 THE COURT: We'll take a half an hour break
17 -- half an hour break and come back at 1:00 o'clock.

18 MR. KILLEEN: Your Honor, would we be able
19 to push through? Our closing is four sentences long.
20 Theirs is 15 minutes. Could we just push through?

21 MR. KILEY: That is my portion. Fine.

22 MR. GALLAGHER: Whatever the pleasure of the
23 Court is. I think we would be fine to continue and do
24 our closing, but --

25 THE COURT: Does anyone need a five-minute

1 break?

2 All right. Proceed.

3 MR. KILEY: Just one moment, Your Honor, I
4 want to respond to a few items raised by the Defendant.
5 And I'd like to provide a more detailed legal analysis
6 of the relevant statutes and constitutional provisions
7 of the case law in play.

8 First of all, the claim that the Governor
9 has withdrawn this executive order has just been made
10 for the first time in this litigation. The word
11 "withdrawn" has never been used. By contrast, there are
12 several executive orders where the Governor does
13 explicitly state he is withdrawing a previous order such
14 that it is no longer operative. That term has never
15 been used here. The Governor has expressed an opinion
16 as to the relationship between the executive order and
17 the legislation saying one superseded the other.

18 Counsel's assertion that the Governor has
19 withdrawn the order is not supported by the record and
20 is, in fact, directly contradicted by it.

21 MR. GALLAGHER: Yeah, I was confused by that
22 as well. Maybe just a quick question. I don't know if
23 this is appropriate. But quick, are you saying it was
24 withdrawn by his September -- by Exhibit 9?

25 MR. KILLEEN: Exhibit 9?

1 MR. GALLAGHER: I'm sorry, by Exhibit 19 --
2 or, sorry, Exhibit 18.

3 MR. KILLEEN: That was the Governor's formal
4 withdrawal of the executive order.

5 MR. GALLAGHER: Well, I would just point to
6 that exhibit. It's -- the exact wording as he says it
7 is superseded by. I don't see any statement in that
8 Exhibit 18, which we can all read for ourselves, that
9 the Governor has withdrawn his order. He states, again,
10 and I would say this is a conclusory statement, that his
11 order has been superseded by an 860 and SB 423.

12 MR. KILLEEN: Your Honor, he says that
13 the -- that the executive orders have no further force
14 or effect as of the legislation's effective date. I'm
15 not sure what else the Governor could say that would say
16 it would be withdrawn.

17 THE COURT: You know, the code talks --
18 repeatedly talks about rescission. Talks about having
19 the order -- orders, regulating it -- help me find the
20 language. Talks about -- I believe it talks about --
21 amend regulations, amendments or recisions thereof. You
22 see that language again and again and again. And I'm
23 interested that that word isn't being used. It's --
24 I -- I might sound like I'm splitting hairs but there
25 are a lot of different words. In fact, when we were in

1 court two weeks ago and I said, well, is suspended,
2 withdrawn, are all of these terms being used
3 interchangeably. What I was looking for at that time
4 was the rescission and that exact language because I
5 didn't see it -- I haven't seen it used, and I haven't
6 heard the activities that have been going on relative to
7 the executive order in question or others. I don't hear
8 that rescission order, and even in -- I think -- is it
9 No. 18 or 19 -- in 18, the final acts, doesn't use that
10 language either.

11 MR. KILLEEN: Your Honor, I believe two
12 weeks ago when the Court asked that question I said yes.

13 THE COURT: But I did not use the term
14 "rescission."

15 MR. KILLEEN: So I'll have to go back and
16 check -- so I'll go back and check the transcript,
17 Your Honor. I think I communicated that whatever the
18 magic word is the Court used in the executive order is
19 gone now for lack of a better term.

20 THE COURT: Anyway, it may be splitting
21 hairs, and it talks about the broad notice, the
22 really -- it's not just quietly it doesn't mean anything
23 anymore, it talks about the broad notice.

24 MR. GALLAGHER: That he would make it very
25 publicly -- yeah, in the statute. And you're right. I

1 mean, in -- in 8567 it's make, amend, and rescind orders
2 and regulations. Of course, our point is it really
3 doesn't matter what you say. You can say that something
4 is superseded, but as we pointed out, the facts show the
5 order is still being enforced. Exhibit 19 is very clear
6 on that. It still says VCAs don't have to have
7 meetings. The only source of authority for that is the
8 existing order. You know, it's still requiring
9 intelligent mail bar code even though there's nothing in
10 the legislation of the sort. Right? So just because
11 you say something, oh, this is no longer in effect, that
12 doesn't mean that it actually is. This is a conclusory
13 statement for the purposes of this litigation, but it
14 doesn't mean that, in fact, that has occurred. And I
15 think that's what the -- the facts of this case and the
16 evidence before us clearly shows.

17 THE COURT: Thank you.

18 MR. KILLEEN: Your Honor, may I respond to
19 that?

20 THE COURT: Of course.

21 MR. KILLEEN: So, Your Honor, as I said
22 earlier, there is no evidence that the Governor has
23 taken the position in any way, shape, or form that
24 executive order has any force or effect after the
25 legislation was enacted. Plaintiffs have pointed to two

1 statements of the secretary of state and extrapolated
2 that the order is still being enforced. The secretary
3 of state is not a party here. If the secretary of state
4 is illegally enforcing orders after the -- after the
5 Governor has withdrawn or rescinded them, then the
6 Plaintiffs can take that up with the secretary of state.
7 But there is no evidence on this record that the
8 Governor has treated these -- his order as anything
9 other than withdrawn or superseded after the legislation
10 was passed. And even the secretary of state in
11 Exhibit 19, footnote 1, himself confirmed that an 860
12 and SB 423 superseded the executive order.

13 MR. GALLAGHER: Right.

14 MR. KILLEEN: So if someone has a problem
15 with the secretary of state, they can take it up with
16 the secretary of state, but the secretary of state is
17 not a party here, and there is no evidence that the
18 Governor has treated the executive order as still in
19 effect.

20 MR. GALLAGHER: And the issue is not about
21 who is doing it. The issue is: Is the order still in
22 effect and being enforced? That's the issue. And it,
23 in fact, is, and the secretary of state is an executive
24 agency. They are charged with executing elections in
25 the state. That's primarily their duty, and then also,

1 you know, dealing with business formations and
2 et cetera, you know, they have an executive function.
3 They are definitely part of the executive.

4 But to his point -- his footnote in
5 Exhibit 19, okay, they -- again, he says that the order
6 has been superseded but then the very same document they
7 go on to tell VCAs that they don't have to have
8 meetings. You know, I mean, and there's no -- where is
9 the source of authority for that? It could only be the
10 order. Again, like, so when you look at the facts of
11 what they are saying in this document, there's a
12 difference between what you say and what you're actually
13 doing. And we're concerned here with whether the order
14 is actually being enforced. It is. And there's
15 really -- I don't think there's any dispute about that,
16 at least not in the facts of the record.

17 MR. KILLEEN: Your Honor, the secretary of
18 state is an independent constitutional officer. If you
19 want to enjoin the Governor based on what the secretary
20 of state is doing, we'd be thrilled to take that up.

21 And second, even if this were relevant, and
22 it's not, there actually is not evidence that anything
23 has happened on the ground. There is a director from
24 the secretary of state that we're all interpreting as
25 what is happening or not, but there is not actually any

1 evidence of what is happening in the counties right now.
2 As the Court does not need to go down this rabbit hole
3 because there is no evidence as to the Governor. But
4 the only evidence we have are speculations based on
5 these directives.

6 THE COURT: Well, during emergencies -- it
7 seems to me that during emergencies especially, but at
8 other times as well, it is wise and useful to use the
9 prescribed language for a specific act. So saying
10 withdrawn, suspended, I don't know -- I don't know
11 really what those words meant to you or to your client,
12 but I did think I knew what rescinded meant. And I
13 think that in emergencies it's important to be precise,
14 particularly when there are so many things happening at
15 the county level, at the city level. People's lives are
16 really turned upside down with this pandemic and
17 distance learning and all of the things that -- remote
18 working, everything people are having to deal with, I do
19 think there's something to be said during an emergency
20 to use the official language that is in the code. And
21 that's just an observation. But...

22 MR. KILLEEN: Sure, Your Honor. And if this
23 case hinges on the piece of paper that the Governor uses
24 to withdraw this executive order, we would -- we would
25 be happy to consult with our client and use the

1 appropriate form as the Court needed.

2 THE COURT: And that's fine. I just -- it's
3 just really more of an observation and suggestion. It's
4 not that I require the wording. It's that the code
5 seems to have chosen that word for the purposes of
6 clarity. That's how I read it.

7 One of the things I was wondering early on
8 in this case was why there wasn't anything before the
9 Court that had shown the rescission. But it had --
10 seems -- doesn't appear that it was an act on a specific
11 day. It was sort of a rolling suspension or a rolling
12 withdrawal, or a rolling -- I don't know that it's
13 actually been a rescission, though. I don't know if
14 there was technically a specific date.

15 Do you think there is?

16 MR. KILLEEN: So, Your Honor, Exhibit 18 was
17 the formal withdrawal, rescindence (sic), rescission of
18 the executive order throughout the summer --

19 THE COURT: Right.

20 MR. KILLEEN: -- as legislation -- as
21 legislation has been passed the Governor has been
22 consistently saying that his executive order has been
23 superseded in various cases. This is one of several
24 cases where the executive order has been challenged, but
25 Exhibit 18 is the -- is the formal act of the Governor

1 withdrawing the executive order.

2 MR. GALLAGHER: But again, even that is
3 suspect, Your Honor. It's suspect, right, because
4 the -- these bills we're talking about that supposedly
5 superseded the order were passed on June 18th, the first
6 one, and the second one was passed on August 6th.

7 Why didn't the Governor say when he signed
8 those bills that it superseded his order at that time?
9 Instead we have a statement on September 30th, you know,
10 more than a month after these bills had already been
11 signed by him, right, that he finally says, oh, I
12 consider these things superseded, and he kind of lumps
13 it in with other things, other bills as well. These
14 supercede my previous orders on September 30th, you
15 know. I mean, that's -- and again, it's a conclusory
16 statement. He doesn't use the word "rescind." He
17 doesn't use the word "withdrawn." He hasn't used that
18 word at all. It's just been in this litigation that
19 there's been this argument about whether or not the bill
20 superseded the order, and that's why you see the word
21 "superseded" used.

22 It was first used by counsel in this
23 litigation contending that there was -- that the
24 legislation superseded the order, and, therefore, the
25 case is moot. You know, and I think it's telling that

1 the Governor on September 30th uses that same term,
2 again, months after the bills had already passed.

3 THE COURT: Thank you. All right.

4 Mr. Kiley, I think you were closing.

5 MR. KILEY: All right. Thank you very much,
6 Your Honor. I'll just -- I'll address a couple other
7 things that were brought up by the opposition.

8 You know, the first is this idea that, well,
9 the legislature just can't act quickly enough. That's
10 kind of the main thread of their arguments. And, you
11 know, to the extent that that's true, that's the reason
12 why executive powers are vested in the executive branch
13 and why the legislature in 1970 came to a policy
14 determination to delegate the implementation of
15 particular policies relating to combatting emergencies
16 to the executive branch with a detailed law with
17 hundreds -- or with dozens of sections that, as they
18 acknowledge, has been utilized by Governor's for the
19 last 50 years. But their interpretation says that in
20 addition to all of that, the legislature tacked on a
21 provision that said, oh, by the way, you can have all of
22 our powers too and do whatever you deem is necessary
23 from a policy making standpoint. And there's no
24 precedent for that. There is no law behind that, and it
25 certainly isn't allowed by the principles of our

1 Constitution as we're going to discuss. And to the
2 extent that new circumstances present a need for a new
3 policy, well, that happens all of the time. The
4 legislature makes new policies every year that you might
5 have social harms if they didn't exist, and the
6 legislature has the ability to act very quickly as
7 circumstances warrant. So this sort of fear they are
8 trying to stoke is there would be no means to address
9 clear and present dangers in the absence of a full
10 usurpation of legislative power by the executive branch
11 are simply not borne out.

12 And then the second issue I wanted to
13 address was this idea that, you know, there has not
14 really been a conflict between the executive and
15 legislative branches here, and I think that counsel said
16 that the legislature has expressed no dissatisfaction
17 with the Governor's conduct. But, of course, that's not
18 the test. The separation of powers inquiry doesn't turn
19 on whether, you know, the current legislature and the
20 current governor, you know, happen to be getting along
21 in one way or another. The question is whether the
22 Governor is acting pursuant to lawful authority that is
23 vested in him by the Constitution or by statute.
24 Indeed, it's a very clearly-established principle that
25 the legislature cannot willingly delegate legislative

1 power, and sometimes it might even want to do. Our
2 Constitution does not permit the legislature to give the
3 Governor the power to legislate, as I'll address more in
4 just a moment.

5 But this particular case is actually a very
6 clear example of why courts insist upon a separation
7 between the legislative and executive powers and why
8 that's a fundamental principle of our Constitution
9 because, you know, let's assume we take their arguments
10 on face value. Let's assume for the sake of argument
11 that in this particular case there needed to be a signal
12 or direction, as they put it, as to how to conduct the
13 election sooner than the legislature could complete the
14 legislative process. And all of this kind of factual
15 since the legislature could have completed the process
16 much more quickly. That would nevertheless not be
17 justification for an unlawful executive order. An
18 executive order is a binding command. It's not some
19 signal. It's not guidance. It's a command. It's law
20 that can be enforced. So, you know, if the Governor had
21 wanted to provide some signal, he could have supported
22 -- expressed support for the legislation that was moving
23 through the process. In fact, it's actually very common
24 that stakeholders need to start making preparations
25 based upon their anticipation of what policy will

1 ultimately be formulating. But the important thing is
2 that by opting not to do that, but by opting instead to
3 make binding law himself, the Governor crossed a
4 constitutional line and that had consequences as far as
5 the policy that was ultimately formed. Because if his
6 goal was truly to facilitate the necessary planning by
7 elections offices while waiting passage of legislation,
8 he was assuming the legislation would mirror or be very
9 similar to the order that he enacted and it would, in
10 fact, give the legislature a reason not to have too much
11 of a difference from it because then if the county
12 elections offices had started making preparations one
13 way according to his order and the legislature came out
14 and passed a law that required something completely
15 different that would have created chaos, not the
16 certainty that they were asking for. So it forced the
17 legislature's hand basically towards the Governor's
18 preferred policy outcome, and the Governor could exploit
19 that logic on almost any issue by declaring the policy
20 himself and then inviting the legislature to take action
21 to, quote, ratify it, is a term that they use, which is
22 exactly backwards from the way it's supposed to work
23 under the Constitution, right, with the legislature
24 passing bills and then the Governor signs it. The
25 Governor could use that tool to always stack the deck of

1 the legislative process towards whatever he wanted by
2 making it so that, you know, just by making that the law
3 from the get go, you know, instead of having a budget
4 actually get passed and be appropriate, he could start
5 spending it, and then half the legislature hopefully
6 then have it approved afterwards, but that's not the way
7 that our system of government works.

8 So getting down to the core legal principles
9 here of separation of powers, we've already discussed
10 how Article III, Section 3 of the California
11 Constitution continues an explicit separation of powers
12 provision that not even the United States Constitution
13 has, and for the Governor, the California Supreme Court
14 has been very clear about what this means. Unless
15 permitted by the Constitution, the Governor may not
16 exercise legislative powers. That's Harbor v.
17 Deukmejian, the California Supreme Court. And by the
18 way, unless permitted by the Constitution caveat, that
19 accounts for the Governor's one use of what might be
20 deemed legislative power, and that's vetoing
21 legislation. There's a quote from the case of State
22 versus Holder that our Supreme Court has approved
23 several times that the executive in any Republican form
24 of government has only a qualified and destructive
25 legislative function and never creative legislative

1 power. Never creative legislative power.

2 So this is the idea behind the nondelegation
3 doctrine which our supreme court has said is well
4 established in California. The California Supreme Court
5 has repeatedly affirmed that the power to change a law
6 of the state is necessarily legislative in character and
7 is vested exclusively in the legislature and cannot be
8 delegated by.

9 And what's the reason for that? Why do we
10 have this constitutional principle that even a willing
11 legislature cannot give the Governor the power to
12 legislate. Well, the Supreme Court has said in the case
13 of Cutler v. Yocum that it rests upon the premise that
14 the legislative body must itself effectively resolve the
15 truly fundamental issues. It cannot escape
16 responsibility by explicitly delegating that function
17 that others or by failing to establish an effective
18 mechanism to assure the proper implementation of its
19 policy decisions. And sometimes the legislature might
20 even like the agency or the Governor himself to handle
21 these decisions, but the reason that our constitutional
22 doesn't allow that according to the Supreme Court in
23 Cutler is to preserve the representative character of
24 the process of reaching legislative decision.

25 That's what's been missing in all of these

1 orders that cover so many different types of policy that
2 exercise creative legislative power, which they don't
3 even contest, is the representative character of the
4 process.

5 But in this case, we're concerned with the
6 nondelegation doctrine as it applies to one statute, the
7 Emergency Services Act, because, again, it needs to be
8 emphasized that's the only authority the Governor has
9 cited in this action. That's the only authority cited
10 in the executive order and statute and that there's
11 never been anything more specific cited.

12 As we mentioned, a similar statute in
13 Michigan was deemed unconstitutional precisely on this
14 basis because it violated the nondelegation doctrine.
15 The Michigan statute does what the Governor claims
16 California's does, it gives the Governor power to act as
17 she deems necessary to protect life and limb which is
18 the same words quoted by the Defendant in the section of
19 his briefing on the so-called police power. The
20 Michigan Supreme Court held that this delegated
21 legislative power, because the Governor, once the
22 statute passed, could use to it create new policy across
23 any domain without any guidance from the legislature
24 other than it was necessary.

25 The Court held the word "necessary" wasn't

1 enough to guide guidance to transform an otherwise
2 impermissible delegation of legislative power into a
3 permissible delegation of executive power.

4 And this is the actual words of the Court
5 here: The contagions, accidents, misfortunes, and risks
6 and acts of God ordinarily and inevitably associated
7 with the human condition and with our everyday social
8 experiences are simply too various for this standard to
9 apply any meaningful litigation upon the exercise of the
10 delegated powers.

11 Simply put, the Emergency Stop Powers Law
12 intended for the necessary standard just as for the --

13 CERTIFIED SHORTHAND REPORTER: Mr. Kiley.

14 MR. KILEY: I'm too fast again?

15 Neither supplies genuine guidance to the
16 Governor as to how to exercise the authority delegated
17 to her, nor constrains her actions in any meaningful
18 manner.

19 Better?

20 CERTIFIED SHORTHAND REPORTER: A little
21 better.

22 MR. KILEY: Now, as they've raised in that,
23 as the Defendant has raised in his brief, this Court
24 acknowledged, in Michigan is actually not that common
25 for laws to be struck down under the Nondelegation

1 Doctrine, but the Court in that case added if the
2 emergency powers law does not constitute an excessive
3 delegation of power under our Constitution, what ever
4 would?

5 And that's the question I ask today as far
6 as how they've interpreted this Act and you've heard it
7 in the oral argument today. If that doesn't constitute
8 an unconstitutional delegation of legislative authority,
9 then what ever would?

10 So specifically the constitutionality of
11 this Act would turn on whether the statute provides
12 enough guidance for how the Governor exercises the power
13 conferred. And, if anything, California Supreme Court
14 actually takes the issue of unlawful delegation more
15 seriously than Michigan's.

16 So then the question is whether the statute
17 has enough guidance as to how the Governor is exercising
18 his or her authority so that it is not an unlawful
19 delegation and it's not delegating legislative power.
20 For a statute to contain enough guidance in Michigan,
21 the legislature must include intelligible principles of
22 guidance, but our Supreme Court requires something more,
23 an effective mechanism to assure the proper
24 implementation of his policy decisions. It is often
25 described as applying primary standards for the

1 implementation of the policy, suitable safeguards to
2 guide the powers used, and a yardstick guiding the
3 administrator.

4 So this is a question that has not been
5 answered by the Defendant at any point in this
6 litigation is what is the effective mechanism yardstick
7 or primary standards in the Emergency Services Act to
8 guide the Governor's use of powers granted by the Act
9 and assure their proper implementation. Rather than
10 providing such a yardstick or pointing to any such
11 guidance, they've argued that the Act provides plenary
12 authority to govern, however that might be defined, and
13 unrestricted police power caveated only by what the
14 Governor deems necessary.

15 So this admits of no limit on executive
16 stretch, no yardstick, no mechanism, no primary standard
17 in the statute itself to guide the executive in
18 exercising the powers conferred. It's precisely what
19 the nondelegation doctrine permits by the precedents of
20 our own supreme court, and by the logic of the Michigan
21 Supreme Court it would have to be struck down as
22 unconstitutional.

23 However, that is not the only option before
24 the Court because we've offered an alternative
25 interpretation of the Act. And our state Supreme Court

1 has made it very clear that when you have two competing
2 interpretations of a statute, one of which would raise
3 doubts as to its constitutionality, then you go with the
4 one that doesn't raise at least as many doubts about its
5 constitutionality. And that's the key thing for the
6 Court here to give what the so-called constitutional
7 avoidance can wait, the Court need not even be convinced
8 that their interpretation is unconstitutional but only
9 that it would raise questions, raise doubts as to its
10 constitutionality, and I'll give you a couple of
11 precedents on that from People v. Amore of California
12 Supreme Court.

13 "California Courts must adopt an
14 interpretation of a statutory provision which is
15 consistent with the statutory language and purpose,
16 eliminates doubts as in the provisions of
17 constitutionality."

18 Or you can look at the City of Los Angeles
19 v. Bellridge where it said you should go with the
20 construction that will render the act valid in its
21 entirety or free from doubt as to its constitutionality
22 even though the other construction is equally
23 reasonable.

24 This rule is based on the presumption that
25 the legislative body intended not to violate the

1 Constitution.

2 So that's kind of the setup I want to
3 provide for our interpretation of the Act that even if
4 you viewed the two interpretations as equally reasonable
5 or even if you thought the Defendant's was somewhat more
6 reasonable, if they were both plausible interpretations
7 of the Act, the Court should adopt Plaintiffs' in order
8 to avoid the very clear constitutional question that
9 their interpretation would raise and there can be simply
10 no doubt that there is at least a constitutional
11 question given that the Supreme Court of the State of
12 Michigan has struck down their comparable statute on
13 that basis.

14 So as we mentioned, the Emergency Services
15 Act is a rather lengthy statute. The version I've been
16 looking at is a hundred-some pages. And those
17 provisions are detailed generally relating to mobilizing
18 different agencies of government to deal with the
19 emergencies.

20 To contrast that by omission, theirs is a
21 very small statute that basically just includes the
22 provision that they relied on in this case. They
23 suggest that the provisions that they relied on in this
24 case, the police power act statute.

25 So there are only actually three -- three

1 provisions that we've been discussing today so I won't
2 belabor the point. There are only three sections that
3 they have cited for authority. 8571, again, is the
4 power to suspend certain statutes, and they have
5 conceded -- the Defendant has conceded that the
6 executive order did more than this. They have instead
7 tried to justify and claim that the Act provides
8 authority to provide what they call corresponding
9 affirmative direction.

10 So we can remove that as a plausible basis
11 for justifying what happened here. And notably, by the
12 way, in the executive orders that they have produced
13 from these five -- these five executive orders from
14 prior governors, that's the only provision that's cited
15 in this order is 8571 which is clear that for those
16 governors they were viewing the Act to provide the
17 ability to suspend a certain requirement as those orders
18 did but were not claiming that these two other
19 provisions then gave them policy-making authority or
20 that that's what those orders did.

21 So 8567, this is the one that talks about
22 rules, orders, and regulations. It authorizes certain
23 orders and regulations to carry out the provisions of
24 this chapter. Since there is no provision in the
25 chapter on overhauling elections, Defendant is instead

1 forced to stretch this text to give the Governor
2 authority not just to issue orders and regulations to
3 carry out the provisions of the Act, but to create whole
4 new statutes to do absolutely anything. This is
5 inconsistent with, among other things, the expressed
6 text in the Emergency Services Act that refers to lawful
7 orders and regulations within the limits of the
8 Governor's authority provided herein.

9 As the Court has pointed out as well, the
10 term "orders and regulations" is -- has a very different
11 bearing than "statutes" which is a term that's used
12 elsewhere in the Act when it comes to the power of
13 suspension.

14 So it's very clear what the limits, and
15 again, the text I referred to specifically refers to
16 limits in the Act on what orders and regulations can be
17 used for. They must be tied to provisions of the Act in
18 order to implement those provisions. So, anyway, there
19 is all kinds of provisions, which you mentioned several
20 of them, Your Honor, that deal with topics such as food
21 safety, curfews, disaster worker classification which
22 all grant authority to the Governor --

23 (Whereupon the Certified Shorthand Reporter
24 motioned to Mr. Kiley to speak more slowly.)

25 MR. KILEY: -- or other officials to issue

1 orders and regulations. This is the statutory scheme.
2 Section 8567 confers the authority to carry out the
3 provisions of this chapter and the relevant provisions
4 that echo that authority.

5 That scheme, that fits more comfortably
6 within the California Supreme Court's framework for the
7 lawful delegation of implementation authority to the
8 executive branch.

9 Defendant's conception of freewheeling
10 lawmaking authority does not fit within that framework.
11 And this will be relevant to the question of relief
12 today as well, which my co-counsel will discuss, is that
13 the framework of this statute which would have the
14 Governor issue orders and regulations only in as much as
15 they are tied to provisions of the statute and are
16 carrying out those provisions should be part of any
17 injunctive relief granted in this case to ensure that
18 that is the use the Governor is making of this Act.

19 Finally, we've discussed police power, 8627,
20 at some length. But it should be noted again that the
21 Governor has lifted them out of context, just, you know,
22 and notwithstanding disputes as to what police power
23 itself means and the lack of any significant authority
24 on that question.

25 They have lifted -- the Defendant has lifted

1 those words out of context to suggest that they provide
2 plenary authority to govern and centralize the State's
3 powers in the hands of the Governor. And again, if that
4 is, in fact, what those words did, you wonder why the
5 legislature bothered writing the rest of the Act at all.
6 If this, in fact, was a catchall that provided unlimited
7 power as Defendant claims.

8 So, Your Honor, to sum up the main, we
9 think, options that are before the Court, the order here
10 we believe -- the statute here we believe can be
11 interpreted in a way that would not require it to be
12 struck down under the reasonings, at least, provided by
13 the Michigan Supreme Court and that is clearly
14 delineated in decisions of the California Supreme Court.
15 And that is by using -- by interpreting these provisions
16 in the way that we have offered the Court and in the way
17 the plain reading suggests.

18 That the first 8571, as its plain language
19 suggests, offers the power to suspend, not the power to
20 create.

21 The next provision dealing with orders and
22 regulations, those must be tied to specific provisions
23 and specific purposes in the Emergency Services Act.
24 And then the police power section is also limited
25 because it clearly states that it must be exercised in

1 accordance with section 8567's orders and regulations.
2 So that's the clear language of limitation. They claim
3 this is just the language of definition, but, in fact,
4 it's right there in 8627 referring back to the other
5 section as the mechanism by which the Court is to
6 exercise the powers that are granted.

7 So if the Court is inclined towards that
8 interpretation of the statute, we believe that there is
9 not as clear a case, at least, that the statute must be
10 struck down in its entirety. But if we accept
11 Defendant's interpretation, then they have provided us
12 no real basis to avoid that conclusion because the one
13 distinction the Defendant has tried to draw relating to
14 the ability of the legislature to terminate the
15 emergency, as Your Honor has pointed out, is not a
16 viable option and is not relevant to the separation of
17 powers inquiry which is about whether there is an
18 effective mechanism within the Emergency Services Act's
19 words itself to guide the exercise of power by the
20 executive branch. That's the inquiry specifically that
21 our Supreme Court requires; that's the inquiry that was
22 undertaken by the Michigan Supreme Court. And the fact
23 that today's legislature, if it wanted, might have the
24 ability, theoretically, to terminate the entire
25 emergency in order to, say, disapprove of this

1 particular executive order in this case, that simply
2 isn't pertinent to the separation-of-powers analysis.

3 So with that, I'd like to allow my
4 co-counsel to handle the rest of our closing.

5 THE COURT: Thank you.

6 MR. GALLAGHER: Thank you, Your Honor.

7 I think I would just end here and sum up by
8 saying, why -- why are we here today? You know. I
9 think we've all said this is a very important case, and
10 it's important because it goes to the fundamental center
11 of who we are as Americans. And our system of
12 government, and the preservation of that system of
13 government, the ideals behind it that we don't have an
14 accumulation of power, that we have separate powers,
15 that we have checks and balances is important. And the
16 process that is part of that system of government is
17 important. It's not a minor thing to deviate from the
18 process that's outlined in our system of government.

19 Now, we all admit here today that we are in
20 an emergency such that we have never seen in California.
21 This is something that requires a lot of attention and
22 requires us to respond in a way to keep people safe.
23 Nobody disputes that here today. Nobody disputes that
24 there are actions that need to be taken in an emergency
25 to help preserve and protect the people of this state.

1 As to the policies that have been enacted by
2 this -- by this order, or by the other executive orders
3 that we've talked about, we're not here to discuss the
4 merits of those policies. Actually we might even agree
5 with a lot of the policies that were put in place. But
6 process matters in a republic, in a free society where
7 we are governed by the rule of law. It's not something
8 that we can just kind of sweep to the side and say --
9 and that's what Defendant wants to do essentially, and
10 say it really doesn't matter that we didn't follow the
11 process because, and there are several different
12 arguments that come after that. It really doesn't
13 matter that we did, in fact, violate the separation of
14 powers, but it's okay, and it really doesn't matter
15 because, after all, the election is already happening
16 right now. And so the election is going to come and go,
17 and it really doesn't matter that we overstepped our --
18 the clear bounds of our authority.

19 Well, it does matter. And I think it
20 matters even more so in an emergency. We don't cease to
21 become a constitutional republic, to become a free
22 society when we face an emergency, and this country and
23 our state have certainly faced many great challenges in
24 our history. And some of the most egregious human
25 rights abuses happened when we deviated -- when we

1 deviated from our system of government, when we didn't
2 recognize individual liberties, when we didn't recognize
3 the need to separate powers and not allow for a
4 centralization of powers.

5 I will note that it was an executive order
6 that created Japanese internment here in California.
7 Now, am I putting this on the same level of that? No.
8 But I'm saying how easily we can devolve into that
9 system when we start to ignore the procedures, the
10 process, that is in place. That's not just something
11 that we can sweep aside. It is important, and we need
12 to enforce it. And it is incumbent upon the judicial
13 branch to enforce that in this case.

14 It is very clear from the evidence in this
15 case that the Governor did assert legislative authority.
16 He did legislate where he had no power to do so. We've
17 gone through the statutory language of the Emergency
18 Services Act painstakingly and pointed out that nowhere
19 in there does it give him this power to unilaterally
20 change statute. And we've also pointed out that his
21 powers to issue orders and regulations, keyword, is
22 limited to the provisions in the Act, in the chapter,
23 and they -- and they have to be connected to that in
24 some way. And, in fact, words and regulations are not
25 legislative power. They are executive power. They are

1 the power to administer.

2 And so that is why this case is so
3 important. Yes, this election is going to come and go,
4 but do we allow the Governor to continue to act in this
5 way as he continues to assert that he has the power to
6 do without any check on his powers? That's what
7 Defendant would like you to do today is sort of ignore
8 this -- this violation and to just kind of let things go
9 as normal and then make it upon -- put the burden upon
10 myself and my co-plaintiff or other similarly situated
11 to continually bring cases -- case after case against
12 each individual executive order that's passed to
13 hopefully get into court fast enough before something
14 else happens in an emergency, right, and -- or maybe the
15 legislature acts or some intervening thing happens in
16 the meantime to hopefully delay the check on his power.
17 That seems to be the consistent strategy of Defendant in
18 this case.

19 You should not allow that to occur. The
20 judicial branch needs to be the one that provides that
21 essential check to the Governor, and that is what we're
22 asking you to do here today. We have clearly pled that
23 we want the order to be struck down based on the clear
24 legal interpretation. We do think this case can be
25 decided as a matter of law.

1 But also -- but not just that alone. We do
2 need an injunction, and we have prayed for that very
3 clearly in our Complaint in paragraph 21 where we
4 sought, we need to enjoin the Governor from further
5 intrusions on legislative powers, specifically
6 unilaterally changing statutes, amending statutes. But
7 as we have also pointed out, that should include he
8 needs to stay in the lines of the Emergency Services Act
9 as we have proposed and the Court interpreted today,
10 that, in fact, those orders and rules -- regulations as
11 the statute provides must be related to provisions in
12 the Act.

13 Now, Defendants say that we can't enjoin
14 future acts, that those aren't ripe. Those orders
15 aren't before us. That's not what we're asking the
16 Court to do. As we know, we enjoin conduct, not acts,
17 not future acts. We enjoin conduct, and we enjoin
18 conduct so as to govern those future acts, to ensure
19 that future acts will be in compliance with the ruling
20 of the Courts. With the rule of law.

21 And so what we are asking is an injunction
22 of conduct that heretofore the Governor will abide by
23 the clear terms of the Emergency Services Act, which is
24 he cannot suspend stat- -- or he cannot -- he can
25 suspend statutes, but he cannot amend or alter statutes.

1 That is clear. And that his orders must be related to
2 the provisions in the Act.

3 So I think we can -- you know, I'm more than
4 happy to brief the Court further on why injunctive
5 relief is certainly warranted and necessary here, but
6 that is part of our request for relief, and I think we
7 need that, especially in these circumstances as I've
8 outlined. We are in an important time in our history.
9 And it cannot be the case that we sort of morph into a
10 different form of government when we face a challenge.
11 It has never been the case before. We shouldn't allow
12 it to happen. When it has happened, it has had very
13 grave implications for the citizens of our country, and
14 we cannot allow to it happen here, and I think it begins
15 today that we provide that.

16 I didn't bring this case -- we thought a lot
17 about bringing this case because we knew the
18 circumstances we were in. We even gave -- we, for long,
19 gave the Governor the benefit of the doubt in the early
20 stages of this emergency. But as we progressed along,
21 we saw continued intrusions that violated that sacred
22 compact that's outlined in our Constitution. And this
23 order was the most clear case of a violation of that
24 separation of powers. And that's why we brought the
25 case ultimately to ensure that very -- in a very clear

1 way this Court and the judicial branch could provide
2 those outlines and ensure that in the future we continue
3 to be the free society, the republican form of
4 government that provides the protections, the checks and
5 balances that avoids the very tyranny that our founders
6 were concerned about. It starts small, and that's why
7 it needs to be checked early. And I ask the Court to do
8 that today.

9 Thank you, Your Honor.

10 THE COURT: Mr. Killeen?

11 MR. KILLEEN: Your Honor, we've extensively
12 briefed everything in this case, and so I will not dump
13 on the Court and the court staff all of those case
14 citations again.

15 I think Mr. Kiley's ideas work well in
16 theory, but they don't work in practice. They don't
17 correspond to the facts of this case. California is
18 grappling with a virus with no cure and that could be
19 transmitted asymptotically and no one had any idea
20 what was going to happen. The legislature was working
21 to safeguard the election. And they were working hard.
22 They were working fast. And that meant they got
23 something done in four months. That's good. That's
24 fast.

25 Governor Newsom helped the legislature,

1 protected the election process by issuing this executive
2 order. He had the authority to fill the gaps and
3 critically, once the legislation was passed, he yielded
4 to that legislation. There is no evidence that he has
5 ever taken the position that his executive order
6 superseded or was the law in place of the legislation.
7 The legislation was the law when it was enacted. It's
8 the law now. Your Honor, I just -- this is not a
9 situation -- there might be situations out there where
10 Governor Newsom could act like a tyrant in the eyes of
11 Mr. Plaintiff -- of Mr. Kiley and Mr. Gallagher. If
12 safeguarding elections at the request of folks in the
13 legislature -- which is not in evidence -- that if
14 safeguarding elections in the middle of, indeed, a
15 once-in-our-history pandemic and then giving way to the
16 legislation once it's been passed is against the law, so
17 be it, but it's not.

18 And with that we rest, Your Honor.

19 THE COURT: Anything else? Anything else?

20 MR. KILLEEN: No, Your Honor.

21 THE COURT: Thank you.

22 MR. GALLAGHER: Nothing further, Your Honor.

23 We did have kind of a written form of what
24 we believe an injunction could be in this case.

25 Obviously I know you have not yet ruled on that, but I

1 mean, if there is additional support you need -- that
2 has been our request. So we just want to make that
3 clear, and we have proposed, you know, versions of what
4 that could be that we could submit to the Court as well.

5 THE COURT: Okay. To that point, I have the
6 orders that you provided, Mr. Killeen, regarding
7 Exhibit 3 and Exhibit 17. And, truly, I haven't made a
8 decision. I'm going to read my notes, look at the
9 transcript, study the briefs again. It's all done, been
10 beautifully prepared and a very nice job arguing your
11 respective positions. And I expect that in short order
12 -- very short order you'll have a tentative decision and
13 then you'll have an opportunity to respond to that, and
14 ultimately I'm guessing that you're going to ask the
15 Court for a Statement of Decision. That would be my
16 guess of how this would unfold.

17 Is that what you're expecting?

18 MR. GALLAGHER: Yes, Your Honor.

19 MR. KILLEEN: Yes, Your Honor.

20 THE COURT: Okay. So if you -- either of
21 you wanted to propose some kind of language that the
22 other side had seen, I would certainly look at that, but
23 I'm not requiring it. But I certainly -- this order is
24 helpful for me today. I'll sign it, and if there is
25 some language that you would like considered that you

1 shared with counsel in terms of the injunctive relief, I
2 can -- I think that could be presented.

3 MR. GALLAGHER: So just so I understand,
4 Your Honor, is your intent to -- we were going to
5 request just a Statement of Decision, but is it your
6 intent that it would be a tentative decision that would
7 be issued and then we would --

8 THE COURT: It would be the intended
9 decision that you would receive and then you'd have an
10 opportunity to respond and then ultimately I'd write the
11 Statement of Decision, and one of us --

12 MR. GALLAGHER: Respond in terms of, like,
13 would we write a written response to you?

14 THE COURT: Yeah.

15 MR. GALLAGHER: Or arguing that in a
16 subsequent --

17 THE COURT: I don't think we'd necessarily
18 be arguing it. When I've done them before, I've had --
19 sometimes I've written them and I've heard nothing from
20 one side and then a bunch of additions or objections
21 from the other side, but ultimately have it become a
22 Statement of Decision that would be available to
23 everyone and probably the Court of Appeal.

24 MR. GALLAGHER: After hearing from both of
25 us, then the -- after hearing from both of us. Or

1 giving us the opportunity for both of us to respond to
2 the tentative, then you would issue the final Statement
3 of Decision?

4 THE COURT: That's what I am anticipating.

5 MR. GALLAGHER: I mean, we have some
6 language for the injunction portion that we can
7 obviously share with counsel.

8 THE COURT: Have you shared that with
9 counsel? And again, I haven't made any decisions yet,
10 but I -- it would be helpful to have some language
11 that --

12 MR. KILLEEN: Your Honor, just one other
13 housekeeping item.

14 If you are -- if after the Statement of
15 Decision you are intending to issue anything like this,
16 the Governor would request either a two-week stay
17 between the entry of the order and the entry of judgment
18 or the two-week stay in the affect of the judgment once
19 it's been issued to give us an opportunity to go up to
20 the Court of Appeal. I think, as we said throughout the
21 case, the order enjoining executive order N-67-20 is one
22 thing. An order enjoining other conduct is a very
23 different thing. So that -- we would request that,
24 Your Honor.

25 MR. GALLAGHER: And obviously we would

1 object. You know, I think if you determine and the
2 judgment is warranted in our favor, we think it should
3 be effective immediately.

4 THE COURT: Okay. If you both want to brief
5 that, you may. You're not required to. I'll consider
6 both of your requests and decide accordingly.

7 MR. KILLEEN: Thank you, Your Honor.

8 MR. GALLAGHER: I mean, to that point, to
9 the injunctive portion, we do have a pocket brief that
10 we could submit if that -- if it helps you. I don't
11 know if that's needed. We have obviously discussed it
12 during the trial, but we do have some additional -- we
13 have a pocket brief prepared on that if -- obviously we
14 would share what we're sharing with counsel and you.

15 Do you desire further --

16 THE COURT: I have --

17 MR. GALLAGHER: -- briefing on that?

18 THE COURT: I've got lots of notes here.
19 I'll have the transcript. I'll take anything you want
20 to give me.

21 MR. GALLAGHER: We'll just, I guess, submit
22 that for our purposes of --

23 THE COURT: Okay. Anything else?

24 MR. KILLEEN: No, Your Honor.

25 MR. KILEY: Thank you, Your Honor.

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THE COURT: Thank you.

MR. GALLAGHER: Thank you, Your Honor.

(Whereupon the proceedings concluded at

1:27 p.m.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SUTTER

DEPARTMENT 2 HON. SARAH H. HECKMAN, JUDGE

JAMES GALLAGEHR AND)
KEVIN KILEY,)
Plaintiffs,) SUPERIOR COURT
vs.) NO.
GAVIN NEWSOM, in his official) CVCS20-0000912
capacity of Governor of)
California,) REPORTER'S
Defendant.) CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SUTTER)

I, Tamara L. Houston, CSR 7244, Official Court Reporter of the Superior Court of the State of California, for the County of Sutter, do hereby certify that the preceding pages, 1 through 20, comprise a full, true and correct transcript of the proceedings reported by me on October 21, 2020, in the above-entitled matter.

Dated this 30th day of October, 2020.

Tamara L. Houston

Tamara L. Houston, CSR No. 7244
Certified Court Reporter

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