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7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **COUNTY OF SUTTER**

8	_____)	Case No. CVCS 20-0912
9	JAMES GALLAGHER and KEVIN)	
10	KILEY,)	PLAINTIFFS' JAMES
11	Plaintiffs,)	GALLAGHER AND KEVIN
12	v.)	KILEY'S NOTICE OF
13)	SUPPLEMENTAL AUTHORITY
14	GAVIN NEWSOM, in his official capacity)	Hearing Date: October 7, 2020
15	as Governor of California)	Time: 9:00 a.m.
16	Defendant.)	Judge: Hon. Sarah Heckman
17	_____)	Trial Date: October 21, 2020
		Action Filed: June 11, 2020

1 Plaintiffs JAMES GALLAGHER and KEVIN KILEY hereby provide notice of a new
2 opinion¹ from the Michigan Supreme Court issued two days after Plaintiffs filed their Reply
3 Brief, which holds that an emergency powers law similar to California’s violates a
4 constitutional separation-of-powers provision virtually identical to California’s.

5 The Court there found “an unlawful delegation of legislative power to the executive
6 branch,” just as Plaintiffs here argue that “lawmaking power cannot be constitutionally
7 delegated” to the executive branch (Reply at p. 5). The Court there relied on the proposition
8 that a Legislature cannot give the Executive Branch “a roving commission to repeal or amend
9 by executive order unspecified provisions included anywhere in the entire body of state law,”
10 just as Plaintiffs here argue that our Legislature cannot “give[] the Executive Branch a roving
11 authority to create any and all new laws in any California code.”²

12 As noted in their Reply Brief, Plaintiffs’ primary legal theory in this case does not
13 require a finding that the Emergency Services Act is unconstitutional. However, both sides
14 agree that the question of whether it is constitutional is before the Court.³ The Michigan
15 decision thus crystallizes the possible outcomes of this case:

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

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20 ¹ *In re Certified Questions from the United States District Court, Western District of*
21 *Michigan, Southern Division Midwest Institute of Health, PLLC v. Governor*, Docket No.
161492 (Oct. 2, 2020). The persuasive authority relevant to this case spans pages 21 to 37.

22 ² Notably, the case cited invalidated an ***elections order*** issued under an emergency
23 powers statute, which the Governor claimed let him “modify statutes establishing the date of
24 state primaries so as to allow soldiers to vote.” The court held that this unconstitutionally
25 “surrendered legislative power to the executive.” (Opinion at pp. 34-35.)

26 ³ The Governor’s Opposition states: “Plaintiffs contend that the Order – and, therefore,
27 the Emergency Services Act itself – is an “impermissible exercise of legislative power” in
28 violation of the California Constitution’s separation-of-powers provision; “Plaintiffs’ challenge
to the constitutionality of Executive Order N-67-20 is . . . necessarily a challenge to
constitutionality of the Emergency Services Act.” And Plaintiffs consistently argue that the
Governor’s interpretation of the Act would render it unconstitutional. Mot. at p. 6, n.2; p. 8, ll.
19-20; p. 9, ll. 12-13; p. 10, l. 26; p. 11, ll. 18-19; p. 12, ll. 6-7; p. 15, ll. 13-15; Reply at p. 6, ll.
6-9; p. 10, ll. 10-15; p. 10, ll. 16-18; p. 7, ll. 1-3; p. 7, ll. 4-5; p. 7, n.3; p. 9, ll. 13-16; p. 11, ll. 9-
10; p. 11, n.5.

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(2) If the Court instead accepts the Defendant’s statutory interpretation of broad unilateral authority under the Act, the Act itself should be declared unconstitutional.

To state the matter clearly: 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.” (Opinion 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 in Plaintiffs’ Reply Brief, 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.” (Reply at p. 9.). No such qualification is found in the Michigan law. Plaintiffs have also pointed out that the clear terms of the California ESA allow only a suspension of specified statutes by the Governor, not unilateral amendments and re-writes thereof. (Reply at 7.).

Therefore, if the Court agrees with Plaintiffs that the clear statutory provisions of the ESA narrow the scope of the powers conferred (see Reply at pp. 7-9), 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, that would make the Act equivalent to the Michigan statute – and by the reasoning of the Michigan Supreme Court, it should be declared unconstitutional.

DATED: October 5, 2020

Respectfully Submitted,

KEVIN KILEY

JAMES GALLAGHER