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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SUTTER

JAMES GALLAGHER and KEVIN KILEY Plaintiffs, v. GAVIN NEWSOM, in his official capacity as Governor of California Defendant.	Case No. CVCS20-0912 PLAINTIFFS JAMES GALLAGHER AND KEVIN KILEY'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JUDGMENT ON THE PLEADINGS Date: October 7, 2020 Time: 8:59 a.m. Judge: Hon. Sarah Heckman Action Filed: June 11, 2020

INTRODUCTION

Unable to muster a response to the clear legal basis for judgment on the pleadings, Governor Gavin Newsom has resorted to (1) countering a legal theory that Plaintiffs have not advanced (the constitutionality of the California Emergency Services Act) and (2) invoking the ongoing wildfires in a cynical attempt to strike a chord with a Northern California court at a time of untold suffering in the region.

Looking past these diversions and emotional appeals, the issue before the Court is clear: Does the Governor have the power to create new law under the California Emergency Services Act? A review of the statute shows that the answer is No. That is why the Executive Order at issue is legally deficient and judgment on the pleadings must be granted for Plaintiffs.

Recent developments also underscore the need for a directive that the Governor stop usurping the Legislature's power to make new statutory law. Plaintiffs' Opening Brief warned of the dangers of an extended State of Emergency, with a Governor apt to "fall into the habit of acting unilaterally" even for non-emergency purposes. As if to prove the point, on September 24 Governor Newsom issued a unilateral Executive Order banning gas-powered vehicles by 2035. In the Order, he did not cite the Emergency Services Act – a chilling sign that seven months into this emergency, lawmaking by decree has become normalized. The time for a judicial check has arrived, as has already occurred in numerous other states.

SUMMARY OF UNDISPUTED FACTS

The undisputed and dispositive facts from the pleadings and documents that can be judicially noticed by the Court are as follows:

1. **Executive Order N-67-20 (the "Order') was issued by the Governor on June 3, 2020.** (Plaintiffs' Request for Judicial Notice ("RJN"), Ex. B.)
2. **The Order not only suspends but substantively changes provision of the California Elections Code.** (*See* Plaintiffs' RJN, Ex. B; Plaintiffs' Motion for Judgment on the Pleadings ("Mot.") at pp. 9-10; and Defendant's Opposition ("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. (*See* Defendant's Motion for Judgment on the Pleadings 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." (*See* 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' RJN in Opposition to Def. Motion for Judgment on the Pleadings, Ex. C.)
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" [*see* Compl. ¶21] during the course of the current emergency, an emergency which as of yet has no determinative end in sight. (*See* Mot. at p. 5, ll. 13-26; Opp. at 6-7; see also Def. Motion JOP, 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 (*See* Plaintiffs' RJN Exs. A, B, and E) and altogether has issued 55 different executive orders that span 15 different Codes and change over 400 laws (*id.*, Ex. G); because there is a strong likelihood of a special election in the coming months (*See* Plaintiffs' RJN in Opposition to Defendant's Motion for Judgment on the Pleadings, Ex. 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…"].)

The active controversy may be resolved purely as a matter of law because the Order on its face is either legally permitted by the Constitution and the California Emergency Services Act or it is not. If not, the Order must be struck down and the Governor should be further enjoined from usurping legislative powers in this same way in the future.

I. THE GOVERNOR'S ORDER VIOLATED THE SEPARATION OF POWERS

A. The Governor's Order Was an Impermissible Legislative Act

"Unless permitted by the Constitution, the Governor may not exercise legislative powers." (*Harbor v. Deukmejian* (1987) 43 Cal. 3d 1078, 1084.) The Court will search the Governor's Opposition Brief in vain for any argument that he did not do precisely that with Executive Order N-67-20. The relevant section of the brief does not quote from or even mention the substance of the Executive Order's operative provisions. There is no explanation as to why the policies enacted by the Order were something less than legislative acts, as is alleged in Plaintiffs' Complaint and clearly demonstrated in their Opening Brief.

Instead, the Governor attempts to cast separation of powers as airy-fairy theory and leave the impression that anything goes. He describes the doctrine as "flexible" and "pragmatic" and even suggests the Executive Branch can "add to" laws at its pleasure. (Opp. at pp. 16, 17.) The latter claim is derived from a few words, shorn of context, in *Yamaha Corporation v. Board. of Equalization* (1998) 19 Cal.4th 1. As it happens, this particular California Supreme Court decision illustrates precisely what was wrong with the Governor's action here.

The agency rulemaking framework discussed in *Yamaha*, far from blessing a constitutionally forbidden marriage between the Legislative and Executive, actually presupposes an Executive Branch that is not cutting law from whole cloth. When a regulation is challenged, the Supreme Court explained, a reviewing court must look to whether it is "within the scope of the authority conferred" by the authorizing statute. (*Id.* at p. 10 [internal quotation

marks omitted].) Here, the Court cannot attempt that inquiry because there was no authority conferred by any authorizing statute. The Governor has never cited any section of the Elections Code that gives him the ability to craft election policy as he did with the Executive Order; to the contrary, his Order expressly replaced portions of that Code with his own policies. The second part of the inquiry, the *Yamaha* court explained, is whether the agency's regulation is "reasonably necessary to implement the purpose of the statute." (*Id.*) Once again, there is no elections statute here – no legislative purpose the Governor was dutifully implementing.

As *Yamaha* makes clear, proper rulemaking proceeds under the authority of a duly enacted statute and is directed at implementing the statutory purpose. Here, by contrast, the Governor improperly laid claim to policymaking authority *independent* of any statute and enacted such policy with a *self-directed* purpose. That is exactly what the California Constitution's separation-of-powers provision prohibits. Art. III, § 3; *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 297 [the "separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch"]; *id.* at p. 301 [forbidding the Executive Branch from exercising "discretion as to what [the law] shall be" [quoting *Loving v. United States*, 517 U.S. 748 (1996) at pp. 758-759]]).[1]

B. Lawmaking Power Cannot Be Constitutionally Delegated

As discussed, the Governor's Order points to no authorizing statute in the Elections Code pursuant to which it enacts policy. The only statute cited in the Order is in the Government Code: the Emergency Services Act. For this Act to have played the role of an "authorizing statute" here, it would have to be conceived as a sort of meta-statute that gives the Executive Branch a roving authority to create any and all new laws in any California code, so

[1] The Governor complains that *Carmel Valley* predates the California Supreme Court's recognition that federal separation-of-powers jurisprudence need not bind state courts. Yet he makes no claim that the case has been disapproved. Moreover, since the California Constitution contains an *explicit* separation-of-powers provision that its federal counterpart lacks, U.S. Supreme Court precedents would apply *a fortiori* to California.

long as they implement the meta-purpose of the Act. As will be discussed, *infra*, this is nowhere close to what the text of the statute allows.

For present purposes, it should be noted that not even the Governor argues that this is how the Act functions.[2] That is, the Governor himself is unwilling to try to stretch the facts of this case into the one accepted framework for the issuance of positive law by the Executive Branch. And for good reason: this conception – of the Emergency Services Act as an all-purpose authorizing statute pursuant to which the Executive Branch can churn out the equivalent of statutes at will in any California Code – would spectacularly exceed the outer reaches of powers the Legislature can lawfully delegate. (*Carmel Valley*, *supra*, 25 Cal.4th at p. 301 [a statute that gives the Governor "discretion as to what [the law] shall be" amounts to an unlawful delegation]; see also *Clinton v. City of New York*, 524 U.S. 417 (1998) (Kennedy, J., concurring ["That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow.... Abdication of responsibility is not part of the constitutional design."]).

Because the Governor cannot identify a specific authorizing statute, and because no statute, including the Emergency Service Act, can function as an all-purpose authorizer, the Executive Order was a constitutionally impermissible exercise of legislative powers.

II. THE GOVERNOR'S ORDER WAS NOT AUTHORIZED BY THE EMERGENCY SERVICES ACT

A. The Text of the Act Does Not Confer Lawmaking Powers

[2] While relying on *Yamaha* to cherry-pick impressive-sounding language, the Governor explicitly *rejects* its agency rulemaking framework in arguing that 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, under *Yamaha*, 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.

The text of the Emergency Services 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. From the start, the Governor's argument that this is a proper interpretation of the Act faces an uphill battle. First, the canon of constitutional avoidance counsels against an interpretation that would render the Act a clear violation of the Constitution. (See, e.g., *People v. Coronado* (1995) 12 Cal.4th 145.) Second, the California Supreme Court has held that any exception to separation-of-powers (which could only come from the Constitution itself) must be "strictly construed." (*Deukmejian, supra*, 43 Cal. 3d at p. 1086.).

The Governor attempts to rely upon Government Code sections 8571, 8567, and 8627.[3] There is no colorable argument that section 8571, which confers a power to "suspend" specified statutes, authorized the new replacement 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. It is not even clear, moreover, that section 8571 contemplates elections policy as within the power of suspension, and the Governor points to no case law in support of that proposition.

Not finding the authority in 8571, the Governor 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. To try to inflate the section's impact, the Governor's Opposition Brief selectively edits the statutory text, 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

[3] Sections 8567 and 8627 are not even mentioned by courts in outlining the "broad" powers afforded by the Emergency Services Act. (See, e.g., *Ca. Corr. Peace Officers v. Schwarzenegger,* 163 Cal.App.4th 802.). This works against the Governor's contention that the provisions confer a plenary, roving lawmaking authority foreign to the California Constitution and republican government.

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.

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 over *executive* orders and regulations to *administer* and *implement* pursuant to the emergency, it does not bestow upon him 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].)

The final authority cited by the Executive Order is Government Code section 8627. Again, the Governor's brief truncates the statutory language to promote an implausible inflation of the powers conferred, claiming authority to "exercise . . . all police power vested in the state." (Opp. at p. 11.) This omits 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.

There is simply no reasonable textual interpretation of these three sections that either separately or in combination provides a mandate to engage in plenary policymaking. Even if there were a plausible argument to that effect, the Court should opt for another reasonable interpretation because of both the canon of strict construction for separation-of-powers exceptions and the canon of constitutional avoidance.

B. <u>The Previous Executive Orders Cited Are Not Relevant Authority</u>

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 Request for Judicial Notice, 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.

Finally, in an argument bordering on the frivolous, the Governor suggests that because the Legislature did not respond to the above elections-related Executive Orders by promptly amending the Act, this "is a strong indication that this use of the Emergency Services Act is correct." (Opp. at pp. 13-14.) First, as discussed, these Orders are in no way comparable, as a matter of fact or law, to the Order at issue here. Furthermore, because they were so miniscule and targeted in nature – and apparently consistent with the power to suspend statutes afforded by section 8571 – one cannot reasonably draw any inference of acquiescence from the Legislature's failure to spring to action and overhaul the Act in response.

III. THE SEPARATION-OF-POWERS HARMS OF UNILATERAL EXECUTIVE LAWMAKING WERE BORNE OUT WITH THE GOVERNOR'S ORDER

Plaintiffs Opening Brief explains in detail how the Governor's unlawful Order forced the Legislature' hand towards his preferred policy and clearly usurped the legislative role. In Opposition, the Governor chooses to simply ignore this analysis. Not a word is said about it. Instead, he hopes the mere incantation of "inter-branch cooperation" over and over will conjure an alternate reality.

The Governor's continued invocation of the approval of two legislators – Assemblyman Marc Berman and Senator Tom Umberg – as relevant to the separation-of-powers inquiry is baffling. He has provided no reason why their comments should carry any weight at all. Kind words from individual legislators does not amount to "interbranch coordination." Even if one

assumes, counterfactually, that these two legislators and the Governor were in lock-step about every detail of election policy, the Governor's Order effectively foreclosed substantive changes other lawmakers might have induced through the give-and-take of the legislative process. For that matter, even if the Governor were "coordinating" with all 120 Legislators, they cannot collectively award him authority outside of the specific procedure for legislation outlined in the Constitution.[4]

Nor does the Legislature's power to terminate a State of Emergency under Government Code section 8629 create some sort of equilibrium that justifies any and all unilateral actions, as the Governor argues. As an initial matter, the same argument would justify any unlawful delegation of legislative power, as the Legislature could always supersede the Governor's subsequent actions with new legislation. But here the Governor's argument is even weaker, because the Legislature could *not* supersede the Governor's action with new legislation on the topic of that action, but only by terminating the entire State of Emergency. This is hardly a "safeguard against executive overreach" (Opp. at p. 18) if the Legislature must terminate what may well be a clear-and-present emergency in order to disapprove any particular action taken by the Governor.[5] The Legislature can both believe there is a continued need for declared emergency and expect the Governor to stay within the confines of his powers under the Emergency Services Act. If he does not there are other methods to check his abuse of power: hence this lawsuit.

[4] Contrary to the Governor's assertion, the Legislature was in session when the Governor issued his Order and for weeks after – and indeed passed Senate Bill 423 several months before the election. (Plaintiffs' RJN, Exs. C and D.)

[5] If emergency powers really did include the power to create policy across various domains, as the Governor argues, then their retraction by the Legislature would constitute an unconstitutional legislative veto. (See, e.g., *California Radioactive Materials Management Forum v. Department of Health Services*, 15 Cal.App.4th 841 (1993)). For this additional reason, the Governor's interpretation of the Act would render it unconstitutional, and the avoidance canon counsels rejecting that interpretation.

IV. THE CASE IS RESOVABLE ON THE PLEADINGS AS A PURE QUESTION OF LAW

Contrary to Defendant's assertion, the general denial here with boilerplate defenses lacking any material factual allegations is not sufficient to make any material fact at issue here. *See All State Insurance Company v. Kim* (1984) 160 Cal.App.3d 326, 332. And as Defendant concedes judgment may be had where Plaintiffs claims are resolvable "purely as questions of law". *Barasch v. Epstein* (1957) 147 Cal.App.2d 439, 443. They are. Plaintiffs' motion should be granted.

DATED: September 30, 2020

Respectfully Submitted,

By: _____

/s/ KEVIN KILEY
/s/ JAMES GALLAGHER

In Pro Per

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 30, 2020, I served the within documents:

1. **REPLY OF PLAINTIFFS RE: MOTION FOR JUDGMENT ON THE PLEADINGS**

2. **PLAINTIFFS' ADDITIONAL 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.

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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 30, 2020 at Yuba City, California.

JENNIFER MCMULLEN