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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SUTTER

JAMES GALLAGHER and KEVIN KILEY, Plaintiffs, v. GAVIN NEWSOM, in his official capacity as Governor of California Defendant.	Case No. CVCS20-0912 *OPPOSITION* OF PLAINTIFFS TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS Hearing Date: September 28, 2020 Time: 9:00 a.m. Judge: Hon. Sarah Heckman Trial Date: October 21, 2020 Action Filed: June 11, 2020

INTRODUCTION

The Complaint and its allegations, taken as true for the purposes of this motion, are not made moot by the passage of AB 860 and SB 423, for two distinct reasons. First, the Executive Order at issue, which has not been rescinded, has operative provisions that are in conflict with or go beyond those in the enacted legislation. Second, the controversy here presented is not merely likely, but certain to recur.

FACTUAL AND PROCEDURAL HISTORY

1. On June 3, 2020 Defendant GAVIN NEWSOM, in his capacity as Governor of the State of California, issued Executive Order N-67-20 (hereinafter the "Order"), which significantly modified existing elections procedures outlined in the California Elections Code. A true copy of the Order is found in Plaintiffs Request for Judicial Notice ("RJN"), Exhibit A.

2. This was the third (3rd) executive order the Defendant had issued in calendar year 2020 purporting to proscribe elections procedures in order to respond to the COVID-19 pandemic emergency. The first was N-34-20 issued on March 20, 2020 which modified the California Elections Code to, among other things, provide for differing election procedures for two (2) special elections and one (1) special recall election. *See* Plaint. RJN, Exh. B. The second was N-64-20 issued on May 8, 2020 which modified California Elections Code to provide for mail ballots to be sent to all registered voters for the November 3, 2020 General Election. *See* Def. RJN #4.

3. On June 11, 2020 Plaintiffs, both members of the California State Assembly, filed this lawsuit requesting both declaratory and injunctive relief. The Plaintiffs' complaint seeks a declaration of this Court that the Order is "null and void as an unconstitutional exercise of legislative powers…" (Compl. ¶18) and as to "the rights of the parties under the Constitution and applicable law…" (Compl. ¶20). They further seek to "restrain and enjoin the Defendant (1) from carrying out or implementing the provisions of the Executive Order and (2) from further exercising any legislative powers in violation of the California Constitution and applicable statute, specifically from unilaterally amending, altering, or changing existing statutory law or making new statutory law." Compl. ¶21 (emphasis added)

4. On June 12, 2020, Plaintiffs applied ex parte for a temporary restraining order of this Court temporarily restraining the Defendant from implementing the provisions of N-67-30 and from further impermissibly exercising legislative powers. A true copy of that application is found in Def. RJN #8. After hearing and argument, this Court granted the order.

5. Defendant sought a writ of mandate from the Third District Court of Appeals to order the dissolution of the temporary restraining order. After written briefing by both parties, the appellate court on July 10, 2020 granted the writ and ordered the Court to vacate the temporary restraining order. *Newsom v. Superior Court* (2020) 51 Cal.App.5th 1093. The ruling only instructed the court to vacate the TRO and did not preclude the court from making any determinations on the underlying merits of the case or from granting further injunctive relief after a hearing on notice or a trial in the matter. *Id.* at 1100.

6. During the pendency of this action, Defendant made public statements that his Order was on "firm legal footing" and that enactment of legislation was not "strictly necessary". Defendant has never recanted those statements and, even after the passage of applicable legislation, has not rescinded his Order or made any public statement that the Order is rescinded or otherwise not in effect. *See* Christopher, *Courtroom Win for Newsom's Vote-by-Mail Strategy as Legislature Presses On*, CalMatters.org, Plaint. RJN, Exh. C.

7. On June 18, 2020, the Legislature passed AB 860 which provides for a mail-ballot election specifically and only for the November 3, 2020 General Election. The Governor signed the bill into law on the same day. *See* Def. RJN #5.

8. On Aug 6, 2020, the Legislature passed SB 423 which proscribes the in-person voting procedures that will be authorized specifically and only for the November 3, 2020 General Election. The Governor signed the bill into law on the same day. *See* Def. RJN. #6.

9. Subsequent to the passage of AB 860, on July 14, 2020 the Secretary of State issued an advisory to county elections officials notifying them that they are still required by Executive Order N-67-20 to provide for Intelligent Mail Barcode (IMb) on mail-ballot envelopes. *See* Plaint. RJN Exh. D.

MEMORANDUM OF POINTS & AUTHORITIES

I. APPLICABLE LAW

Mootness is present where there is no longer any actual controversy "by which a judgment can be carried into effect" and where judgment would only "give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect he matter in issue in the case before it." *Consol. etc. Corp. v. United Auto etc. Workers* (1946) 27 Cal.2d 859, 863.

Further "if a pending case poses an issue of broad public interest that is likely to recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot." *In re William M.* (Cal. Supreme Court, 1970) 3 Cal.3d 16, 23-24 (*see also* fn. 14 citing *Moore v. Ogilvie* (1969) 394

U.S. 814, 816 "we should not avoid the resolution of important and well litigated controversies arising from situation which are 'capable of repetition, yet evading review.'").

Plaintiffs also highly dispute Defendant's assertion that the issue of mootness was either decided or partly decided by the appellate court in Defendant's writ of mandate action. The issue squarely before the court was the propriety of the temporary restraining order. The court held that the temporary restraining order should be vacated based on a lack of notice of the ex parte hearing and a failure to make a sufficient showing of harm. *Newsom* at 1099-1100. The appellate court merely noted as dictum that the issue could become moot by the passage of legislation. However, the court also recognized that "there remain substantive issues governing the conduct of the election..." and that "if, for some reason, a substantive conflict does arise between the Governor's emergency authority and the Legislature, that could present issues requiring careful consideration and ultimate resolution by the courts." *Id.* a 1100. And again, the controlling legal precedent of *William M.* and its progeny would not render a case moot where it involved a matter of public concern likely to recur again.

II. APPLICATION OF LAW

A. The 'Controversy' at Issue is Not Only the Validity of the Executive Order Itself but the Fundamental Issue of Whether the Governor Has the Power to Amend Existing Statute during a Declared Emergency under the California Emergency Services Act.

Let us clearly state the controversy. The "controversy" at issue here is whether the Governor unconstitutionally exercised legislative powers in issuing Executive Order N-67-20 (hereinafter the "Order") on June 3, 2020 and over the underlying principle of whether the Governor has authority to unilaterally amend existing statutory law. The Complaint clearly seeks to rescind the Executive Order but also to enjoin the Governor from "further exercising any legislative powers… specifically from unilaterally amending, altering or changing existing statutory law or making new statutory law." Compl. ¶21. We are equally concerned here both with the Order itself and "why" the Order is impermissible. The Complaint alleges that the Governor is impermissibly "exercising legislative actions" in violation of the Constitution (Compl. ¶16); and the "actual controversy" between the parties includes Defendant's contention

that his acts are valid "despite existing statutory law created by the Legislature to the contrary." Compl. ¶17. The Plaintiffs seek a declaratory judgement that the Executive Order is null and void because "it is an unconstitutional exercise of legislative powers reserved only to the Legislature, nor is it permitted action under the statutory framework provided under the California Emergency Services Act." (Compl. ¶18, p. 4, ll. 7-10).

Plaintiffs seek a legal determination from the court as to this constitutional controversy. The issuance of the Order was either an authorized use of power or it was not. If it was, then the Governor's Order stands and he can continue to issue Orders that unilaterally amend statutes that are on the books. If it is not, then the Governor's order is rescinded and he cannot issue Orders of a similar nature that unilaterally amend statutes. Plaintiffs argue that he does not have such power under the Constitution or the California Emergency Services Act. Defendant still "vigorously disputes" this. *See* Def. JOP Mot. at 14, ln. 4. A ruling in Plaintiffs' favor decides this underlying issue and governs not only the Governor's action in issuing the Order but future executive orders that purport to unilaterally amend or alter statutes.

As pled by Plaintiffs, the Governor's Executive Order "exercises legislative powers by substantively amending, altering, or changing existing California statutes including but not limited to California Elections Codes §§3000 et seq., 3019.5, 3019.7, 4005, 4007, 12200-12286, and 12288." Compl. ¶14. A review of the Order (Plain. RJN, Exh. A) and the applicable statutes shows that it substantively amended the Elections Code as follows:

1. Resolution 1) re-iterates provisions of a previous order (N-64-20) for the November 3, 2020 election, that all voters (except those who are inactive) shall receive a mail-ballot whether they have requested one or not. This substantively amends, changes, and alters the provisions of Elections Code §3001 et. seq. which provides that a mail-ballot is an *elective* process in which a voter may request to vote by mail.
2. Resolution 2) states that all counties elections officials shall use the Secretary of State's ballot tracking system. This substantively amends, changes, and alters Elections Code §3019.5 and 3019.7, which provide counties with other methods of tracking ballots.

3. Resolution 3) allows counties to opt-out of their statutory obligation pursuant to Elections Code §12286(a)(3) to provide a polling place in each voting precinct for the November 3, 2020 election. If they do, they must provide for voting procedures outlined in subsections (a), (b), and (c) of the Order which are substantively different from those outlined in existing state statute (*See* Cal. Elec. Code §§12280-12288).
4. Resolution 5) substantively amends, alters and changes Elections Code §4005(a)(10) which requires that an elections official provide for in-person publicly noticed meetings with Voting Rights Act protected groups and disability rights groups regarding the conduct of an upcoming election and provides instead that an elections official can provide information on-line with public comment.

In order to determine whether the Executive Order is valid, the court is *directly* confronted with the issue of whether such a substantive amendment of existing statute by the Governor is proper. The law on this point is straightforward and clear. The Constitution squarely prohibits the exercise of the powers of one branch of government by another branch. Cal. Const., Art. III, §3. And the California Emergency Services Act allows only the "suspension" of certain statutes where the Governor makes a definitive showing of the need. *See* Cal. Gov. Code §8571. It does not allow the Governor the power to "amend" or change existing statutes. A further detailed discussion of the clear and controlling law on this point is found in Plaintiffs' concurrently filed Motion for Judgment on the Pleadings, at 8-12.[1]

This is at the heart of the controversy and dispute between Plaintiffs and the Defendant. He clearly asserts he has power to unilaterally amend (not just suspend) statutes. Plaintiffs say he has no such power. Considering the circumstances that this is an emergency that has no apparent end in sight and the Governor's publicly-stated position, this is an issue that must be decided once and for all. A declaration of this court grants Plaintiffs' the "effectual relief" (*Consol. etc. Corp.* at 863) of having this constitutional controversy decided and govern the respective parties' actions through the remainder of this emergency and future emergencies.

[1] The clear law was also pointed out in Plaintiffs ex parte application to the court (Def. RJN, Exh. #8, pp. 2-4) which demonstrated their substantial likelihood of success on the merits of the case.

In his motion, Defendant cleverly attempts to remove the clear request for permanent injunctive relief from Plaintiff's complaint. *See* Def. JOP Motion, p. 15 ll. 2-8. It is however clear that only the temporary restraining order was "resolved" by the writ of mandate. If Plaintiffs prevail in this action, the face of the Complaint and the prayed for relief includes a permanent injunction restraining Defendant's future acts. Compl. ¶21. Similarly, Defendant for self-serving purposes also tries to limit the scope of the controversy to just the November 3 election and the N-67-20 Order itself. *See* Def. JOP Motion, pp. 12-13. Again, the Complaint on its face encompasses broader relief to enjoin Defendant's future usurpations of legislative power by amending, altering existing statutes.

B. Defendant's Blanket Assertion That the Order Has Been Superseded by Legislation is Factually Inaccurate and Contrary to Actual Practice and Defendant's Public Statements.

Defendant contends for the purposes of his motion that his Order has been "superseded" and is no longer in effect. *See* Def. Motion JOP, p. 13, ln. 7. While that is a convenient position to adopt once haled into court, it represents nothing more than an opinion on the current status of the law. One essential fact is missing from Defendant's motion: any actual evidence that its Order has been rescinded, superseded, or is otherwise no longer in effect. The Order has not been rescinded through any official action by the Governor, and there has not been any public statement suggesting the Order is superseded. Moreover, the Legislature stated no such intent in passing AB 860 and SB 423. *See* Legislative Intent language for AB 860 [SEC. 1]. and SB 423 [SEC. 1]; Def. RJN, #5, pp. 2-3 and RJN #6, pp. 2-3. All we have here is the vague and evolving representations of his attorneys made in this case. In fact, the available evidence from the pleadings (taken as true) and facts that can be accepted by judicial notice show the opposite.

First, a review of the enacted legislation shows that it has not completely superseded the Order in significant respects:

i. The Executive Order's Provisions on Ballot Tracking Is at Odds with the Legislation and is Still Being Enforced.

The legislation (AB 860 and SB 423) has not superseded the Order with respect to counties utilizing their own ballot tracking systems and the use of Intelligent Mail Barcode on mail-ballots.

The second resolution of the Order states in relevant part:

> 2) Notwithstanding any contrary provision of state law (including, but not limited to, Elections Code sections 3019.5 and 3019.7), all county elections officials are required to use the Secretary of State's vote by mail tracking system, created pursuant to Elections Code section 3019.7 and to use Intelligent Mail Barcodes on all vote-by-mail ballot envelopes. *See* Order at Plaintiffs' RJN, Exh. A (emphasis added).

AB 860 only partly mirrors this provision by properly amending (through the legislative process) Elections Code §3019.7 and providing that a county must utilize the Secretary of State's vote tracking system to allow a voter to track their vote-by-mail ballot through the mail system, "unless the county makes available to voters a different vote by mail ballot tracking system that meets or exceeds the level of service provided by the Secretary of State's system." *See* AB 860, SEC. 4, §3019.7(d), at Def. RJN #5, p. 4. The legislation clearly anticipates that counties can utilize other systems. The Order, on the other hand, continues to require that all counties must utilize the Secretary of State's system and purports to eliminate ("notwithstanding") Elections Code §3019.5 (the Code section which expressly requires counties to create their own vote tracking system). Since AB 860 did not address §3019.5 of the Code, the Order still serves to nullify the statutory provisions and replace them with its own unique requirement. In other words, the legislation superseded the Order as §3019.7, but not §3019.5. This essential fact alone should defeat Defendant's motion. Because the Order was not actually superseded the Elections Code now says one thing and the still-operative Executive Order says another – producing a live controversy between two sources of law and the two branches of government that produced them. This controversy is far from academic.

Furthermore, the Executive Order is still, in actual practice, requiring the use of Intelligent Mail Barcode (IMb) on mail ballot envelopes, despite there being no such

requirement in AB 860 or any other state statute.[2] The Secretary of State recently issued a guidance on July 14, 2020 (nearly a month after AB 860's enactment) requiring counties to use IMb on their ballot envelopes. *See* Plaitiffs' RJN, Exh. D. The Memorandum even denotes the passage of AB 860, but nonetheless states: "Executive Order N-67-20 provides that all county elections officials are required to use Intelligent Mail Barcodes (IMb) on all mail ballot envelopes." The only possible basis for the requirement is the Executive Order itself, not the statute. Thus very clearly, and contrary to the contention of Defendant that the Order has been superseded, the provisions of the Executive Order are still being enforced in practice.

ii. The Legislation Does Not Address the Executive Order's Unilateral Removal of Publicly Noticed Meetings for Voter Access by Protected Groups.

With respect to voting access rights for Californians with disabilities or limited English proficiency, the state of the law – far from achieving the clarity needed for a claim of mootness – is now a complete muddle. Prior to the Governor's Executive Order being issued, Voter's Choice Act counties[3] were required to undertake the following outreach to assure proper input from these protected groups:

> (i) One meeting, publicly noticed at least 10 days in advance of the meeting, that includes representatives, advocates, and other stakeholders representing each community for which the county is required to provide voting materials and assistance in a language other than English under subdivision (a) of Section 14201 and the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10101 et seq.).
>
> (ii) One meeting, publicly noticed at least 10 days in advance of the meeting, that includes representatives from the disability community and community organizations and individuals that advocate on behalf of, or provide services to, individuals with disabilities. *See* Elections Code §4005(a)(10)

However, the Executive Order expressly did away with these provisions and unilaterally replaced the statutory requirements with a pro forma procedure of its own creation: post the election plan online, and accept comments for 10 days. *See* Plaint. RJN Exh. A ¶5.

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[2] There is no such requirement found in AB 860, *See* Def. RJN Exh. #5. Nor does any other statute require it.
[3] The Voter's Choice Act (Cal. Elec. Code §4005 et. seq.) enables 14 counties to conduct all-mailed-ballot elections in accordance with procedures set forth in Elections Code sections 4005 and 4007.

Then came SB 423, which ultimately did not pick a side between the Order and existing statutory law. In fact, its provisions as to access for protected groups only apply to counties *not* following the Voter's Choice Act. *See* SB 423, SEC. 2. 1602 at Def. RJN #6, p. 3-5. The only change that SB 423 makes to Voter's Choice Act counties to is to provide that they are "not required to have its vote centers open before the third day prior to the election." *See* SB 423, SEC. 2. 1601. Because SB 423 made no further amendments to Elections Code §§4005 and 4007, the provisions of §4005(a)(10) requiring noticed public meetings are still statutory law. In sum, the provisions of SB 423 did not supersede the Executive Order on this point. If counties are not holding such publicly-noticed meetings, the only authority for not doing so is the Executive Order. For Voter's Choice Act counties, the Executive Order still governs as to both the cancellation of statutorily required public meetings and their replacement with pro forma public comment period.

This failure to supersede the Order has significant implications as it makes it unclear what directives should be followed for the November 3, 2020 election, and subjects the state and counties to potential liability – not to mention the damage it poses to the disability rights community and others whose rights to access and input have been unilaterally curtailed in express contradiction to existing statutory law.

Finally, despite the assertion of the Order merely being "interim guidance" in partnership with the Legislature for the purposes of this motion, the Governor has publicly stated that his Order is "on firm legal ground" and has argued that legislation like AB 860 and SB 423 "wasn't strictly necessary." *See* Plaint. RJN, Exh. D. Far from recognizing their inherent legislative power or even from seeing the Legislature as an essential partner, the Defendant stated: "We appreciate their work and, to the extent they want to codify it, that could help as well. Why not?"[4] Defendant has yet to make any public statement to the contrary. Even in this motion he maintains that he holds the power to amend law ahead of the Legislature, and apparently his position is that it is not even reviewable so long as the

[4]https://calmatters.org/blogs/california-election-2020/2020/06/judge-blocks-newsom-vote-by-mail/

Legislature follows up and passes similar (although not identical) legislation.[5] Meanwhile Plaintiffs claim that the Order is unconstitutional on its face and should be overturned.

C. **Even if the Legislation were to Supersede the Executive Order It Does Not Render the Matter Moot Because the Case Involves a Matter of Great Public Concern that is Capable of Repetition.**

This is also a matter of great public concern and, based on the Governor's position and actions thus far, is "capable of repetition." *Moore v. Ogilvie* (1969) 394 U.S. 814, 816. Elections are of the utmost public concern. Plaintiffs are attempting to obtain declaratory relief that the Governor's actions are unconstitutional as a violation of the fundamental doctrine of separation of powers, another matter of the utmost public concern. It is certainly foreseeable in that legislation could be properly passed, during the pendency of the action, which might serve to make the issue moot. However, long-standing case law says that is not a bar to the court taking action to resolve an important public controversy. *In re William M.* at 23.

Here, it is completely foreseeable that this same set of circumstances could be before us again. Defendant states in his brief the he has unilaterally declared an emergency for the COVID-19 virus in which "at this time there is no known cure…., no effective treatment and no vaccine." He is asserting that the emergency confers upon him such "broad powers" that it effectively "centralizes the State's powers in the hands of the Governor." Def. JOP Motion at 7-8. Though that view of power is both incorrect as a matter of law and antithetical to our republic, it sets the tone for the circumstances we are in: There is no apparent end to the emergency in sight and it is highly foreseeable that the Governor will continue to exercise his perceived power to amend statutory law. Defendant "vigorously disputes" that his Order "unlawfully usurped legislative authority". *See* Def. JOP Motion at 14, ln. 4. Defendant has already issued three separate executive orders this year regarding elections procedures. *See* Def. RJN #4; Plaint. RJN Exhs. A and B. And Defendant has to date issued over 50 executive orders many of which substantively alter state statutes. *See* Plaintiffs RJN, Exh. E.

[5] Defendant's attorneys confirmed during the meet-and-confer process that though the Defendant now considers his Order superseded, he does not believe the Order was impermissible or that he is precluded from issuing similar orders in the future or for future elections.

Indeed, since AB 860 and SB 423 only govern the November 3 General Election, Defendant is pointedly reserving his right to issue *this exact order* in the highly likely[6] event of a special election called this coming spring, which has historically been the case. *See* Plaint. RJN Exh. F. It would not be at all surprising if he issued such an order, not only because he still "vigorously disputes" Plaintiffs' contention that he lacks the power to do so, but also because that is exactly what he did for special elections held earlier this year. *See* Plaint. RJN, Exh. B. A determination of rights here will govern the extent of his powers in that event – namely, whether the Governor is free to unilaterally change election law himself, as he insists, or whether that responsibility falls on the Legislature, as Plaintiffs maintain.

Again, the crux of the dispute is whether the Governor's act was an authorized use of power or not. Specifically, the issue is whether the California Emergency Services Act gives the Governor the power to arbitrarily amend statutes. That is why Plaintiffs sought to enjoin the Governor "from further exercising any legislative powers in violation of the California Constitution and applicable statute, specifically from unilaterally amending, altering, or changing existing statutory law or making new statutory law."

Any acts that the Legislature may have taken subsequently do not take away from the central issue of whether that Order was constitutionally issued. The allegation is that the act was unlawful because it was issued "despite existing statutory law" (Compl. ¶17, p. 4, ll. 1-2); that it was at that time "and usurpation of legislative power." The fact that the Legislature exercised its constitutional powers later despite the Governor's earlier impermissible acts does not save the impermissible act.[7]

The cases cited by Defendant in his motion are factually inapposite. *Hillsboro Properties*, 138 Cal.App.4th 378, dealt with a local ordinance that had first been ruled

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[6] For every regular general election since 2008, there has been a special election held within the first 100 days of the next year (See https://www.sos.ca.gov/elections/prior-elections/special-elections), usually necessitated by a vacancy resulting from someone winning a new office. If the same happens this November, there would be five months after Election Day to prepare for the special election, which is exactly the same interval between when the Governor announced the Executive Order at issue in this case and the November election. Indeed, the controversy presented by this case could very well recur within two weeks of the existing October 21 trial date.

[7] Also for a detailed discussion of how the Governor's Executive Order unlawfully forced the Legislature's hand in passing his preferred policy, *see* Plaintiffs' Motion for Judgment on the Pleadings, p. 14.

unconstitutional and was subsequently amended by the same local legislative body (there was no executive action at issue) and further, the court made no determination as to the issue of mootness so it provides no legal precedent here. *Id.* at 384, 389. The legal proposition cited in a footnote that "parties can have no legally cognizable interest in the constitutional validity of an obsolete statute" means nothing here as we were dealing with whether an *executive order*, not a statute, has become obsolete. And, as discussed above, the subject order has not been superseded or become obsolete.

Assn. of Irritated Residents v. Department of Conservation (2017) 11 Cal.App.5th 1202, cited by Defendant, dealt with the mootness of a CEQA lawsuit challenging an executive agency's permitting procedures which were subsequently changed by the passage of a statute. *Id.* 1208-1210. Similarly, *East Bay MUD v. Dept. of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1113, dealt solely with executive action (regulatory permits issued by CDF for timber harvest plans) which the agency itself subsequently changed to render the lawsuit moot because acts complained of were "not likely to recur". *Id.* at 1132.

Here, the Defendant has changed nothing with regard to its Order nor has it rescinded its order. And Defendant's clear position is that he can and will act similarly again if he determines that the emergency requires it. In sum, none of the cases cited dealt with an *executive order* which purported to exercise legislative powers ahead of legislative action, *and which continues in both effect and practice thereafter*.

As a back-up argument, Defendant cites the case of *Southern Cal. Gas Co. v. Pub. Utils. Comm.* (1985) 38 Cal.3d 64, for its contention that even if there were any issues with its Order "the Legislature has corrected any alleged deficiencies by enacting SB 423." Defendant relies on dictum therein that "the Legislature may supply retroactively, through a curative or validating act, any authority it could have provided prospectively through an enabling act." First, *Southern Cal. Gas. Co.* dealt with contested regulatory rules of an agency that the court specifically found the Legislature intended to confirm by its legislative act. *Id.* at 67. There can be no such finding here. That was certainly not Defendant's intent as he said such legislation was not "strictly necessary". But it was also not the Legislature's intent. In fact, not once in the

lengthy legislative intent language for AB 860 and SB 423 (which we would invite the court to review) does the Legislature reference the Order at all, let alone make any statement that it is superseding or correcting/confirming the Order. To the contrary, the Legislature instead states its intent to exercise its own authority to amend the Elections Code to address the safety of the November 3, 2020 general election in light of COVID-19. *See* Legislative Intent language for AB 860 [SEC. 1]. and SB 423 [SEC. 1], Def. RJN, #5, pp. 2-3 and RJN #6, pp. 2-3.

In fact, the relationship between the legislation and the contested action in the *Southern Cal.* case was precisely the opposite of what Defendant posits here. There the Legislature expressly *validated* agency rulemaking authority; where here, Defendant claims the Legislature impliedly *invalidated* – or superseded – his Executive Order. Without more the Legislature could not be said to have granted "missing authority" to the executive here when it simply acted to do something that was fundamentally within its legislative powers to do.

Further, this principle of retroactive authority has never been applied in any context other than agency rulemaking, and certainly not to the exercise of legislative powers that are beyond the Legislature's ability to delegate. It is worth pausing here to consider the breathtaking scope of what Defendant is suggesting. If executive orders that impermissibly exercise legislative powers can be "corrected" by subsequent legislation on the same topic, and thereby shielded from judicial review, the Governor's ability to dictate legislative outcomes is almost boundless. Especially on time-sensitive matters like election planning, he can preemptively enact his preferred policy and thereby force the Legislature either to "ratify" his edict or disrupt a process of implementation that has already been set in motion, or perhaps nearly completed. Such an outcome would certainly run afoul of the case law surrounding separation of powers. *See Butt v. State of California* (1992) 4 Cal.4th 668 (the separation-of-powers inquiry "focuses on the extent to which" a challenged action prevents another branch "from accomplishing its constitutionally assigned functions" quoting *Nixon v. Administrator of General Services*, supra, 433 U.S. at p. 443).

On the issue of mootness, the doctrine announced by the California Supreme Court case *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal. 2d 536 is

controlling. There the plaintiff sought both injunctive and declaratory relief as to the constitutionality of a regulatory scheme in statute. On appeal after obtaining injunctive relief, plaintiff subsequently became licensed and therefore became compliant with the disputed statute. The Supreme Court held that even though compliance may have worked to make plaintiff's issue moot, the appeal was not barred based on "the case-recognized qualification that an appeal will not be dismissed where, despite the happening of the subsequent event, there remain material questions for the court's determination" and this exception applies to actions for declaratory relief "upon the ground that the court must do complete justice… and the relief thus granted may encompass future and contingent legal rights." *See Eye Dog Foundation* at 541 (emphasis added). The Supreme Court found that the plaintiff "in light of its past history in that regard" would once again find itself afoul of the statute and "will thus be relegated to the very situation which precipitated the present litigation, a development creating a 'continuing controversy ripe for decision.'" *Id.* at 542.

So too here, the Governor's act in becoming compliant with the constitutional framework (allowing the Legislature to make and pass law) does not make the underlying issue moot. There remain material issues for the court to decide, namely in an action for declaratory relief as to whether the Governor actually had the legal authority to issue the disputed Executive Order and an injunction on further impermissible exercises of legislative powers. And again, based on his history and stated positions, we are likely to be right back in this same situation if there is not a determination of the issue.

In short, Defendant continues to contend that he worked in partnership with the Legislature. However, under the California Constitution that partnership works like this: the Legislature introduces, considers and passes legislation and the Governor, only after this process is complete, signs bills into law. The Governor is asserting that, during this emergency, it is the other way around. This contention cannot be allowed to stand.

CONCLUSION

If Plaintiffs are successful on their Complaint as alleged, Executive Order N-67-20, and its provisions that currently conflict with existing statutory law and the recently enacted legislation of AB 860 and SB 423, will finally be overturned. The Election Code will clearly be the law of the land. Further, Defendant will be enjoined from "further exercising any legislative powers in violation of the California Constitution and applicable statute, specifically from unilaterally amending, altering, or changing existing statutory law or making new statutory law." This is effectual relief that cannot be moot. Without a decision on the merits of this case there is a high likelihood that Defendant will continue to pass executive orders usurping the power of the Legislature and undermining the California Constitution. If this cornerstone principal of American government is undermined, Plaintiff and, all citizens for that matter, cannot be assured that the constitutional protections and other provisions of the social contract outlined by our state and federal constitutions will be enforceable, and if they are not enforceable *they* are rendered moot. I cannot imagine something more injurious to our republic.

For these reasons and the arguments as outlined in the points and authorized above we request that the Court deny Defendant's motion for judgment on the pleadings.

DATED: September 15, 2020

Respectfully Submitted,

JAMES GALLAGHER

/s/ KEVIN KILEY

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My place of business is Rice Lawyers, Inc., 437 Century Park Dr. Ste. C, Yuba City, CA 95991. On September 15, 2020, I served the within documents:

1. **OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

2. **PLAINTIFFS REQUEST FOR JUDICIAL NOTICE**

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

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

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

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

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

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

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

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 15, 2020 at Yuba City, California.

JENNIFER MCMULLEN