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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SUTTER

JAMES GALLAGHER and KEVIN KILEY Plaintiffs, v. GAVIN NEWSOM, in his official capacity as Governor of California Defendant.	Case No. CVCS20-0912 PLAINTIFFS' JAMES GALLAGHER AND KEVIN KILEY TRIAL BRIEF Time: 9:00 a.m. Judge: Hon. Sarah Heckman Action Filed: June 11, 2020 Trial Date: October 21, 2020

INTRODUCTION

This case concerns an elections-related Executive Order that presents a controversy of urgent and ongoing importance: the limits of a California Governor's powers during a State of Emergency.

In the midst of World War II, a case with a similar concrete controversy and a similar question of law was decided by the Supreme Judicial Court of Massachusetts. Acting pursuant to an emergency powers law, the state's Governor had changed statutes setting the date of the primary election so that soldiers would be able to vote. Despite the worthiness of that goal and the extreme peril posed by the war, the state's high court resolved the case by declaring the law unconstitutional. It held that the emergency powers statute impermissibly awarded the Governor "a roving commission to repeal or amend by executive order unspecified provisions included anywhere in the entire body of" state law. The emergency, the court held, "did not abrogate the Constitution."[1]

Two weeks ago, the Michigan Supreme Court relied on this case in striking down an emergency powers law that has been expansively invoked by that state's Governor during the COVID-19 pandemic. Nearly eight months into this State of Emergency, other states have also had their constitutional balance of power restored by judicial decisions. The case at bar presents the right controversy at the right time.

California's own Emergency Services Act is not as expansive as the laws in Massachusetts or Michigan. But Defendant has acted as though it is. Plaintiffs humbly ask this Court to reject this overreaching interpretation of California law and uphold the separation of powers that defines our form of government.

SUMMARY OF UNDISPUTED FACTS

The undisputed facts in evidence are as follows:

1. **Executive Order N-67-20 (the "Order') was issued by the Governor on June 3, 2020.** (Defendant's Ex. 5.)

[1] Opinion of the Justices (1944) 315 Mass 761, 767.

2. **The Order not only suspends but substantively changes provisions of the California Elections Code.** (*See* Plaintiffs' Motion for Judgment on the Pleadings ("JOP Mot.") at pp. 9-10; and Defendant's Opposition thereto ("Opp.") at p. 12 ["Accordingly, he suspended completely and in part numerous provisions of the Elections Code *and* issued orders *establishing* certain election procedures…"] [emphasis added].)
3. **There is an actual and ongoing controversy between the parties.** Plaintiffs contend that Executive Order N-67-20 was an impermissible usurpation of legislative powers by the Defendant Governor. (*See* Compl. ¶ 14-16.) The Governor "vigorously disputes" this. (Defendant's JOP Mot. at p. 14. ln. 4.) The Governor contends that the Order "fits comfortably within the Governor's broad grant of authority under the Emergency Services Act." (Opp. at 12, ll. 3-4.) He has also publicly stated that the Order was on firm legal footing and that subsequent legislation was not strictly necessary. (*See* Plaintiffs' Ex. H.)
4. **A decision of this Court will fully resolve the matter between the parties** because it will determine the legality of the Executive Order (Compl. ¶ 18, 20) and govern the Governor's future conduct with regard to executive orders by restraining him from "further exercising any legislative powers… specifically from unilaterally amending, altering or changing existing statutory law or making new statutory law" [Compl. ¶ 21] during the course of the current emergency, an emergency which as of yet has no determinative end in sight. (Plaintiffs JOP Mot. at p. 5, ll. 13-26; Opp. at 6-7; *see also* Def. JOP Mot at pp. 7-8.)
5. **The controversy is very likely to reoccur** because the Governor has already issued three executive orders this year specifically with regard to elections (Defendant's Exs 4 and 5; Plaintiff's Ex. D) and altogether has issued 55 different executive orders that span 15 different Codes and change over 400 laws (*see* Plaintiff's Ex. F); because there is a strong likelihood of a special election in the coming months (*see* Plaintiffs' Ex. J F); and because the Governor continues to assert that he is constitutionally permitted to alter existing elections statutes. (*See* Opp. at p. 13 ["Indeed, the [Emergency Services Act]

has specifically been understood to empower the Governor to suspend provisions of the State's Elections Code and modify the State's elections procedures...."].)

6. **The legislative language and the Legislative Intent Language of AB 860 and SB 423** say nothing about the Legislature Working in Conjunction with the Governor or Ratifying/Superseding the Order. (*See* Defendant's Ex. 6 and 7.)

APPLICATION OF LAW

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.

Defendant cleverly attempts to remove the clear request for permanent injunctive relief from Plaintiff's complaint. 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.

As the evidence shows, 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 (Def.' Exh. 5) clearly shows this.

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. "[T]he Governor may not exercise legislative powers." (*Harbor v. Deukmejian* (1987) 43 Cal. 3d 1078, 1084.) Here, the Governor exercised legislative powers, and does not deny it. Therefore, the Governor did something he may not by law do.

Article III, section 3 of the California Constitution contains an explicit separation-of-powers provision. A Governor can violate this provision in two different ways. The first type of violation occurs when a Governor takes an action that he could only take if authorized by the Legislature, and the Legislature provided no such authorization. The second occurs when a Governor takes an action that *was* authorized by the Legislature, but the Legislature had no right to provide that authorization. While not mutually exclusive, these two options can be conceived

as distinct avenues for resolving this case. Indeed, if the Court accepts the reasoning of the Michigan Supreme Court in its recent decision,[2] they are the *only* options:

(1) The Court can accept Plaintiffs' statutory interpretation and rule that the Executive Order was not authorized by the Emergency Services Act; or

(2) If the Court determines that Defendant's statutory interpretation allowing plenary policymaking authority is the only reasonable interpretation, the Act itself should be declared unconstitutional.

This is the heart of the controversy and dispute between Plaintiffs and the Defendant. A declaration of this court grants Plaintiffs' the "effectual relief" (*Consol. etc. Corp. v. United Auto etc. Workers* (1946) 27 Cal.2d 859, 863) of having this constitutional controversy decided and govern the respective parties' actions through the remainder of this emergency and future emergencies.

I. The Executive Order Violated the Constitutional Separation of Powers

A. The Executive Order Was a Legislative Enactment

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

- Resolution 1) reiterates provisions of a previous order (N-48-20) for the November 3, 2020 election, that all active voters receive a mail-ballot. This substantively amends, changes, and alters the provisions of Elections Code section 3001 et. seq. which provide that a mail-ballot is an elective process by which a voter may request to vote by mail.
- Resolution 2) states all counties' elections officials shall use the Secretary of State's ballot tracking system. This substantively amends, changes, and alters Elections Code sections 3019.5 and 3019.7, which provide counties with other methods of tracking ballots.

[2] *In re Certified Questions from the United States District Court, Western District of Michigan, Southern Division Midwest Institute of Health, PLLC v. Governor*, Docket No. 161492 (Oct. 2, 2020) [hereinafter, "*SDMIH*"].

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

Defendant has never contested the legislative character of these enactments. To the contrary, he has pleaded they were "interim" measures until proper legislation was passed, whereupon they were "superseded." (Def. JOP Mot. at pp. 7, 13.) Several other Executive Orders issued by Defendant during the COVID-19 State of Emergency clearly exercised legislative power in this same way, including measures related to Workers' Compensation, paid sick leave, and other elections-related orders. (See Plaintiffs' Ex. F.)

B. If the Order Was Authorized by the Emergency Services Act, as Defendant Argues, then the Act Must Be Held Unconstitutional

1. Legislative power cannot be delegated

Article IV, section 1 of the California Constitution provides that the "legislative power of this State is vested in the California Legislature." Legislative power – that is, the "formulation of policy" – can neither be seized by the executive branch nor awarded to it by a willing Legislature; a statute that gives the Governor "discretion as to what [the law] shall be" amounts to an unlawful delegation. (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 299; *id.* at p. 301 [quoting *Loving v. United States*, *supra*, 517 U.S. at pp. 758-759].) The California Supreme Court has repeatedly affirmed that the power "to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature and cannot be delegated by it." (*Dougherty v. Austin* (1892) 94 Cal. 601, 606-07.)

The Legislature can, to be sure, confer on the executive branch "authority or discretion as to [a law's] execution." (*Carmel*, *supra*, 25 Cal.4th at p. 299.) But there is no claim that this is what was done here; the Governor cites no elections statute, either in the Order or in this litigation, pursuant to which he was merely executing a duly legislated policy. The only statutory authority cited is in the Government Code: three provisions of the Emergency Services Act. Those provisions do not concern elections policy, nor does any other provision of that Act relate to elections.

Defendant's legal theory, while inchoate and unarticulated, can therefore only be as follows: the Emergency Services Act is an all-purpose authorizing statute pursuant to which the Executive Branch can churn out the equivalent of laws at will in any California Code.[3] This interpretation runs squarely up against the "doctrine prohibiting delegation of legislative power," which is "well established in California." (*Kugler v. Yocum* (1968) 69 Cal.2d 371.) The purpose of the doctrine is "to preserve the representative character of the process of reaching legislative decision." (*Id.*) The California Supreme Court has explained that it "rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions." (*Id.*)

2. *For a delegation to be non-legislative and lawful, there must be an "effective mechanism" or "yardstick" to guide executive action*

This standard for distinguishing a lawful from an unlawful delegation – whether the Legislature has provided an "effective mechanism to assure the proper implementation of its policy decisions" – is also described by courts as providing "primary standards for the

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[3] At the same time, Defendant claims he should be free from judicial oversight. He argues it would be "inconsistent with the Emergency Services Act" for the Court to "second-guess the Governor's determination" that his Order was necessary to address the emergency. (Opp. at p. 14.) But that is precisely the inquiry a court would have to undertake if the Act were truly functioning as an authorizing statute with respect to Executive Order N-67-20: whether the Order's provisions were "reasonably necessary to implement the purpose" of the Act. (*Yamaha Corporation v. Board. of Equalization* (1998) 19 Cal.4th 1.)

implementation of th[e] policy" (*Davis v. Municipal Court* (1988) 46 Cal.3d 64), "suitable safeguards to guide the power's use" (*People v. Wright* (1982) 30 Cal.3d 705, 712), and a "yardstick guiding the administrator" (*id.*) Notably, this is a *higher* standard than that applied by the Michigan Supreme Court in striking down that state's emergency law – an "intelligible principle" test that has been criticized for its permissiveness.[4]

What, then, is the effective mechanism, yardstick, or primary standard in the relevant sections of the Emergency Services Act to guide a Governor's use of powers granted by the Act and assure their proper implementation? Defendant never says. Instead, he simply claims the Act gives him "plenary authority to govern." (Opp. at p. 13.) Since Defendant points to no yardstick or effective mechanism, we can look to the Michigan case. The court there considered two candidates for an "intelligible principle" (again, a less demanding standard) that would save the statute: the requirement that emergency orders be "reasonable" and "necessary" to protect life and property. The first requirement is not found in California's law, but the latter is.[5] The Michigan Supreme Court, however, determined that neither was sufficient:

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

The same reasoning would rule out the word *necessary* as a "yardstick," "effective mechanism," "suitable safeguard," or "primary standard" to guide executive implementation of California's Emergency Services – if, as Defendant insists, that were the only limitation the Act provided.

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[4] *See, e.g.*, P. Hamburger, Is Administrative Law Unlawful? 378 (2014) ("[T]he notion of an 'intelligible principle' sets a ludicrously low standard for what Congress must supply.")

[5] Compare MCL 10.31(1) ["The governor may promulgate reasonable orders, rules, and regulations *as he or she considers necessary* to protect life and property or to bring the emergency situation within the affected area under control"], *with* Cal. Gov. Code § 8527 ["In exercise thereof, he shall promulgate, issue, and enforce such orders and regulations *as he deems necessary*, in accordance with the provisions of Section 8567."] [emphases added].

3. *The Michigan Supreme Court's decision aligns with the question presented here and California Supreme Court precedent*

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

There is nothing to distinguish the constitutional analysis in the Michigan decision from that which would proceed here under Defendant's interpretation of the Emergency Services Act. California and Michigan have essentially identical separation-of-powers provisions in their Constitutions. *Compare* Mich. Const 1963, art 3, § 2, *with* Cal. Const. Art. 3, § 3. Both the Michigan statute and Defendant's interpretation of California's "exhibit a sweeping scope, both with regard to the subjects covered and the power exercised over those subjects," resting on an "assertion of power to reorder social life." (SDMIH, *supra*, at p. 29; see Def. JOP Mot. at p. 8 [asserting that the Emergency Services Act "centralizes the State's powers in the hands of the Governor"].) California's law, like Michigan's, also authorizes an "indefinite exercise of emergency powers for perhaps months – or even years – considerably broaden[ing] the scope of authority conferred by that statute." (*Id.* at p. 30.)

At the October 7 hearing, Defendant attempted to distinguish California's statute because the Legislature, acting alone, can terminate a State of Emergency under Government Code section 8629. As an initial matter, if this provision were relevant to the delegation analysis as Defendant argues, it would not be a statute-saving "yardstick" or "standard" to guide execution action; it would be an unconstitutional legislative veto. (See, e.g., *California Radioactive Materials Management Forum v. Department of Health Services*, 15 Cal.App.4th 841 (1993)). An unconstitutional delegation of legislative power is not saved by an unconstitutional ability to unilaterally retract that power.

But Defendant's argument is beside the point. The current Legislature's ability to declare a particular emergency at an end does nothing to fill in the language of a statute from 1970 with a yardstick to guide executive action during this or any emergency. What matters for the delegation analysis is whether such a yardstick is provided for *in the statute*; it is the statute

that grants the Governor his powers, and it is the statute that must guide their exercise. (*See, e.g.*, *Wright*, *supra*, 30 Cal.3d)[6] Today's Legislature could by all means amend the law to provide such a yardstick; but its theoretical ability to express disapproval of a particular executive action by terminating the entire emergency does not supply one – and in any case, this would by definition come only *after* such unguided action is taken.

Finally, even if one were to accept Defendant's contention that section 8629 somehow obviates the California Supreme Court's nondelegation jurisprudence, it is hardly a "safeguard against executive overreach" (Opp. at p. 18) if the Legislature must declare a clear-and-present emergency "at an end" in order to disapprove any particular action taken by the Governor. The Legislature can both believe there is a continued need for a declared emergency and expect the Governor to stay within the confines of his powers under the Emergency Services Act. Indeed, it is not even clear that the language of the statute allows the Legislature to declare the emergency over simply to rebuke the Governor. Section 8629 refers to the emergency being declared over at "the earliest possible date that conditions warrant," which suggests that declaring an end to the emergency is a matter of fact-finding.[7]

Since Defendant does not distinguish California's Emergency Services Act from the Michigan statute in any way relevant to the nondelegation analysis, and since California has a higher standard for unlawful delegations, it follows that Defendant's interpretation of the Act would render unconstitutional.

4. Since Defendant's interpretation renders the Act unconstitutional, the Court should reject it.

The California Supreme Court has long adhered to a canon of constitutional avoidance, where unconstitutional interpretations of a statute are disfavored: "It is settled that statutes are to

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[6] This is also why Defendant's reliance on an approving letter from two members of the current Legislature is misplaced. The yardstick for guiding executive action must accompany the grant of power in a statute duly enacted by the Legislature and signed into law. Informal correspondence with a couple of political allies does not qualify.

[7] For the same reason, section 8629 does not make the powers delegated by the Emergency Services Act any less indefinite. Just as in Michigan, an emergency in California can last "months – or even years." (*SDMIH*, *supra*, at p. 29.) The current State of Emergency has lasted nearly eight months.

be so construed, if their language permits, as to render them valid and constitutional rather than invalid and unconstitutional . . . and that California courts must adopt an interpretation of a statutory provision which, consistent with the statutory language and purpose, eliminates doubt as to the provision's constitutionality. (*People v. Amor* (1974) 12 Cal.3d 20, 30 [internal quotation marks and alterations omitted]; see also *City of Los Angeles v. Belridge Oil Co.* (1954) 42 Cal.2d 823, 832 ["It is the rule that where a statute or ordinance is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, in whole or in part, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. The rule is based on the presumption that the legislative body intended not to violate the Constitution."].)

If possible, the Court should therefore construe the Emergency Services Act so as to render it valid and constitutional. In the following section, Plaintiffs offer such a construction, which follows directly from the text of the statute and puts it on firmer constitutional footing than Defendant's plainly unconstitutional reading. On the other hand, if the Court disagrees with Plaintiffs' interpretation of the statute and finds its words can only bear the broad and unbounded meaning Defendant gives them, it should be held unconstitutional. (See *Salinas v. United States* (1997) 522 U.S. 52 [explain that the avoidance canon does "not apply when a statute [is] unambiguous" and that a court "cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question."])[8]

II. The Executive Order Was Not Authorized by the Emergency Services Act

To uphold the constitutional separation of powers in this case, the Court need not determine that the Emergency Services Act is unconstitutional. The text of the Act does not purport to do what the State Constitution precludes: confer lawmaking powers such as the Governor claimed with Executive Order N-67-20.

[8] Were the Act struck down, Defendant would not be bereft of authority to address COVID-19. And if he believed additional authority were needed, he could summon a Special Session of the Legislature to pass a more limited emergency services law.

A. The Executive Order Created New Law

As discussed in Section I.A, *supra*, the Executive Order did not merely suspend multiple statutes. It created new laws for the upcoming election by (1) replacing the existing opt-in system for receiving a vote-by-mail-ballot with a requirement that all registered voters receive one; (2) replacing the existing laws for ballot tracking with a requirement for a specific ballot tracking system and specific type of barcode for ballot mail envelopes; (3) replacing existing election process laws with new requirements for the number of polling places and ballot drop-off locations as well as the days and hours they are to be open; and (4) replacing the procedure for getting input from the disability community and voting rights groups with a specific new procedure.

The legislative character of the Order is confirmed by the fact that at the time it was issued, two bills in the Legislature had been introduced to address the same topics: Senate Bill 423 and Assembly Bill 860. Defendant now opines that these bills, in their final form, "superseded" the Order. (Def. Ex. 18.)[9] Also confirming the legislative character of the Governor's enactments, he insists the Order was "an interim measure . . . until the pending legislation can be enacted" and that "to the extent there are minor differences between the Executive Order's requirements and SB 423 or AB 860, Defendant acknowledges that these statutes control." (Def. JOP Mot. at pp. 13, 14.)

B. The Emergency Services Act Does Not Confer Plenary Lawmaking Authority

In a statute with dozens of sections, Defendant only attempts to rely on three of them as authority for the Executive Order: Government Code sections 8571, 8567, and 8627. These provisions do not individually or collectively give a California Governor the kind of legislative powers exercised with the Order at issue in this case.

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[9] This statement only came from the Governor himself on September 30, despite the fact that the bills were signed on June 18 and August 6. (Defendant's Ex. 19.) Previously, the only statements as to the effect of the legislation on the Executive Order were ambiguous and evolving characterizations by his attorneys in this litigation, variously stating that the legislation "superseded," "corrected," "ratified and superseded it," or "essentially ratif[ie]s and supersede[s] it." (Def. JOP Mot. at pp. 7, 14.)

Section 8571 ("Suspension")

There is no colorable argument that section 8571, which confers a power to "suspend" specified statutes, authorized the new laws that were enacted here – and the Governor's brief does not attempt one. Had the Governor merely suspended provisions of the Elections Code, that section might be on-point. But his own Opposition Brief admits that the Executive Order did not stop at mere suspension (Opp. at 12); it created binding new law to govern the election.

Section 8567 ("Orders and Regulations")

Defendant next attempts to argue that section 8567 grants him the broad authority to create new election law. In fact, this section provides implementing authority as to the provisions of the Emergency Services Act itself. There is no elections provision in the Act.

To try to inflate the section's impact, Defendant selectively edited the statutory text in his filing, asserting that the section "authorizes the Governor to make 'orders and regulations' that 'have the force and effect of law.'" (Opp. at p. 11.) Omitted is the key caveat: that such orders and regulations are only authorized as is "necessary to carry out the provisions of this chapter." (Gov. Code § 8567(a).) This is the standard language of agency rulemaking, with a specific authorization for the Executive Branch to effectuate the enumerated purposes of the Act itself, *not* to create a boundless universe of new law. The section even provides an example, with subsection (c) describing the timing of orders and regulations "relating to the use of funds" – not any funds, but those whose expenditure is explicitly authorized by Article 16 of the statute. (*Id.* § 8567(c).)

Indeed, the Act does not keep it a mystery as to the provisions where "orders and regulations" are needed for implementation. Provisions dealing with topics such as food safety (section 8627.5), curfews (section 8634), and disaster worker classification (section 8585.5) all grant authority to the Governor or other officials to issue orders or regulations. This statutory scheme – with section 8567 conferring the authority needed to "carry out the provisions of this chapter" and the relevant provisions echoing this authority – is a far cry from the freewheeling lawmaking authority described by the Governor. It also fits much more comfortably within the

California Supreme Court's framework for the lawful delegation of implementation authority to the executive branch.

While section 8567 gives the Governor "orders and regulations" as tools to carry out the provisions of the Act, there is one tool he is clearly not given: "statutes." This is no accident. While the section gives the Governor power issue orders and regulations to *administer* and *implement* pursuant to the emergency, it does not confer the *legislative* power to rewrite or enact statutory policy. Notably, the Act does use the term "statute" elsewhere, including in section 8571 where the Governor is granted powers to suspend certain types of statutes. The drafters of the Act understood what statutes are, but did not use that term in section 8567 or in any way that would give the Governor the power to create them.

Other textual evidence adds to the certainty that "orders and regulations" refers to implementing authority over the Act itself. Subsection (d), for instance, suggests orders and regulations can be issued without there even being a State of Emergency, providing they "shall, whenever practicable, be prepared in advance of a state of war emergency or state of emergency." Finally, the Act explicitly recognizes that its own provisions limit the reach of the orders and regulations that can be issued, referring to "lawful orders and regulations of the Governor made or given *within the limits of his authority as provided for herein.*" (*Id.* § 8621 [emphasis added].)

Section 8527 ("Police Power")

The final authority cited by the Executive Order is Government Code section 8627, which Defendant claims gives him authority to "exercise . . . all police power vested in the state." (Opp. at p. 11.) He argues that this amounts to a "plenary authority to govern" that "centralizes the State's powers in the hands of the Governor." (Opp. at p. 13; Defendant's JOP Mot. at p. 8.) If this section did in fact confer this limitless power, one wonders why the drafters of the statute bothered to list other powers at all.

In fact, Defendant again truncates the statutory language to inflate the powers conferred, omitting three key caveats in the surrounding text. First, the police power conferred is that "vested in the state by the Constitution and the laws of the State of California" (Gov. Code §

8627) – and thus could not transcend constitutional strictures, including separation of powers. Second, the "orders and regulations" issued pursuant to this section must be "in accordance with the provisions of Section 8567," discussed above; it thus cannot confer any additional authority beyond that section. (Gov. Code § 8627.) Third, the text makes clear that such orders and regulations must "effectuate the purposes of this chapter" (*id.*) – again sounding the language of implementation, not law creation.

Section 8527 thus does not provide the mandate for plenary policymaking that Defendant claims. Even if there were a plausible argument to that effect, the Court should opt for another reasonable interpretation because of the canon of constitutional avoidance.

C. Defendant Has Provided No Example of A Governor Exercising Emergency Powers in a Similar Way

The Governor's citation to Executive Orders by previous Governors is even less compelling than his textual analysis. Grasping for some precedent, he has produced five past elections-related executive orders that purportedly show that "the Emergency Services Act has specifically been understood to empower the Governor to suspend provisions of the State's Elections Code and modify the State's elections." (Opp. at p. 13.)

As an initial matter, none of these Orders has been tested in court. They have no weight as precedents. But even if they did, the Orders are so inapposite as to underline the historically unusual nature of what the Governor did here. Three of the five were issued the day before or day of a special election to facilitate voting by firefighters and EMS workers who were away from home fighting wildfires. (Defendant's Exs. 12, 13, and 15.) A fourth briefly extended a candidate filing deadline in one county. (*Id.*, Ex. 14.) The fifth was also limited to one county and issued while voting was underway. (*Id.*, Ex. 16.) The Order before the Court, by contrast, overhauled an election for all voters five months in advance.

Whatever else these Orders may be, they are not relevant to the point of law at issue here: four of the five invoke *only* section 8571 relating to the suspension of statutes. None invokes section 8627 ("police power"), and only one mentions section 8567 ("orders and

regulations") – but the latter is an Executive Order with 20 separate items, whose one elections-related item merely "suspends" and "waives" existing laws; it does not create them.[10]

D. Defendant's Interpretation of the Act Puts It on Par with the Michigan Statute

The Michigan Supreme Court struck down a grant of authority for the Governor "to promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property." (*SDMIH*, *supra*, at p. 31). Here, the Governor relies on a virtually identical provision of California's Emergency Services Act, giving him power to "promulgate, issue, and enforce such orders and regulations as he deems necessary for the protection of life and property…." (Opp. at p. 11.). But as pointed out above, his selective quotation cuts off a qualification at the end of this sentence: that this power must be exercised "in accordance with the provisions of Section 8567." No such qualification is found in the Michigan law.

Therefore, if the Court agrees with Plaintiffs that the clear statutory provisions of the Emergency Services Act narrow the scope of the powers conferred, then the Court should find that the Executive Order exceeded the powers granted by the Act. On the other hand, if the Court agrees with the Governor's interpretation that these qualifications do not limit his powers, and the statute admits of no other reasonable reading, that would make the Act equivalent to the Michigan statute – and by the reasoning of the Michigan Supreme Court, it should be declared unconstitutional.

III. THE CASE HAS NOT BEEN MADE MOOT BY THE PASSAGE OF LEGISLATION

It is Plaintiffs understanding that the Court has specifically ruled that the case is not moot by denying Defendant's recent Motion for Judgment on the Pleadings in the order dated October 7, 2020. To the extent that Defendant continues to make that argument at trial Plaintiffs would refer the Court to its previously filed Opposition to said Motion and the points and authorities stated therein as to why the case is not moot. Defendant has now agreed to limit

[10] Contrary to Defendant's claim, this Order did not "empower" the County of Sonoma to conduct an all-mail "special election." (Opp. at p. 13.) The authority to conduct an all-mail Consolidated Election was in existing law. (Defendant's Ex. 16; Elections Code § 4100 et seq.) The Order merely suspended some of the statutorily required procedures for that kind of election.

the formulation of its argument to now assert that the case is moot now because the November election is currently underway. *See* Joint Statement of Evidence and Exhibits. However, as we have pointed out the court may proceed in this matter because (1) the Order is still in effect and requiring counties to utilize IMb on their mail ballot envelopes and waiving the required meetings for VCA counties with respective voting rights groups; and (2) this is a matter of great public concern that is very likely to re-cur given the evidence at bar. *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.'").

Defendant may attempt to argue that there was no need to address VCA counties in the legislation because their plans had already been finalized at that point. Defendant can provide no evidence in the record of this fact. Also, SB 423 itself (Exh. 8) belies this factual contention because it provides for a strike team and waiver process for all counties (VCA and traditional) with regard to the number and location of their polling places and vote centers. Such provisions would not be necessary if all elections plans were already finalized for the November election.

Defendant may also attempt to argue that this was some coordinated, tandem response by the Legislature and his office, (i.e. that the two political branches just worked together on this question). Again, there is no evidence to support this factual contention. A letter from two legislators (which we have objected to as being both irrelevant and not subject to judicial notice) does not prove that there was coordination between the Legislature as a whole and the Governor. The clear terms of the legislation itself and the Legislative Intent language state nothing about any proposed coordination. *See* Legislative Intent language for AB 860 [SEC. 1]. and SB 423 [SEC. 1], Def. Ex. #6, pp. 2-3 and Ex. #7, pp. 2-3. By passing AB 860 and SB 423 the Legislature merely acted within its own powers and of its own accord. Neither does the legislation or Legislative Intent Language make any statement of ratification or superseding the Order. In fact, the legislation does not even mention the Order at all! Instead Defendant tries to offer a Senate Floor analysis written by Senate floor staff as evidence of such intent (Ex. 17). First, it is a settled canon of statutory interpretation that there is no need to go to such analysis

where the legislation and the intent language are clear. But even if we were, this is evidence only of what one legislative bodies staff thought of the matter, not evidence of what the Senate or Senators believed when they passed the legislation.

Finally, contrary to the assertion of the Order being some "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. Exh. H. 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?"[11] And apparently his position is that his action is not even reviewable so long as the Legislature follows up and passes similar (although not identical) legislation.[12] The evidence simply does not support Defendant's narrative here.

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.[13]

DATED: October 20, 2020

Respectfully Submitted,

By: _____

KEVIN KILEY

JAMES GALLAGHER

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

[12] 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.

[13] 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.

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 October 16, 2020, I served the within documents:

PLAINTIFFS' TRIAL BRIEF

___ 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.

__ 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 October 16, 2020 at Yuba City, California.

JENNIFER MCMULLEN