Case No.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

GAVIN NEWSOM, in his official capacity as Governor
of the State of California,
Petitioner;

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SUTTER,
Respondent;

JAMES GALLAGHER and **KEVIN KILEY**
Real Party in Interest.

After a Decision by the Court of Appeal
Third Appellate District
Case No. C093006
(Super. Ct. No. CVCS200912)

VERIFIED PETITION FOR REVIEW

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court, Rules 8.208, 8.490(i), 8.494(c), 8.496(c), or 8.498(d)

Supreme Court Case Caption:

GAVIN NEWSOM v. THE SUPERIOR COURT OF SUTTER COUNTY, et al.

Court of Appeal Case Number: C093006

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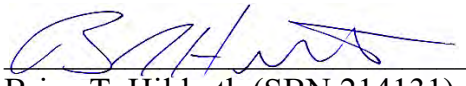
☒ There are no interested entities or persons to list in this Certificate as defined in the California Rules of Court.



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PETITION FOR REVIEW

TO THE HONORABLE PRESIDING JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT:

This Petition seeks review of the first ever appellate opinion in the history of the State of California holding that the Governor possesses virtually unchecked legislative powers during a state of emergency. If the case is not reviewed or depublished, it will set a dangerous precedent during future emergencies, particularly because states of emergency typically do not last long enough to allow a future appellate decision to address the subject.

Real Parties in Interest JAMES GALLAGHER and KEVIN KILEY respectfully petition this Court for review of the decision of the Court of Appeal, Third Appellate District, filed May 5, 2021 (**Exhibit A**), issuing a peremptory writ of mandate against the Sutter County Superior Court and a published opinion permitting the Governor's unilateral use of the State's legislative power and executive power following a declaration of emergency.

I. QUESTION PRESENTED

The central questions of statewide importance presented here are whether the California Governor may unilaterally exercise the State's legislative powers under Government Code section 8627, or if said statute's delegation of power, as interpreted by the Court of Appeal, violates article III, section 3 of the California Constitution, which provides: "The powers of state government are legislative, executive, and judicial. **Persons charged with the exercise of one power may not exercise either of the others** except as permitted by this Constitution." (Emphasis added.)

II. NECESSITY AND GROUNDS FOR REVIEW

This case tenders an urgent, unsettled and current question of whether the California Constitution and the Emergency Services Act empower the Governor to act with unimpeded legislative power during a proclaimed state of emergency. This Court has, of course, made clear how to identify an unconstitutional attempt to legislate. (*Gerawan Farming, Inc. v. Agric. Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1146 ["[A]n unconstitutional delegation of authority occurs only when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy"].)

The Governor claims that during a proclaimed emergency he is granted the unilateral discretion to decide fundamental policy issues. For example, in this matter, the Governor (by executive order) reduced the number of days voters could cast their ballots, ordered ballots be mailed to every address at which there was a record of a registered voter, and negated the need for many in-person polling places. The Governor's executive action unilaterally amended the Elections Code.

Fundamentally altering the way Californians participate in elections and restricting the methods by which voters may cast ballots could be just the beginning from a governor who has said he intends to utilize the state's COVID response as an "opportunity for reimagining a [more] progressive era as it [relates] to capitalism [and] an opportunity to reshape the way we do business and how we govern." (Andrew Mark Miller, Newsom says coronavirus is an 'opportunity for reimagining a more progressive era', Washington Examiner (Apr. 2, 2020).) The Governor's prior actions unquestionably violated article III, section 3 of the California Constitution,

and with the Court of Appeal's approval, Californians can undoubtedly expect more fundamental policy changes from an official now holding virtually unlimited police power.

Troublingly, the "legislative safeguards" enumerated by the Court of Appeal (opining that either the Governor or Legislature could simply call an end to the emergency) are not safeguards at all. This is because any legislative action (by the Legislature), addressing the state of emergency, could be overridden by the Governor acting in his new, broad legislative/executive capacity. This would leave the Legislature facing a Sophie's Choice of either calling off the emergency, when the emergency may not in fact be over, OR leaving the emergency declaration in place and acquiescing to the Governor's unconstitutional lawmaking.

The "safeguard" of adequate judicial review or objection by residents and voters is also absent. As the Ninth Circuit has opined, emergency decision-making "normally does not admit participation by, or input from, those affected, [and] judicial review…is often greatly curtailed or non-existent." (*Sinaloa Lake Owners Ass'n v. City of Simi Valley* (9th Cir. 1989) 882 F.2d 1398, 1410.)

Finally, while parts of the executive branch maintain rulemaking and regulatory authority, those powers are limited to filling the priorities set by the Legislature. The executive branch has never maintained actual legislative powers, but rather quasi-legislative powers only. As a result, the Court of Appeal's ruling sets the stage for a Governor to unconstitutionally end-run the Legislature at will in times of proclaimed emergency.

Supreme Court review is warranted when it is "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules

of Court, rule 8.500(b)(1).) Review is particularly important when the disputed questions of law are ones of statewide impact.

Real Parties In Interest ask this Court to remedy the Court of Appeal's overbroad grant of legislative power to the Governor in times of proclaimed emergency, or depublish the Appellate Court's opinion (as will be requested by Real Parties' by subsequent letter).

III. STATEMENT OF CASE AND FACTS

A. Procedural History

Governor Issues EO No. N-64-20: The Governor issued Executive Order No. N-64-20 on May 8, 2020. Executive Order N-64-20 required all voters to be provided vote-by-mail ballots and that the administration work in partnership with the Secretary of State and the Legislature on requirements for in-person voting opportunities and how other details of the November election will be implemented. (**Exhibit B**.)

Governor Issues EO No. N-67-20: As relevant to this matter, the Governor next issued Executive Order No. N-67-20 on June 3, 2020 (hereinafter the "Executive Order"). (**Exhibit C**.) Executive Order N-67-20 imposed fundamental changes to the way 17 million voters would receive, cast and return ballots for the November 3, 2020 election. Among other changes to elections statutes, the Governor's Executive Order unilaterally altered the procedures for the number, location, and duration of polling places and voting centers.

Until issuance of the Executive Order, the conduct of elections was governed by the Elections Code, a duly enacted statutory scheme passed by the Legislature, and supplemented by a short code of regulations promulgated by the Secretary of State (the Secretary of State's power to enact

elections regulations was also enacted by the Legislature). The Executive Order attempted to supersede the Elections Code by not only suspending certain provisions of the statute, but *enacting* others. The Executive Order explicitly reaffirmed the Governor's prior order (N-64-20) that "all Californians who are registered (and otherwise eligible) to vote in the November 3, 2020 General Election *shall receive vote-by-mail ballots*." (Emphasis added.) The Executive Order likewise attempted to legislate the process for voting in-person, contravening existing California law in the process. The Executive Order also altered the procedures for the number, location, and duration of polling places and voting centers - all previously provided for by valid legislative enactments (see, e.g., Elec. Code, §§ 12200-12286; 12288). Indeed, the text of the Executive Order itself acknowledges the purpose of the Order is to legislate, by imposing new legal requirements on county elections officials (e.g., the Executive Order's repeated use of the phrasing "Notwithstanding any contrary provision of state law," then citing to various Elections Code provisions, and then usurping those Elections Code provisions with new governing language).

Real Parties' Complaint for Declaratory & Injunctive Relief: On June 11, 2020, Real Parties In Interest filed a complaint for declaratory and injunctive relief in the Sutter County Superior Court seeking a declaratory judgment that the Executive Order "is null and void as it is an unconstitutional exercise of legislative powers reserved only to the Legislature, nor is it a permitted action" under the Emergency Services Act. Real Parties further sought an injunction against the Governor implementing the Executive Order. The complaint also sought an injunction against the Governor "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."

Superior Court Issues TRO: On June 12, 2020, the superior court granted Real Parties' *ex parte* application for a temporary restraining order, suspending the Executive Order, and also issued an order to show cause why the Governor should not be enjoined from implementing the Executive Order and exercising further legislative power to amend, alter or change existing statutory law, and/or make new statutory law.

Governor Signs AB 860: On June 18, 2020, the Governor signed Assembly Bill No. 860 (2019-2020 Reg. Sess.), which took effect immediately as an urgency statute. AB 860 declared that the general election to be held on November 3, 2020 raised health concerns about in-person voting due to the COVID-19 pandemic. The statute required county election officials to mail a ballot to every registered voter for the November 3, 2020 election, permitted voters to cast a ballot using a certified remote accessible vote-by-mail system in the election, and used the Secretary of State's system or its equivalent to allow voters to track their votes. The statute also made changes to certain elections deadlines.

Court of Appeal Reverses Superior Court's TRO: On July 10, 2020, the Third District Court of Appeal issued a peremptory writ of mandate directing the superior court to vacate its order granting Real Parties' *ex parte* application and issued an order denying it. (*Newsom v. Superior Court* (2020) 51 Cal.App.5th 1093, 1100.)

Governor Signs SB 423: On August 6, 2020, the Governor approved Senate Bill No. 423 (2019-2020 Reg. Sess.), also as an urgency statute with

immediate effect. SB 423 shortened the time for vote centers to open before the November 3, 2020 election, allowed election officials to establish consolidated precinct boards for multiple precincts in the same polling place, and provided for a number of other measures for a safe election. The declared purpose of SB 423 was to provide safe in-person voting opportunities for those who need them despite the vote-by-mail mandates of the Executive Order and AB 860. (Stats. 2020, ch. 31, §§ 1-4.)

Superior Court Issues Statement of Decision: On November 13, 2020, the Sutter County Superior Court issued a Statement of Decision addressing five primary legal issues in the case:

The superior court found that the case was not moot because plaintiffs requested declaratory relief beyond the validity of the Executive Order. The court found that plaintiffs' complaint sufficiently alleged that the California Constitution and the Emergency Services Act did not permit the Governor to issue orders that amended or made new statutory law;

The superior court determined that the Emergency Services Act is not unconstitutional, but concluded that the plain language of sections 8567 and 8571 does not authorize the Governor to *make or amend existing statutes*;

The superior court further concluded that the Executive Order in fact amended provisions of the Elections Code and therefore exceeded the Governor's authority under the Emergency Services Act. The court rejected the Governor's contention that the separation of powers was preserved by the Legislature's ability to terminate the state of emergency;

The superior court determined that declaratory relief holding that the Governor does not maintain the power to enact or amend statutory law under the Emergency Services Act was a matter of broad public interest particularly

suited to determination by judicial declaration. The court found and declared that the Executive Order was void as an unconstitutional exercise of legislative power because the Emergency Services Act does not authorize the Governor to amend or make statutory law;

Finally, the superior court found that a permanent injunction was necessary to prohibit the Governor from issuing executive orders that enact or amend state statutes. The court was persuaded by the evidence that the Governor would continue to issue executive orders enacting/amending statutes under the Emergency Services Act in violation of the California Constitution, which would lead to a multiplicity of other lawsuits unless restrained by a permanent injunction.

On November 16, 2020, the Governor filed an original action in the Third District Court of Appeal seeking a writ of mandate against the superior court and requesting an immediate stay of the lower court's permanent injunction.

Court of Appeal Overturns Superior Court: On May 5, 2021, the Third District Court of Appeal issued a peremptory writ of mandate directing the Sutter County Superior Court to dismiss as moot the portion of the lower court's judgment awarding declaratory relief that the Executive Order is null and void. (*Newsom v. Superior Ct. of Sutter Cty.* (2021) 278 Cal.Rptr.3d 397.) The Court of Appeal also directed the lower court to vacate the remainder of the judgment and enter a new and different judgment in favor of the Governor. The Court of Appeal's opinion centered on four separate legal principles:

1. **Mootness**: The Court of Appeal initially opined that the Governor's signing of AB 860 and SB 423 superseded the challenged Executive Order. However, the court also found that significant justiciable

issues remained because of the superior court's declaratory relief order that stated the Emergency Services Act does not give the Governor authority to make or amend statutory law by executive order, and, further, the permanent injunction prohibiting the Governor from doing so was not directed at the Executive Order but *any* order issued under the Emergency Services Act. (*Id*. at 404.)

2. **Constitutionality of Section 8627**: Upon *de novo* review, the Court of Appeal rejected the superior court's interpretation of section 8627 as excluding any grant of authority to the Governor to issue quasi-legislative orders. Instead, the Court of Appeal opined that "police power" includes generally the power to legislate (*i.e.* "the authority to enact laws to promote the public health, safety, morals and general welfare"). (*Id*. at 406.)

   The Court of Appeal described the Emergency Services Act's purpose as ensuring "that 'all emergency services functions' of the State and local governments, the federal government, and 'private agencies of every type,' 'be coordinated . . . to the end that the most effective use be made of all manpower, resources, and facilities for dealing with any emergency that may occur.'" (*Id*. at 408, citing *Macias v. State of California* (1995) 10 Cal.4th 844, 854.) The court concluded that the lack of specificity in guidance given to the Governor under the Emergency Powers Act was essentially a feature not a bug: "the requirement of particularized standards delimiting the specific orders that the Governor may issue is antithetical to the purpose of the Emergency Services Act to empower the Governor to deal with the exigencies of widely differing emergencies in California

from wildfires to floods to a pandemic." (*Id*.)

3. **Emergency Services Act's "Safeguards"**: The Court of Appeal also found that the Governor or Legislature could call off the emergency at any time, thereby cutting off the Governor's section 8627 legislative powers. (*Id*. at 409.) Section 8567 provides that "[w]henever the state of war or state of emergency has been terminated, the orders and regulations shall be of no further force or effect." The Court did not address a situation where, as here, a legitimate emergency exists, but the Governor's legislative actions have overreached the bounds of addressing the emergency.
4. **Other States' Emergency Powers**: Finally, the Court of Appeal pointed to Kentucky and Pennsylvania as examples of other states whose emergency powers grant the governor legislative authority, and which had been recently upheld after court challenge. However, as discussed herein, the cases cited by the Court of Appeal demonstrate different legal and factual scenarios than are present here (i.e., Kentucky's legislature is part-time, necessitating an executive with legislative power in times of emergency, and the Pennsylvania statutes allow for the "evacuation of all or part of the population from any stricken or threatened area," which justified the state's business closures).

IV. LEGAL DISCUSSION

A. The Court of Appeal Erred In Allowing The Governor To Unilaterally Determine What Legislative Actions Relate To A Declared Emergency.

"The exercise of emergency powers is particularly subject to abuse." (*Sinaloa Lake Owners Ass'n v. City of Simi Valley*, *supra*, 882 F.2d at 1410.)

The principle of the Separation of Powers is one of virtually unparalleled historical significance in the American political system. On June 13, 1787, the first draft of the U.S. Constitution's provisions that established the federal government was introduced at the Constitutional Convention. This draft specifically created the three branches of government, which had their constitutional powers clearly circumscribed and separated. (*Madison, James, Journal of the Constitutional Convention* (kept by James Madison), (1840 Ed.) reprinted 1893, Chicago: Scott, Foresman and Company, pp. 160-61.)

In response to those who opposed ratification of the Constitution during the ratification debates, James Madison addressed the issue of separation of powers in Federalist #47 (Hamilton, Alexander, Madison, James, Jay, John, The Federalist Papers, (1996), New York: NAL Penguin, Inc. ("Federalist Papers")):

> The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.

(Federalist Papers, *supra*, at 301.)

As this Court is well aware, this bedrock principle is incorporated into the California Constitution:

> The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.

(Cal. Const., art. III, § 3; and see *Carmel Valley Fire Protection Dist. v.*

State (2001) 25 Cal.4th 287, 297 [The separation of powers doctrine stands to "prevent the combination in the hands of a single person or group of the basic or fundamental powers of government"].)

A plain reading of article III, section 3 and interpreting case law establish that the Governor does not maintain "the power to enact statutes," he is empowered only to "execute or enforce statutes." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068; see Cal. Const., art. V, § 1 [The power of the executive is to "see that the law is faithfully executed"]; *Howard Jarvis Taxpayers Ass'n v. Padilla* (2016) 62 Cal.4th 486, 498 ["[U]nlike the United States Congress, which possesses only those specific powers delegated to it by the federal Constitution, it is well established that the California Legislature possesses plenary legislative authority except as specifically limited by the California Constitution"].) The People or the Legislature adopt public policies and legislate, and the Governor sees that those policies are fulfilled. (*Id*.) A Governor's policy preferences may not override the Legislature's policy choices, let alone the People's policy choices codified in the California Constitution. That would be tantamount to improper gubernatorial legislation.[1] Additionally, the powers vested exclusively in the legislature (to legislate) cannot be delegated by it. (*Dougherty v. Austin* (1892) 94 Cal. 601, 606-07; see also *People v. Johnson* (1892) 95 Cal. 471, 475.) "This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues." (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 376.)

These are the default rules, of course. As an exception of the doctrine of

[1] The Governor's principal legislative function under the state Constitution is his veto power, which is not at issue here. (See Cal. Const., art. III, § 10.)

Separation of Powers, the Governor can be empowered to exercise specific legislative powers, but only by direct constitutional grant of such powers. (See *Lukens v. Nye* (1909) 156 Cal. 498, 501 ["As an executive officer, he is forbidden to exercise any legislative power or function except as in the constitution expressly provided."]; *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1084 ["Unless permitted by the Constitution, the Governor may not exercise legislative powers"]; *Prof. Eng'rs in California Gov. v. Schwarzenegger* (2010) 50 Cal.4th 989, 1015-16, 1041.) These limited transfers of legislative power to the Governor are essentially restrictions on the Legislature's plenary power, and like any other such restriction, they must be "construed strictly" so as to preserve the Legislature's plenary power. (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.)

Although there is a certain overlap and interdependence among the three branches, in interpreting the state Constitution, courts in this state have affirmed that each of the branches maintains "core" or "essential" powers upon which the others cannot intrude. (See, e.g., *People v. Bunn* (2002) 27 Cal.4th 1, 14 ["[T]he Constitution does vest each branch with certain 'core' or 'essential' functions that may not be usurped by another branch"].) This Court's interpretation of the Legislature's core powers dates back 150 years, to literally the dawn of California's statehood. (*Nogues v. Douglass* (1857) 7 Cal. 65, 70 ["The legislative power is the creative element in the government, and was exercised partly by the people in the formation of the Constitution…[t]he legislative power makes the laws, and then, after they are so made, the judiciary expounds and the executive executes them"].)

/ / /

B. By Enacting Section 8627, the Legislature Has Not Authorized Legislative Action by The Governor Under A Grant Of The State's Police Powers.

The California Emergency Services Act (Gov. Code, § 8550 et seq.) ("ESA") allows the Governor to exercise certain enumerated powers during proclaimed states of emergency. The three ESA statutes principally at issue in this matter are sections 8567, 8571, and 8627.

Government Code section 8567(a) provides that "[t]he Governor may make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter" and such "orders and regulations shall have the force and effect of law." The Court of Appeal was quick to point out that section 8567 maintains no provision authorizing the Governor to enact legislation, but rather distinguishes "orders and regulations" from "law" by stating that the former "shall have the force and effect of law." (*Newsom v. Superior Ct. of Sutter Cty.*, *supra*, 278 Cal.Rptr.3d at 405; but see *Canteen Corp. v. State Bd. of Equalization* (1985) 174 Cal.App.3d 952, 960 ["a valid administrative regulation has the force and effect of law"].)

Section 8571 provides in pertinent part that during "a state of emergency the Governor may suspend any regulatory statute, or statute prescribing the procedure for the conduct of state business, or the orders, rules, or regulations of any state agency . . .where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency."

Next, Government Code section 8627 states:

> During a state of emergency the Governor shall, to the extent he deems necessary, have complete authority over all agencies

> of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes of this chapter. 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.

The Court of Appeal determined that section 8627's grant of the state's "police power" to the Governor was not an unconstitutional delegation of legislative power. However, given the applicable authorities, the court's conclusion was overbroad and unnecessary, and sets a dangerous precedent.

As an initial matter, the Court of Appeal failed to reconcile the grant of police powers with the qualification in section 8627, limiting the conveyed police powers to "orders and regulations." (*DeCanas v. Bica* (1976) 424 U.S. 351, 356 [A state's police power includes the power to issue regulations].) A more restrained reading of the statute would preserve both the language of section 8627 (including its limiting reference to police powers as vested by the Constitution) *and* article III, section 3 of the state Constitution: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others…."

Instead, the Court of Appeal's opinion results in a constitutional violation in light of article III and case law that holds that the police power is the product of legislative determinations empowering the legislative branch to set fundamental policies and make laws as may be necessary to promote public "health, peace, comfort, and welfare." (*Ex parte Junqua* (1909) 10 Cal.App. 602, 604; *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436, 440 [The Legislature exercises the police power of the

state at its discretion]; and see *Berman v. Parker* (1954) 348 U.S. 26, 32 [Police power is "essentially the product of legislative determinations addressed to the purposes of government"]; *Stone v. Mississippi* (1880) 101 U.S. 814, 817 ["[T]he legislature cannot bargain away the police power of a State"].)

"The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." (*Mistretta v. United States* (1989) 488 U.S. 361, 371.) Generally, a legislative body is precluded from delegating or transferring its legislative functions with which it is vested. (*Panama Refining Co. v. Ryan* (1935) 293 U.S. 388, 425-26.) A statute violates the federal nondelegation principle if "there is an absence of standards for the guidance of the [executive's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed…." (*Mistretta v. United States*, *supra*, at 379.) Therefore, for a delegation of legislative authority to be valid, there must be "an intelligible principle to which the person or body authorized to [act] is directed to conform." (*J.W. Hampton, Jr. & Co. v. United States* (1928) 276 U.S. 394, 406.) Under the intelligible principle standard, a statute delegating authority is constitutional if it "***clearly delineates*** [(1)] the general policy, [(2)] the public agency which is to apply it, and [(3)] ***the boundaries of the delegated authority***." (*Mistretta v. United States*, *supra*, at 372-73 (emphasis added).) Finally, the more sizable the amount of power that the legislature delegates to the executive, the more precise the standards constraining the executive's exercise of those powers must be. (*Whitman v. Am. Trucking Associations* (2001) 531 U.S. 457, 475 ["While Congress need not provide any direction to the EPA regarding the manner in which it is to define

'country elevators,' . . . it must provide substantial guidance on setting air standards that affect the entire national economy"].)

Federal courts have demonstrated how this analysis works in the context of emergency management statutes. For example, the Third Circuit upheld the delegation to the President of certain economic powers during national emergency situations under the International Emergency Economic Powers Act – but it did so only because the statute "subjected the President's authority to a host of procedural limitations designed to ensure Congress would retain its essential legislative superiority in the formulation of sanctions regimes erected under the Act's delegation of emergency power." (*United States v. Amirnazmi* (3d Cir. 2011) 645 F.3d 564, 572.)

The court in *Amirnazmi* pointed out that procedural restrictions embedded in the statute included provisions that provided for "congressional consultation, review, and termination." (*Id*. at 577.) Due to these procedural limitations on the executive's power, the court concluded that the statutory scheme "struck a careful balance between affording the President a degree of authority to address the exigencies of national emergencies and restraining his ability to perpetuate emergency situations indefinitely…" (*Ibid*.) By contrast, in 1935, the U.S. Supreme Court struck down two statutes on improper delegation grounds. (See *A.L.A. Schechter Poultry Corp. v. United States* (1935) 295 U.S. 495 [Invalidating the delegation of legislative authority as unconstitutional where statute extended Executive Branch "discretion to all the varieties of laws which he may deem to be beneficial" in implementing the statute]; and *Panama Ref. Co. v. Ryan* (1935) 293 U.S. 388 [Invalidating the delegation of power to the Executive Branch where the legislature failed to articulate a policy to limit the Executive Branch's

discretion].)

In California, the Legislature is the representative component of government that sets fundamental policy, even if thereafter Executive Branch officials enact regulations or other procedures to implement the Legislature's identified policy. (*Clean Air Constituency v. California State Air Res. Bd.* (1974) 11 Cal.3d 801, 817.) This means that the Legislature must impose intelligible boundaries upon the Executive Branch when conveying the State's police power, including within the Emergency Services Act. Failure to do so results in an improper delegation that would convey to the Governor the power to set fundamental policy.

Here, despite the Legislature imposing intelligible boundaries upon the Governor under the Emergency Services Act, the Court of Appeal essentially removed those limitations in favor of granting the Governor broad, discretional legislative powers. Under the Court of Appeal's opinion, it is easy to envision even the most obscure legislative enactment by the Governor as complying with section 8550's directive "to mitigate the effects of natural, manmade, or war-caused emergencies that result in conditions of disaster or in extreme peril to life, property, and the resources of the state," and "to protect the health and safety and preserve the lives and property of the people of the state."

Indeed, the Governor has assumed unfettered discretion to decide whether and when businesses should be closed, reopened, partially reopened, or otherwise restricted in their operations. The same is true for public schools. The Governor has sought to regulate and legislate virtually every aspect of the lives of Californians, from forcing schools to close (public schools, but not private schools), businesses to close (and then how/when

they must reopen), how families could trick-or-treat, and under what circumstances residents could dine indoor at restaurants or gather for Thanksgiving dinner.

Likewise, the Governor's Executive Order N-64-20 required all voters to be provided with vote-by-mail ballots. This is a vivid example of legislating on a fundamental policy issue, which the Court of Appeal's opinion now grants the Governor – should voters who do not even take the trouble or interest to request an absentee ballot be given a ballot to mail? Should every registered voter be mailed a ballot when the voter rolls may be outdated?

Under the Court of Appeal's logic, this Governor, or the next, could enact all of the controversial Georgia election reforms, or he or she could enact voter ID as a component of the mail ballot system, or even postpone *all* elections indefinitely, for that matter. And the Legislature's only remedy would be to end the emergency. Even now the "emergency" continues and the Governor refuses to end it despite low case numbers and high vaccination rates.

The Governor is now the subject of a recall election. Could he call off his own recall election under the justification that doing so will "mitigate the effects" of the COVID-19 pandemic and "protect the health and safety and preserve the lives and property of the people of the state"? Could he change the recall vote threshold to two-thirds, claiming that during the pendency of a state of emergency the state should change its executive *only* on a supermajority vote? The Court of Appeal offers no limitation on the Governor's power during a proclaimed state of emergency. Such "uncontrolled power" is the hallmark of a non-delegation violation. (*People's Fed. Sav. & Loan Assn. v. State Franchise Tax Bd.* (1952) 110

Cal.App.2d 696, 700 [Invalidating a statute which gave the State Franchise Tax Board "uncontrolled power" to set rates].)

In sum, what is obvious is that the Legislature *intended* to protect public health during an emergency by enacting the Emergency Services Act. However, by text of the Act itself, it is clear the Legislature intended to limit the Governor's police powers in times of emergency. After the Court of Appeal's ruling, the Governor now holds far-reaching legislative powers. Once the illusory and ineffective "safeguards" are nullified (as discussed below), all that's left is "unfettered discretion" and "uncontrolled power" solely in the hands of the Governor. (*Home Bldg. & Loan Ass'n v. Blaisdell* (1934) 290 U.S. 398, 425 ["Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved"].)

C. The Court Of Appeal's Interpretation Of The Emergency Services Act Would Result In Prohibited Statutory Surplusage.

Under the canon of *in pari materia*, all sections of the Emergency Services Act must be read together because they speak to the same subject: the Governor's emergency powers, as delegated by the Legislature.

The Court of Appeal's analysis pulled out broad language in the ESA that states the Governor may issue orders "necessary to carry out the provisions of this chapter" (Gov. Code, § 8567(a)), "to effectuate the purpose of this chapter" (Gov. Code, § 8627). The Court's analysis continued that the ESA specifies as its purpose "to mitigate the effects of natural, manmade, or war-caused emergencies that result in conditions of disaster or in extreme peril to life, property, and the resources of the state," and "to protect the health and safety and preserve the lives and property of the people of the state." (Gov.

Code, § 8550.)

But this interpretation ignores other language in the ESA that narrows the statutory language cited by the lower court. In doing so, the Court of Appeal has created a violation of the established rule against statutory surplusage. (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330 ["whenever possible, significance must be given to every word in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage"].)

When courts are called upon to interpret a statute, their goal is to effectuate the intent of the Legislature. (*Lopez v. Ledesma* (2020) 46 Cal.App.5th 980, 1002.) If the language used has a plain meaning such that it is clear and unambiguous, courts must honor it. (*Ibid*.) But if it is susceptible to more than one reasonable interpretation, courts will construe its meaning "bearing in mind the statute's purpose, the evils to be remedied, the legislative history, public policy, contemporaneous administrative constructions, and the consequences of that will flow from the different possible interpretations." (*Ibid*., citing *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2012) 203 Cal.App.4th 1328, 1338.)

For example, section 8571 grants the Governor the power to suspend a statute. But if the Governor were vested with full legislative powers under section 8627, there would be no need to delineate the Governor's power to "suspend" state statutes. Likewise, the Emergency Services Act contains numerous subsections narrowing the scope of the Act and conferring authority on the Governor to take very specific actions. For example, section 8627.5's grant of authority to suspend rules "imposing nonsafety related restrictions on the delivery of food products, pharmaceuticals, and other

emergency necessities" would be unnecessary if section 8627 broadly conferred all police powers of the State.

Under Real Parties' reading of the ESA, no provision is rendered superfluous. To the contrary, all provisions are given force and effect. The Governor receives both the authority, under the grant of the State's police powers, to issue "order[s] and regulations" on behalf of the unified executive branch, and the power to implement or enforce these orders and regulations derived from the "complete control" provision. This is in fact the only reading of the ESA that yields total harmony, giving separate effect to each provision of the ESA.

Not uncoincidentally, this interpretation *also* avoids the serious constitutional issues raised herein. In other words, read together (and rejecting a reading that results in statutory surplusage), the Emergency Services Act is not an open-ended grant of authority. It is a statute that affords the Governor limited legislative powers, which also adheres to this Court's requirement that delegated legislative power be exercised in a manner that is "reasonably necessary to implement the purpose of [a] statute." (*Yamaha Corp. v. Bd. of Equalization* (1998) 19 Cal.4th 1, 11.)

Finally, when interpreting the law, statutory provisions should be harmonized to the extent possible. (*People v. Honig* (1996) 48 Cal.App.4th 289, 328.) An important caveat to these rules is that courts "cannot, under the guise of statutory interpretation, rewrite [a] statute. [Citations.]" (*People v. Nettles* (2015) 240 Cal.App.4th 402, 408; and see Code Civ. Proc., § 1858.)

Here, section 8627 grants police power to the Governor, but limited specifically to "effectuate the purposes of the chapter." The ESA thereafter provides the Governor with numerous statutorily-authorized actions he/she

make take to mitigate the effects of an emergency. For example, the Governor may:

> (a) Ascertain the requirements of the state or its political subdivisions for food, clothing, and other necessities of life in the event of an emergency.
> (b) Plan for, procure, and pre-position supplies, medicines, materials, and equipment.
> (c) Use and employ any of the property, services, and resources of the state as necessary to carry out the purposes of this chapter.
> (d) Provide for the approval of local emergency plans.
> (e) Provide for mobile support units.
> (f) Provide for use of public airports.
> (g) Institute training programs and public information programs.
> (h) Make surveys of the industries, resources, and facilities, both public and private, within the state, as are necessary to carry out the purposes of this chapter.
> (i) Plan for the use of any private facilities, services, and property and, when necessary, and when in fact used, provide for payment for that use under the terms and conditions as may be agreed upon.
> (j) Take all other preparatory steps, including the partial or full mobilization of emergency organizations in advance of an actual emergency; and order those test exercises needed to insure the furnishing of adequately trained and equipped personnel in time of need.

(Cal. Gov. Code § 8570.)

Code of Civil Procedure section 1858 provides that "[i]n the construction of a statute…the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, **not to insert what has been omitted, or to omit what has been inserted**." (Emphasis added.) Of course, there are no provisions within the ESA providing for the Governor's

commandeering of the Elections Code, but that is exactly what happened with Executive Order N-67-20. The Court of Appeal's subsequent blessing of the Executive Order effectively adds nonexistent text to the ESA, inserting language that the Legislature did not include.

In addition, the Court of Appeal repeatedly uses the phrase "quasi-legislative" powers, but its ruling suggests there's nothing "quasi" whatsoever about the legislative powers it afforded to the Governor in times of declared emergency. Because the Court of Appeal's holding affords the Governor the power of the Legislature, it results in a constitutional violation. A sensible interpretation, which avoids the aforementioned constitutional traps, is Real Parties In Interest's interpretation of limited gubernatorial authority under the ESA.

D. The Out-Of-State Cases Cited By The Court Of Appeal Are Inapposite And Distinguishable From The Current Matter.

As an initial matter, the out-of-state cases cited by the Court of Appeal were each decided by the respective states' supreme courts. This matter is of no less importance and is an additional reason this Court should grant the instant Petition and review the appellate court's decision.

The Court of Appeal relied primarily upon two out-of-state cases to reinforce its holding that the Emergency Services Act, and specifically section 8627, is not an unconstitutional delegation of legislative power. The cases cited, however, are factually and legally dissimilar from the current matter.

For example, in *Beshear v. Acree* (Ky. 2020) 615 S.W.3d 780, the Kentucky statute granting legislative powers to the governor (Ch. 39A. 100) in times of emergency was deemed reasonable by the Kentucky Supreme

Court because the state legislature is not a full-time legislature and was not in session when the challenged executive actions took place. (*Beshear, supra*, 615 S.W.3d at 813.) According to the court, "[a] legislature that is not in continuous session and without constitutional authority to convene itself cannot realistically manage a crisis on a day-to-day basis by the adoption and amendment of laws" and therefore the court found the grant of power to the governor reasonable and constitutional. (*Id*.)

Conversely, California's Legislature is a full-time legislature that has been in session for virtually the entirety of the COVID-19 pandemic. As such, an open-ended grant of the State's police power under the Emergency Services Act is unnecessary and unadvisable, and there is no compelling reason for the Governor to have such unmitigated powers. Moreover, while the Kentucky Supreme Court found that the Kentucky Constitution "tilts to authority in the full-time executive branch to act in [emergency] circumstances" (*Id*. at 808), California's enumerated constitutional powers tilt in precisely the opposite direction.

The other case cited by the Court of Appeal is equally distinguishable. In *Friends of Danny DeVito v. Wolf* (Pa. 2020) 227 A.3d 872 and *Wolf v. Scarnati* (Pa. 2020) 233 A.3d 679, the Governor of Pennsylvania took actions under the Emergency Code to close "non-essential" businesses in the State. The statutory powers utilized by the Governor stated expressly that the Governor may "direct and compel the evacuation of all or part of the population from any stricken or threatened area within this Commonwealth if this action is necessary for the preservation of life or other disaster mitigation, response or recovery." (35 Pa. Stat. and Cons. Stat. Ann. § 7301.) This, of course, is in stark contrast to the provisions of the Emergency

Services Act from which the Governor seeks a takeover of all of the State's legislative powers so long as he can tangentially relate it to mitigating the COVID-19 pandemic. For example, the ESA contains no specific grant of authority to the Governor permitting him to unilaterally change the conduct of statewide elections. Thus, whereas the Governor of Pennsylvania acted within his enumerated emergency powers by closing businesses during an emergency, Governor Newsom created new law without proper legislative delegation. (See, e.g., *Jacobson v. Massachusetts* (1905) 197 U.S. 11, 31 ["[I]f a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects…it is the duty of the courts to so adjudge, and thereby give effect to the Constitution"].)

The more applicable of the out-of-state cases cited by the Court of Appeal is *In re Certified Questions from United States Dist. Court, W. Dist. of Michigan*, (Mich. Oct. 2, 2020) S. Div., No. 161492, 2020 WL 5877599, at *14. There, the Michigan high court concluded that the Governor of Michigan did not possess the authority to exercise emergency powers under the Michigan Emergency Powers of the Governor Act (EPGA) because that act was an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution. The "vast grant of power impermissibly allowed the Governor the power to reorder social life and to limit, if not altogether displace, the livelihoods of residents across the state and throughout wide-ranging industries." (*Id*. at *15.) The court reasoned that the powers conferred by the act were "remarkably broad" and that there were not sufficient standards in place to constrain the governor's actions. (*Id*. at *16-18.)

Importantly, Michigan's EPGA conferred significantly narrower powers than the California ESA. In Michigan, the Legislature had afforded the Governor only the power to "promulgate reasonable orders" as may be "necessary to protect life and property or to bring the emergency situation with the affected area under control." (*Id*. at *16.) The Michigan Supreme Court rejected the EPGA on the grounds that it gave away "a substantial part of the entire police power of the state" and thus violated separation of powers. (*Id*.)[2]

The same is true here. As with the Michigan statute, the Court of Appeal's analysis confers virtually unlimited power on the Governor, for a virtually unlimited duration. Under the court's opinion, section 8627 does not merely vest a "substantial part" of the Legislature's police powers, it unconditionally surrenders the entirety of the police power to the Governor. And, after the Court of Appeal's published opinion, it confers these core legislative powers without any realistic substantive, procedural, or temporal limitations.

E. The Court Of Appeal's Enumerated "Safeguards" Are Illusory.

After removing the safeguard of the constitutional protections of

[2] In its opinion, the Michigan Supreme Court cites to *Opinion of the Justices* (1944) 315 Mass. 761, 52 N.E.2d 974, which is also applicable to the current matter. In the midst of World War II, acting pursuant to an emergency powers law, Massachusetts' Governor changed state 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." (*Id*.)

separation of powers, the Court of Appeal noted that two *other* safeguards were in place to prevent a legislative overreach by the Governor.

The court cited to section 8629, which provides that "[t]he Governor shall proclaim the termination of a state of emergency at the earliest possible date that conditions warrant," thus terminating the powers granted the Governor with respect to a state of emergency. The court also pointed out that section 8629 additionally allows for a concurrent resolution of the Legislature declaring the emergency at an end, which likewise cuts off the Governor's legislative powers. (*Newsom v. Superior Ct. of Sutter Cty.*, *supra*, 278 Cal.Rptr.3d at 409.) But these enumerated safeguards provide little protection in a situation where, as here, the Governor is legislating beyond the scope of the emergency.

For example, if the Legislature felt the Governor was usurping too much of the legislative branch's powers under the guise of a state of emergency, the only ability the Legislature has to restrain the Governor is to declare the emergency over. This is fine in a situation where the emergency is legitimately over, but highly problematic where the emergency situation continues. Forcing the Legislature to call an end to a continuing emergency deprives residents of timely protections and aid.

The safeguard of Legislature-enacted emergency-response statutes is also susceptible to gubernatorial interference during a declared emergency. This is because in light of the Court of Appeal's ruling, the Governor could simply suspend the newly adopted law in favor of his own.

The only *other* method of reining in a governor who is over-legislating under the pretense of a state of emergency is for the governor himself or herself to declare an end to the emergency. But this is highly unlikely where

a governor seeks to utilize an emergency response as an "***opportunity for reimagining a [more] progressive era as it [relates] to capitalism [and] an opportunity to reshape the way we do business and how we govern***." (Andrew Mark Miller, *Newsom says coronavirus is an 'opportunity for reimagining a more progressive era'*, Washington Examiner (Apr. 2, 2020).) Ushering in a sweeping new progressive era, and fundamentally altering the way Californians conduct business and are governed would require legislating far beyond an emergency response meant to protect the health and welfare of residents. A governor fixated on such changes would not easily relinquish the levers of power of one-man rule.

The Court of Appeal's safeguards essentially thrust a Sophie's Choice upon the Legislature to rein in an overreaching Governor: Either (1) declare an ongoing emergency over; or (2) allow the Governor to exercise unchecked legislative power. This is especially true after the Court of Appeal refused to adopt "particularized standards delimiting the specific orders that the Governor may issue" in an emergency. (*Newsom v. Superior Ct. of Sutter Cty.*, *supra*, 278 Cal.Rptr.3d at 408 ["[I]s antithetical to the purpose of the Emergency Services Act to empower the Governor to deal with the exigencies of widely differing emergencies in California from wildfires to floods to a pandemic"].)

Troublingly, the Court of Appeal's decision unnecessarily sets up the next legal fight – how to define the end of an emergency. As the State's current "emergency" lurches into its 15th month, with vaccinations up and cases down, the next legal dispute will seek a judicial determination rejecting the State's attempt to prolong the emergency indefinitely (or even permanently). (*Hoitt v. Vitek* (1st Cir. 1974) 497 F.2d 598, 600 ["Emergencies…cease to be

emergencies when they continue indefinitely"].)

1. Could the Governor Suspend Operation of the Judiciary?

Part 1, Titles 1-5 of the Code of Civil Procedure set-up the state's court structure, and the jurisdiction and responsibilities of the civil courts. Part 2 of the Penal Code does the same for criminal procedure. In a proclaimed state of emergency, using the Court of Appeal's ruling, could the Governor determine that the emergency at hand required suspension of the Code of Civil Procedure and the State's Criminal Procedure in favor of his own "Executive Branch Court of Arbiters" who could hear and decide civil disputes and sentence lawbreakers to confinement? All that would be necessary, it seems, is a determination by the Governor that continued operation of the courts would somehow interfere with his "coordinated emergency response" to "to mitigate the effects of natural, manmade, or war-caused emergencies." (*Newsom v. Superior Ct. of Sutter Cty.*, *supra*, 278 Cal.Rptr.3d at 408 [Rejecting "particularized standards delimiting the specific orders that the Governor may issue"].) A full-blown constitutional crisis may not be present just yet, but the Court of Appeal leaves a pathway of breadcrumbs to such a crisis.

Of course, there is an effective, efficient and legally compatible way to limit the Governor's legislative powers in a state of emergency, but still allow for addressing the specific emergency at hand. That is to limit the Governor's powers to the terms of the statute itself: "make, amend, and rescind orders and regulations necessary" to address the exigent emergency.

As applied to this matter, if the Governor wants to encourage voters to vote from home, he could have ordered vote-by-mail ballot *applications* sent to all voters, instead of legislating changes to the Elections Code. Such an

"order" would not require enactment of a new statute, but would have allowed voters to *choose* to vote by mail, and could have been accomplished solely though the Executive Branch and its subordinate officials of county registrars of voters/clerks. (*Hill v. Board of Supervisors* (1917) 176 Cal. 84, 85 ["counties are parts of the political subdivisions of the state"].)

F. The Governor's Power To Call Special Session Of The Legislature.

If there is a question has to how the Governor could effectuate his desire to amend state statutes to "reshape" the lives of Californians during a state of emergency, it is through the constitutionally-authorized legislative special session under Article IV, section 3 of the California Constitution.

This means that if there was any doubt about the ability of legislation to be timely introduced to address the Governor's concerns relative to the conduct of the election (or other desired fundamental policy changes) during the COVID-19 pandemic, the Governor had at his disposal the power to call a special session of the legislature. (Cal. Const., art. IV, § 3; and see *Martin v. Riley* (1942) 20 Cal.2d 28 [The duty of the Legislature in a special session to confine itself to the subject matter of the Governor's call is mandatory and the Legislature cannot legislate on any subject not specified in the proclamation].)

Calling a special session puts the lawmaking functions of the State in proper order: (1) The Governor calls the special session and proposes legislation; (2) the Legislature considers and passes the legislation; and (3) the Governor signs the legislation into law. This is the constitutionally-prescribed process for enacting statutory change in California, even in the face of a pandemic.

IV. CONCLUSION

For the reasons set forth above, this Court should grant this Petition for Review.

Respectfully submitted

Dated: June 14, 2021

BELL, MCANDREWS & HILTACHK,

BY: _____

BRIAN T. HILDRETH
THOMAS W. HILTACHK
PETER V. LEONI

Attorneys for Real Parties In Interest

BY: _____/s/_____

JAMES GALLAGHER

Co-Counsel & Real Party In Interest

BY: _____/s/_____

KEVIN KILEY

Co-Counsel & Real Party In Interest

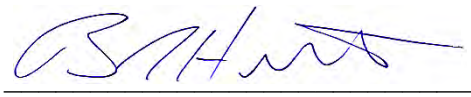
VERIFICATION

I, BRIAN HILDRETH, declare that I am the attorney for Petitioner, JAMES GALLAGHER; that Petitioner is currently out of the county in which my office is located and in which this action is filed, or is currently unavailable to sign this verification; that I make this declaration on his behalf.

I have read the foregoing Verified Petition for Review.

The foregoing is true and correct and of my personal knowledge. If called as a witness, I could and would testify competently thereto.

Executed under penalty of perjury under the laws of the State of California this 14th day of June, 2021.



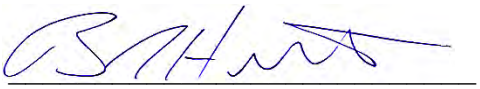
BRIAN T. HILDRETH

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) and 8.360(b)(1) of the California Rules of the Court, the enclosed brief of JAMES GALLAGHER is produced using 13-point Times New Roman type including footnotes and contain approximately 8,387 words, which is less than the total words permitted by the rules of the court. Counsel relies on the word count of the computer program, Microsoft Word 2010, used to prepare this brief.

Dated: June 14, 2021

BELL, MCANDREWS & HILTACHK,

BY: 

BRIAN T. HILDRETH

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is 455 Capitol Mall, Suite 600, Sacramento, CA 95814.

On June 14, 2021, I served the following:

VERIFIED PETITION FOR REVIEW

X BY U.S. MAIL: By placing said document(s) in a sealed envelope and depositing said envelope, with postage thereon fully prepaid, in the United States Postal Service mailbox in Sacramento, California, addressed to said party(ies), 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.

X BY ELECTRONIC MAIL: By causing true copy(ies) of PDF versions of said document(s) to be sent to the e-mail address of each party listed.

Honorable Sarah Heckman
Judge of the Sutter County Superior Court
1175 Civic Center Blvd.
Yuba City, CA 95993

John Killeen, Esq.
Office of the State Attorney General
P.O. Box 944255
1300 I Street, Suite 125
Sacramento, CA 94244-2550
John.Killeen@doj.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 14, 2021 at Sacramento, California.

K Merina

EXHIBIT A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

GAVIN NEWSOM, as Governor, etc., Petitioner, v. THE SUPERIOR COURT OF SUTTER COUNTY, Respondent; JAMES GALLAGHER et al., Real Parties in Interest.	C093006 (Super. Ct. No. CVCS200912)

ORIGINAL PROCEEDING in mandate. Stay issued. Petition granted with directions. Sarah H. Heckman, Judge.

Xavier Becerra, Attorney General, Matthew Rodriquez, Acting Attorney General, Thomas S. Patterson, Assistant Attorney General, Benjamin M. Glickman, Jay C. Russell and John W. Killeen, Deputy Attorneys General, for Petitioner.

Aaron D. Silva, Chief Deputy Legislative Counsel and Benjamin R. Herzberger, Deputy Legislative Counsel, for Senator Tom Umberg and Assemblymember Marc Berman as Amici Curiae on behalf of Petitioner.

David A. Carrillo and Brandon V. Stracener for California Constitution Center as Amicus Curiae on behalf of Petitioner.

James R. Williams, County Counsel (Santa Clara), Hannah M. Kieschnick, Stephanie L. Safdi and Karun Tilak, Deputy County Counsel; Corrie Manning; and Jennifer Henning for California State Association of Counties and League of California Cities as Amici Curiae on behalf of Petitioner.

Boersch & Illovsky and Kevin Calia for Secretary of State Alex Padilla as Amicus Curiae on behalf of Petitioner.

No appearance for Respondent.

James Gallagher, in pro. per., and Kevin Kiley, in pro. per., for Real Parties in Interest.

Karin E. Schwab, County Counsel (Placer), Brett D. Holt, Chief Deputy County Counsel, Renju Jacob and Emily F. Taylor, Deputy County Counsel, for the County of Placer as Amicus Curiae on behalf of Real Parties in Interest.

Pacific Legal Foundation, Luke A. Wake and Daniel M. Ortner for Ghost Golf, Inc., Daryn Coleman, Sol y Luna Mexican Cuisine and Nieves Rubio as Amici Curiae on behalf of Real Parties in Interest.

Bell, McAndrews & Hiltachk, Thomas W. Hiltachk, Brian T. Hildretch and Katherine C. Jenkins for Senators Shannon Grove, Brian Dahle and Jim Nielsen, and Assemblymembers Marie Waldron, Megan Dahle, and Jordan Cunningham as Amici Curiae on behalf of Real Parties in Interest.

This petition for writ of mandate by Governor Gavin Newsom concerns the same parties and the same Executive Order No. N-67-20 (which we refer to as before as the "Executive Order") at issue in this court's decision in *Newsom v. Superior Court* (2020) 51 Cal.App.5th 1093 (*Newsom*). In that decision we granted the Governor's petition challenging a temporary restraining order suspending the Executive Order that the superior court issued in an expedited, "ex parte" proceeding. We held that there was no basis for the superior court to grant real parties' ex parte application at a hearing

conducted one day after the action was filed, without proper notice to the Governor or his appearance, and without the substantive showing required for an ex parte proceeding.

Following our decision in *Newsom*, the case was reassigned to a different judge who conducted a trial on documentary exhibits without live witnesses and entered a judgment granting declaratory relief that the Executive Order is void as unconstitutional and that the California Emergency Services Act (Gov. Code, § 8550 et seq. (Emergency Services Act))[1] does not authorize the Governor to issue an executive order that amends or makes statutory law. The court issued a permanent injunction prohibiting the Governor from exercising any powers under the Emergency Services Act "which amend, alter, or change existing statutory law or make new statutory law or legislative policy."

We will grant the Governor's petition and direct the superior court to dismiss as moot real parties' claim for declaratory relief that the Executive Order is void as an unconstitutional exercise of legislative power. The Executive Order was superseded by legislation and was directed only at the November 3, 2020 general election, which had occurred before the judgment was entered. However, the declaratory relief and accompanying permanent injunction regarding executive orders issued under the Emergency Services Act raise matters of great public concern regarding the Governor's orders in the ongoing COVID-19 pandemic emergency. The superior court erred in interpreting the Emergency Services Act to prohibit the Governor from issuing quasi-legislative orders in an emergency. We conclude the issuance of such orders did not constitute an unconstitutional delegation of legislative power. We will direct the superior court to vacate this portion of the judgment and enter a new and different judgment in favor of the Governor.

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[1] All undesignated statutory references are to the Government Code.

BACKGROUND

In *Newsom*, we set forth the background of the filing of this action: "In May [2020] the chairs of the Assembly and Senate committees that consider election-related matters prepared a formal letter to the Governor indicating they were working on legislation to ensure Californians could vote by mail in light of the emergency occasioned by COVID-19. The letter indicated the legislation would ensure adequate ballot dropoff locations and regulate safe in-person voting while ensuring a minimum standard of one polling location per 10,000 voters open for four days statewide. The committee chairs encouraged the Governor to issue an executive order allowing all Californians to vote by mail, noting: 'three-quarters of California voters already receive a mail ballot. Let's mail a ballot to the rest.'

"The Governor issued Executive Order No. N-64-20 on May 8, 2020, which required all voters to be provided vote-by-mail ballots. That order affirmed, however, that the administration continued to work 'in partnership with the Secretary of State and the Legislature on requirements for in-person voting opportunities and how other details of the November election will be implemented' and '[n]othing in this Order is intended, or shall be construed, to limit the enactment of legislation on that subject.'

"On June 3, 2020, the Governor signed the order at issue here, Executive Order No. N-67-20, which will be referenced throughout as simply the 'Executive Order.' The Executive Order affirms that all counties would mail eligible voters vote-by-mail ballots and provides for the use the Secretary of State's vote-by-mail ballot tracking system. It also provides additional terms related to the number and operation of polling places (including opening at least one polling place per 10,000 registered voters for four days) and vote-by-mail ballot dropoff locations, and it states in-person public participation in public meetings or workshops would not be required. The Executive Order identifies statutory provisions that are displaced pursuant to its provisions. But it also affirms the administration is 'working in partnership' with the Legislature and Secretary of State and

'[n]othing in this Order is intended, or shall be construed, to limit in any way the enactment of legislation concerning the November 3, 2020 General Election.'

"At the time the Governor issued the Executive Order, two bills pending in the Legislature addressed the substance of the Governor's Executive Order: Assembly Bill No. 860 (2019-2020 Reg. Sess.), which would ensure all California voters were provided ballots in advance of the election to vote by mail, and Senate Bill No. 423 (2019-2020 Reg. Sess.), which would govern those remaining aspects of the election that are yet to occur." (*Newsom, supra*, 51 Cal.App.5th at pp. 1095-1097, fn. omitted.)

On June 11, 2020, real parties filed a complaint for declaratory and injunctive relief seeking a declaratory judgment that the Executive Order "is null and void as it is an unconstitutional exercise of legislative powers reserved only to the Legislature, nor is it a permitted action" under the Emergency Services Act and an injunction against the Governor implementing the Executive Order. The complaint also sought an injunction against the Governor "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."

On June 12, 2020, the superior court granted real parties' ex parte application for a temporary restraining order suspending the Executive Order and issued an order to show cause why the Governor should not be enjoined from implementing the Executive Order and exercising legislative power to amend, alter or change existing statutory law or make new statutory law.

On June 18, 2020, the Governor signed Assembly Bill No. 860 (2019-2020 Reg. Sess.), which took effect immediately as an urgency statute. Assembly Bill No. 860 declared that the general election to be held in November 3, 2020, raised health concerns about in-person voting due to the COVID-19 pandemic. The statute required county election officials to mail a ballot to every registered voter for the November 3, 2020 election, permit voters to cast a ballot using a certified remote accessible vote-by-mail

system in the election, and use the Secretary of State's system or its equivalent to allow voters to track their votes. The act also made changes to certain deadlines associated with the November 3, 2020 election. (Stats. 2020, ch. 860, §§1-8.)

On July 10, 2020, in *Newsom*, this court issued a peremptory writ of mandate directing the superior court to vacate its order granting real parties' ex parte application and issue an order denying it. (*Newsom, supra*, 51 Cal.App.5th at p. 1100.)

On August 6, 2020, the Governor approved Senate Bill No. 423 (2019-2020 Reg. Sess.), also as an urgency statute effective immediately. Senate Bill No. 423 shortened the time for vote centers to open before the November 3, 2020 election, allowed election officials to establish consolidated precinct boards for multiple precincts in the same polling place, and provided for a number of other measures for a safe election. The declared purpose of Senate Bill No. 423 was to provide safe in-person voting opportunities for those who need them despite the vote-by-mail mandates of the Executive Order and Assembly Bill No. 860. (Stats. 2020, ch. 31, §§1-4.)

In September 2020, real parties and the Governor filed motions for judgment on the pleadings, both of which the superior court denied.

On September 30, 2020, the Governor issued a news release that included the following statement: "[T]he Legislature passed a number of bills that build on the Governor's executive actions in response to COVID-19. Some of these bills replace certain executive orders entirely. Legislation has superseded the following executive orders, which have no further force or effect as of that legislation's effective date: [¶] . . . [¶] Executive Order N-64-20 and Executive Order N-67-20 (elections) -- superseded by AB 860 and SB 423."

On October 21, 2020, the superior conducted a trial in which stipulated documentary evidence was introduced but no witnesses called.

On November 13, 2020, the court issued a statement of decision addressing five issues. First, the court found that the case was not moot because plaintiffs requested

declaratory relief beyond the validity of the Executive Order. Plaintiffs contended that the California Constitution and the Emergency Services Act did not permit the Governor to issue orders that amended or made new statutory law. The Governor maintained that the Emergency Services Act's grant of authority to exercise the state's police power to issue orders as necessary in an emergency authorized amending existing statutory law. The court determined that this "critically important" controversy was for the judiciary to resolve, given that the COVID-19 emergency continued and the Governor "has issued more than 50 different executive orders changing numerous California statutes since the state of emergency was declared." The superior court also found that the Executive Order had not been formally rescinded or entirely superseded by subsequent legislation.

Second, the superior court determined that the Emergency Services Act is not unconstitutional. The court analyzed sections 8567, 8571 and 8627 of the statute relied on by the Governor. The court first concluded that the plain language of sections 8567 and 8571 does not authorize the Governor to make or amend statutes. As for section 8627, the court noted that this provision "gives the Governor authority over state agencies and in connection therewith to exercise all 'police powers' vested in the state by the Constitution and laws of California." The court reasoned that section 8627 was qualified by its reference to the Governor's power under section 8567 to issue " 'orders and regulations,' " indicating the Governor had no power to make or amend statutory law. Further, the superior court declined to interpret the term " 'police powers' in a manner which violates the separation of powers under the California Constitution."

Third, applying these principles, the superior court concluded that the Executive Order amended provisions of the Elections Code and exceeded the Governor's authority under the Emergency Services Act. The court rejected the Governor's contention that the separation of powers was preserved by the Legislature's ability to terminate the state of emergency—which would have the effect of terminating any change in statutory law by executive order—as "not a realistic or effective manner to address an unconstitutional

exercise of power by a governor under the [Emergency Services Act] and does not preserve the separation of powers intended by the Constitution."

Fourth, the superior court determined that declaratory relief that the Emergency Services Act does not give the Governor power to amend or make statutory law was a matter of broad public interest particularly suited to determination by judicial declaration. The court found and declared that the Executive Order is void as an unconstitutional exercise of legislative power and the Emergency Services Act does not authorize the Governor to amend or make statutory law.

Fifth, the superior court found that a permanent injunction was warranted to prohibit the Governor from issuing executive orders that amend or make statutory laws. The court noted that the Governor had issued "a multitude of executive orders under the purported authority of the [Emergency Services Act], many of which have amended statutory law." Further, the court observed the state of emergency declared by the Governor due to the COVID-19 pandemic continues indefinitely and the Governor "continues to issue executive orders which create legislative policy." The court also reasoned that the amendments to the Elections Code in Assembly Bill No. 860 and Senate Bill No. 423 pertained only to the November 2, 2020 election and there was a reasonable likelihood that a special election would occur in 2021. In sum, the court was persuaded by the evidence the Governor would continue to issue executive orders amending statutes under the Emergency Services Act in violation of the California Constitution, which would lead to a multiplicity of lawsuits unless restrained by a permanent injunction. The court found good cause to issue a permanent injunction prohibiting the Governor from issuing an executive order under the Emergency Services Act "which amends, alters, or changes existing statutory law or makes new statutory law or legislative policy."

On November 16, 2020, the Governor filed a petition for writ of mandate and requested an immediate stay of the permanent injunction. We issued a stay order the next day.

On November 25, 2020, the superior court entered judgment in accordance with its statement of decision (but added a proviso that the Governor "may suspend statutes consistent with" section 8571).

The previous day this court had stayed any further proceedings in the superior court and issued an alternative writ of mandate.

DISCUSSION

Mootness

By the time the superior court issued the statement of decision on November 13, 2020, real parties' claim for declaratory relief that the Executive Order was null and void as an unconstitutional exercise of legislative authority was unquestionably moot.

" '[A]n appeal is moot if " 'the occurrence of events renders it impossible for the appellate court to grant appellant any effective relief.' " ' [Citations.]" (*La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles* (2016) 2 Cal.App.5th 586, 590.) "Subsequent legislation can render a pending appeal moot." (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 560; see also *Equi v. San Francisco* (1936) 13 Cal.App.2d 140, 141-142; *Bell v. Board of Supervisors* (1976) 55 Cal.App.3d 629, 636.) "It is well settled that an appellate court will decide only actual controversies. Consistent therewith, it has been said that an action which originally was based upon a justiciable controversy cannot be maintained on appeal if the questions raised therein have become moot by subsequent acts or events." (*Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 10 (*Finnie*); see also *Lenahan v. City of Los Angeles* (1939) 14 Cal.2d 128, 132 (*Lenahan*).)

This court observed in *Newsom* that the parties agreed "the issue of whether the Governor's Executive Order exceeds his authority" was made "partially but not entirely

moot" by Assembly Bill No. 860 and the remaining issues "may likewise become moot if Senate Bill No. 423 (2019-20120 Reg. Sess.) also passes and is signed by the Governor." (*Newsom, supra*, 51 Cal.App.5th at p. 1100.) The Governor subsequently declared that Assembly Bill No. 860 and Senate Bill No. 423 superseded the Executive Order. However, the superior court maintained that the Executive Order had not been "formally rescinded" and "remained in effect requiring all county election officials to use the Secretary of State's barcode tracking system for all mail ballots and altered the statutorily required outreach in Voter's Choice Act counties to provide noticed, public meetings allowing for public comment on voting access for California voters with disabilities or limited English proficiency." Nonetheless, the superior court did not disagree that the Executive Order was directed only at the November 3, 2020 election, which has now been run in accordance with the vote-by-mail and other provisions of the Executive Order. Thus, declaring the Executive Order null and void had no remedial effect whatsoever at the time the superior court issued its statement of decision and judgment and was therefore moot. (See *Lenahan, supra*, 14 Cal.2d at pp. 133-134; *Finnie, supra*, 199 Cal.App.3d at pp. 10-11.)

By contrast, the superior court's declaratory relief order that the Emergency Services Act does not give the Governor authority to make or amend statutory law by executive order, and the permanent injunction prohibiting the Governor from doing so was not directed at the Executive Order but any order issued under the Emergency Services Act. In particular, the declaratory relief order and permanent injunction apply to the Governor's orders issued in connection with the ongoing COVID-19 state of emergency that the Governor declared in March 2020. The superior court referred to, but did not specifically identify, the "50 different executive orders changing numerous California statutes [issued] since the state of emergency was declared" in the statement of decision. However, the court cited plaintiffs' exhibit offered as an "[o]verview" of the Governor's executive action since the COVID-19 state of emergency was declared. The

exhibit listed orders the Governor issued and statutes affected or changed by executive orders, many of which are still in effect.

Thus, the superior court's declaratory relief order and permanent injunction may govern existing and future emergency executive orders and are not moot. (See *California Charter Schools Assn. v. Los Angeles Unified School Dist.* (2015) 60 Cal.4th 1221, 1233-1234 (*California Charter Schools*).) Moreover, this court has " 'discretion to decide a case which, although technically moot, poses an issue of broad public interest that is likely to recur.' " (*Malaga County Water Dist. v. Central Valley Regional Water Quality Control Bd.* (2020) 58 Cal.App.5th 396, 409.) Given that the COVID-19 crisis is not over and the efforts to combat it are of statewide concern, there can be no doubt that this appeal falls within our discretion. (See *Brown v. Chiang* (2011) 198 Cal.App.4th 1203, 1219; *California Medical Assn. v. Brian* (1973) 30 Cal.App.3d 637, 650.)

We are mindful that, "[i]n passing judgment on cases requesting declaratory relief, we decide only actual controversies and refrain from issuing advisory opinions." (*California Charter Schools, supra*, 60 Cal.4th at p. 1234; *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.) However, we conclude there is an actual controversy regarding the scope of the Governor's authority to issue and implement executive orders under the Emergency Services Act, which the Governor clearly intends to continue to do during the COVID-19 state of emergency. (See *Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 886.)

Section 8627 Is Not an Unconstitutional Delegation of Legislative Power

The superior court concluded that the Emergency Services Act did not authorize the Governor to issue an executive order that amends or makes statutory law. In doing so, the court declined to reach plaintiffs' argument that if the Emergency Services Act granted the Governor the power to amend statutory law during an emergency, the act

"would be an unconstitutional delegation of power to legislate in violation of the separation of powers."

The court relied on the rule that " 'statutes are to be so construed, if their language permits, as to render them valid and constitutional rather than invalid and unconstitutional.' " This rule of statutory interpretation, called the canon of constitutional doubt, applies to *ambiguous* statutes, i.e., statutes reasonably susceptible of two interpretations.[2] (*California Chamber of Commerce v. State Air Resources Bd., supra*, 10 Cal.App.5th at pp. 630-631; see also *City of Los Angeles v. Belridge Oil Co.* (1954) 42 Cal.2d 823, 832; *Siskiyou County Farm Bureau v. Department of Fish & Wildlife* (2015) 237 Cal.App.4th 411, 445.) In that circumstance, " ' "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." ' " (*Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1153; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373.) But, in this instance as we explain, the court erred in applying the canon "because there was no ambiguity to resolve" in section 8627. (*Siskiyou County Farm Bureau, supra*, at p. 445; *Gutierrez, supra*, at p. 1373 ["the canon 'is qualified by the proposition that "avoidance of a difficulty will not be pressed to the point of disingenuous evasion" ' "].)

That said, we agree that two out of the three provisions of the Emergency Services Act the court examined do not by their terms refer to the Governor's powers in an emergency as including amending or making law.

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[2] Real parties refer to the "canon of constitutional avoidance," which is distinct from the constitutional doubt canon. Under the "constitutional *avoidance* doctrine . . . it is often deemed prudent to address a statutory or other ground to avoid reaching a constitutional ground." (*California Chamber of Commerce v. State Air Resources Bd.* (2017) 10 Cal.App.5th 604, 631, fn. 19.) Under the doctrine, as well as the canon, "a statute will be interpreted to avoid serious constitutional questions *if such an interpretation is fairly possible.*" (*People v. Buza* (2018) 4 Cal.5th 658, 682, italics added.)

In pertinent part, section 8567, subdivision (a), provides that "[t]he Governor may make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter" and such "orders and regulations shall have the force and effect of law." This language does not refer to the Governor making or amending "law" but rather distinguishes "orders and regulations" from "law" by stating that the former "shall have the force and effect of law."

Section 8571 provides in pertinent part that during "a state of emergency the Governor may suspend any regulatory statute, or statute prescribing the procedure for the conduct of state business, or the orders, rules, or regulations of any state agency . . . where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency." The Governor points out the absurdity of interpreting section 8571 as limited to suspending statutes whole cloth without allowing the Governor to alter them or replace them with orders containing requirements tailored to the emergency. Nonetheless, the phrasing of section 8571 that the Governor may "suspend" a statute where "strict compliance" with the statute would interfere with mitigating the emergency is clear that this provision of the Emergency Services Act is addressed to the Governor's negative power to suspend unhelpful statutes in an emergency, not an affirmative power to create helpful ones.

In contradistinction, section 8627 provides in full: "During a state of emergency the Governor shall, to the extent he deems necessary, have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes of this chapter. 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." Rather than limit the reach of section 8627 as the superior court concluded, we interpret the reference to section 8567 in section 8627

merely as requiring the Governor to comply with the procedure specified in section 8567, i.e., that the Governor's emergency orders be widely publicized before issuance, be in writing, take effect immediately upon issuance, and terminate when the state of emergency is terminated. (§ 8567, subds. (a), (b).)

While the superior court attempted to interpret section 8627 to exclude any grant of authority to the Governor to issue quasi-legislative orders, "police power" as exercised is generally the power to legislate.[3] " 'The police power is the authority to enact laws to promote the public health, safety, morals and general welfare.' " (*Goldbaum v. Regents of University of California* (2011) 191 Cal.App.4th 703, 712; see also *Berman v. Parker* (1954) 348 U.S. 26, 31-32 [99 L.Ed. 27] ["all the legislative powers which a state may exercise over its affairs" is "what traditionally has been known as the police power"]; *Bond v. United States* (2014) 572 U.S. 844, 854 [189 L.Ed.2d 1]; *Massingill v. Department of Food & Agriculture* (2002) 102 Cal.App.4th 498, 504; *Max Factor & Co. v. Kunsman* (1936) 5 Cal.2d 446, 459-460.)

Accordingly, the plain language of section 8627 giving the executive the state's "police power," i.e., quasi-legislative power, in an emergency raises the issue whether the statute violates the constitutional separation of powers by delegating such authority to the Governor. We review this issue de novo. (*Samples v. Brown* (2007) 146 Cal.App.4th 787, 799 (*Samples*).)

In *People v. Wright* (1982) 30 Cal.3d 705 (*Wright*), the California Supreme Court articulated the applicable principles: "An unconstitutional delegation of legislative power occurs when the Legislature confers upon an administrative agency unrestricted authority

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[3] While we interpret section 8571 not to refer to affirmative quasi-legislative power, such power "usually concerns the adoption of regulations but it can also involve other legislative-type action such as the suspension of existing statutes." Asimow et al., Cal. Practice Guide: Administrative Law (The Rutter Group 2020) ¶ 2:30, citing *Salmon Trollers Marketing Assn. v. Fullerton* (1981) 124 Cal.App.3d 291, 301-302.)

to make fundamental policy decisions. [Citations.] 'This doctrine 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.' [Citation.] [¶] The doctrine prohibiting delegations of legislative power does not invalidate reasonable grants of power to an administrative agency, when suitable safeguards are established to guide the power's use and to protect against misuse. [Citations.] The Legislature must make the fundamental policy determinations, but after declaring the legislative goals and establishing a yardstick guiding the administrator, it may authorize the administrator to adopt rules and regulations to promote the purposes of the legislation and carry it into effect. [Citations.]" (*Id.* at pp. 712-713.)

In *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118 (*Gerawan*), the court said: " '[A]lthough it is charged with the formulation of policy,' the Legislature 'properly may delegate some quasi-legislative or rulemaking authority.' [Citation.] 'For the most part, delegation of quasi-legislative authority . . . is not considered an unconstitutional abdication of legislative power.' [Citation.] 'The doctrine prohibiting delegations of legislative power does not invalidate reasonable grants of power to an administrative agency, when suitable safeguards are established to guide the power's use and to protect against misuse.' [Citation.] Accordingly, '[a]n unconstitutional delegation of authority occurs only when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy.' [Citations.]" (*Id.* at pp. 1146-1147, quoting *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 190; see also *Sims v. Kernan* (2018) 30 Cal.App.5th 105, 110 (*Sims*).)

"Only in the event of a total abdication of power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an 'unlawful delegation' . . . ." (*Kugler v.*

Yocum (1968) 69 Cal.2d 371, 384 (*Kugler*); *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 816 ["An unconstitutional delegation of power occurs when the Legislature confers upon an administrative agency unrestricted authority to make fundamental policy determinations"].)

Thus, the Legislature does not unconstitutionally delegate legislative power when the statute provides standards to direct implementation of legislative policy. (*Gerawan, supra*, 3 Cal.5th at p. 1148.) Here, section 8627 does not set forth express standards. However, "standards for administrative application of a statute need not be expressly set forth; they may be implied by the statutory purpose." (*Wright, supra*, 30 Cal.3d at p. 713, citing *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 168 (*Birkenfeld*); *Sims, supra*, 30 Cal.App.5th at p. 114; 7 Witkin, Summary of Cal. Law (11th ed. 2017) Constitutional Law, § 191; see also *Samples, supra*, 146 Cal.App.4th at p. 805 ["The requisite legislative guidance need not take the form of express standards"]; *Monsanto Co. v. Office of Environmental Health Hazard Assessment* (2018) 22 Cal.App.5th 534, 560 (*Monsanto*) [statutory scheme itself need not provide standards and "the lack of specific formulas regarding how to implement a policy will not render a statutory scheme unconstitutional"].)

The purpose of the Emergency Services Act does furnish standards to guide implementation of section 8627. As the California Supreme Court explained, "[o]ne of the primary purposes of the [Emergency Services Act] is to ensure that 'all emergency services functions' of the State and local governments, the federal government, and 'private agencies of every type,' 'be coordinated . . . to the end that the most effective use be made of all manpower, resources, and facilities for dealing with any emergency that may occur.' (Gov. Code, § 8550.) To further that end, the Governor is charged with the responsibility to coordinate the emergency plans and programs of all local agencies, 'such plans and programs to be integrated into and coordinated with the State Emergency Plan and the plans and programs of the federal government and of other states to the

fullest possible extent.' (Gov. Code, § 8569.)" (*Macias v. State of California* (1995) 10 Cal.4th 844, 854; see also *Martin v. Municipal Court* (1983) 148 Cal.App.3d 693, 696 [the Emergency Services Act "recognizes and responds to a fundamental role of government to provide broad state services in the event of emergencies resulting from conditions of disaster or extreme peril to life, property and the resources of the state," and "confers broad powers on the Governor to deal with emergencies"].)

Thus, in issuing orders under section 8627, the Governor is charged by the Emergency Services Act with the responsibility to provide a coordinated response to the emergency. This statutory purpose while broad gives the Governor sufficient guidance, i.e., to issue orders that further a coordinated emergency response. (See *Wright, supra*, 30 Cal.3d at pp. 712-713 [legislative direction to Judicial Council to adopt rules establishing criteria for imposing upper or lower terms in determinate sentencing to promote "uniformity" provided sufficient standard]; *Sims, supra*, 30 Cal.App.5th at pp. 114-115 [in developing lethal injection protocol, Department of Corrections and Rehabilitation received adequate guidance from purpose of lethal injection statute to bring state into compliance with Eighth Amendment prohibition on inflicting unnecessary pain or lingering death]; see also *Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 510 ["[A] general welfare standard is a sufficient guideline to enable an agency to act constitutionally"].) Moreover, the requirement of particularized standards delimiting the specific orders that the Governor may issue is antithetical to the purpose of the Emergency Services Act to empower the Governor to deal with the exigencies of widely differing emergencies in California from wildfires to floods to a pandemic. (See *Birkenfeld, supra*, 17 Cal.3d at p. 168 [" 'The rule that the statute must provide a yardstick to define the powers of the executive or administrative officer is easy to state but rather hard to apply. Probably the best that can be done is to state that the yardstick must be as definite as the exigencies of the particular problem permit' "].)

In any event, of greater significance than "standards" is the requirement that legislation provide "safeguards" against the arbitrary exercise of quasi-legislative authority. In *Kugler*, the court said that "[t]he requirement for 'standards' is but one method for the effective implementation of the legislative policy decision; the requirement possess no sacrosanct quality in itself so long as its purpose may otherwise be assured." (*Kugler, supra*, 69 Cal.2d at p. 381.) " 'The need is usually not for standards but for safeguards. . . . [T]he most perceptive courts are motivated much more by the degree of protection against arbitrariness than by the doctrine about standards . . . .' " (*Ibid.*; see also *Samples, supra*, 146 Cal.App.4th at pp. 805-806.) Such safeguards may "derive from the statutory scheme itself." (*Monsanto, supra*, 22 Cal.App.5th at p. 558.)

Here, an important safeguard is set forth in the Emergency Services Act. Section 8629 provides: "The Governor shall proclaim the termination of a state of emergency at the earliest possible date that conditions warrant. All of the powers granted the Governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the Governor or by concurrent resolution of the Legislature declaring it at an end." As discussed, section 8567 provides that "[w]henever the state of war or state of emergency has been terminated, the orders and regulations shall be of no further force or effect." (§ 8567, subd. (b).) The Governor's obligation under the Emergency Services Act to terminate the emergency and thereby nullify orders issued under his emergency powers as soon as conditions warrant, as well the Legislature's authority to terminate the emergency at any time with the same effect, provides a safeguard for the delegation of quasi-legislative authority in section 8627.

We find instructive the decisions of federal courts interpreting the International Emergency Economic Powers Act (IEEPA), 50 United States Code section 1701 et seq., finding that Congress's power to terminate a presidential declaration of an emergency

provides a sufficient safeguard such that the statute is not an unconstitutional delegation of legislative authority. IEEPA gives the President the power to a declare a national emergency regarding foreign threats and issue orders and regulations restricting economic activity, violation of which is punishable by civil and criminal penalties. (*Kashani v. Tsann Kuen China Enterprise Co.* (2004) 118 Cal.App.4th 531, 539.) For example, orders and regulations issued under IEEPA "prohibit any United States person from engaging in any transaction, directly or indirectly, relating to the exportation, reexportation, sale, or supply of goods, technology, or services to Iran or the Government of Iran." (*Kashani*, at p. 539.) In *United States v. Mirza* (5th Cir. 2011) 454 Fed.Appx. 249, the Fifth Circuit rejected an unconstitutional delegation challenge to IEEPA noting that the statute provides for "limitations on the President's power," including "the power granted to the President by the IEEPA can be eliminated by Congress's termination of the declaration of emergency." (*Mirza*, at p. 256; see also *United States v. Dhafir* (2nd Cir. 2006) 461 F.3d. 211, 217 [IEEPA is not an unconstitutional delegation to the President to define criminal conduct for unlimited time once national emergency is declared because "Congress can terminate the President's declaration of emergency"].)

Consistent with this authority, the Kentucky Supreme Court upheld its governor's declaration of state of emergency regarding the COVID-19 pandemic and issuance of orders and regulation to address the disease. (*Beshear v. Acree* (Ky. 2020) 615 S.W.3d 780.) The court rejected the contention that the statute under which the governor declared an emergency was an unconstitutional delegation of authority. (*Id.* at pp. 805-813.) The court enumerated "procedural safeguards to prevent abuses," all of which are present in the Emergency Services Act, i.e., written orders and regulations, public notice, and the requirement that the governor state when the emergency has ceased and provision for the legislature to make that determination if the governor does not. (*Beshear, supra*, at pp. 811-812.)

Similarly, in *Friends of Danny DeVito v. Wolf* (Pa. 2020) 227 A.3d 872, another case challenging a governor's orders issued to deal with the COVID-19 emergency, the Pennsylvania Supreme Court noted that "[a]s a counterbalance to the exercise of the broad powers granted to the Governor, the Emergency Code provides that the General Assembly by concurrent resolution may terminate a state of emergency at any time." (*Id.* at p. 886; see also *Wolf v. Scarnati* (Pa. 2020) 233 A.3d 679, 711 ["the National Governors Association 'characterizes the ability of a legislature to intervene to terminate a declaration of a state of emergency as a "limitation on emergency powers" ' "] (conc. & dis. opn. of Dougherty, J.).)

Real parties argue the more apposite authority is *In re Certified Questions from the United States District Court, Western District Court of Michigan, Southern Division* (Mich. Oct. 2, 2020, No. 161492) ___ N.W.2d ___, [2020 WL 5877599]. In that case, the Supreme Court of Michigan examined a statute giving the governor power to declare a state of emergency and promulgate orders, rules and regulations to bring the emergency under control, which would cease to have effect when the governor declared that the emergency no longer existed. (*Id.* at p. *9.) The court considered both the subject matter and the duration of the emergency powers conferred on the governor in determining whether the nondelegation doctrine was satisfied. (*Id.* at p. *15.) The court interpreted the statute to be "of indefinite duration." (*Id.* at p. *16.) The court said, "the state's legislative authority, including its police powers, may conceivably be delegated to the state's executive authority for an indefinite period." (*Ibid.*) The court concluded the statute's "expansiveness, its indefinite duration, and its inadequate standards" were insufficient to sustain the delegation. (*Id.* at p. *18.)

By contrast, the Emergency Services Act is not a statute of indefinite duration. Unlike the Michigan statute, the Emergency Services Act obligates the governor to declare the state of emergency terminated as soon as conditions warrant, and, more significantly, empowers the Legislature to declare the emergency terminated. This

critical difference renders *Certified Questions* of little aid in evaluating the application of the nondelegation doctrine to the Emergency Services Act.

We conclude the Emergency Services Act, and specifically section 8627 of the Emergency Services Act, is not an unconstitutional delegation of legislative power.

DISPOSITION

Let a peremptory writ of mandate issue directing Sutter County Superior Court to dismiss as moot the portion of the judgment awarding declaratory relief that the Executive Order is null and void. The superior court is further directed to vacate the remainder of the judgment and enter a new and different judgment in favor of the Governor. The alternative writ is discharged. The stay previously issued by this court on November 24, 2020, will be vacated upon finality of this opinion. The Governor shall recover his costs in this proceeding. (Cal. Rules of Court, rule 8.493.)

RAYE, P.J.

We concur:

ROBIE, J.

RENNER, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Newsom v. The Superior Court of Sutter County
C093006
Sutter County No. CVCS200912

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EXHIBIT B

EXECUTIVE DEPARTMENT
STATE OF CALIFORNIA

EXECUTIVE ORDER N-64-20

WHEREAS on March 4, 2020, I proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19; and

WHEREAS on November 3, 2020, California—like the other states of the United States—will hold a General Election, and Californians throughout the state will exercise their right to vote; and

WHEREAS it is unknown to what degree COVID-19 will pose a threat to public health in November, and California and its counties must begin taking action now—to procure supplies, secure polling places, enlist volunteers, and draw up plans, among other steps—to ensure that the November 3, 2020 General Election is held in a manner that is accessible, secure, and safe; and

WHEREAS to preserve public health in the face of the threat of COVID-19, and to ensure that the November election is accessible, secure, and safe, all Californians must be empowered to vote by mail, from the safety of their own homes; and

WHEREAS it is also essential to ensure that all Californians who may need access to in-person voting opportunities—including individuals with disabilities, individuals who speak languages other than English, individuals experiencing homelessness, and others who may find vote-by-mail less accessible than in-person voting—are able to access such opportunities and exercise their right to vote; and

WHEREAS the Secretary of State has been working with California elections officials, voting rights advocates, and other stakeholders to explore how best to implement procedures for the November election that will make in-person voting opportunities available, give county elections officials needed flexibility, and preserve public health; and

WHEREAS discussions concerning the November election have been informed, and should continue to be informed, by the ways in which existing California law—including, in particular, the California Voter's Choice Act—provide standards to ensure that, even in the context of an "all-mail ballot" election, voters are able to access in-person voting opportunities; and

WHEREAS work in partnership with the Legislature and the Secretary of State, guided by the standards in existing California law and the exigencies of the COVID-19 pandemic, will be essential to ensure that the November election is accessible, secure, and safe; and

WHEREAS confirming that every voter will be able to vote by mail in the November election will allow California and its counties to begin preparing for that election now—even as planning continues to determine how details of that election (including requirements concerning the availability of in-person voting opportunities) will be implemented; and

WHEREAS it is critical that counties have clarity regarding requirements for in-person voting opportunities and other details of the November election by no later than May 30, 2020, which may require a subsequent Executive Order; and

WHEREAS under the provisions of Government Code section 8571, I find that strict compliance with various statutes specified in this Order would prevent, hinder, or delay appropriate actions to prevent and mitigate the effects of the COVID-19 pandemic.

NOW, THEREFORE, I, GAVIN NEWSOM, Governor of the State of California, in accordance with the authority vested in me by the State Constitution and statutes of the State of California, and in particular, Government Code sections 8567, 8571, and 8627, do hereby issue the following Order to become effective immediately:

IT IS HEREBY ORDERED THAT:

1) Notwithstanding any limitation on the distribution of vote-by-mail ballots in Elections Code sections 1500 and 4000-4007, or any other provision of state law, each county elections officials shall transmit vote-by-mail ballots for the November 3, 2020 General Election to all voters who are, as of the last day on which vote-by-mail ballots may be transmitted to voters in connection with that election, registered to vote in that election. As set forth in this paragraph, every Californian who is eligible to vote in the November 3, 2020 General Election shall receive a vote-by-mail ballot.

2) Nothing in this Order shall be construed to limit the extent to which in-person voting opportunities are made available in connection with the November 3, 2020 General Election. It is the intent of this Order that my Administration continue to work with the Legislature and the Secretary of State to determine how requirements for in-person voting opportunities and other details of the November election will be implemented—guided by California's longstanding commitment to making its elections accessible, as enshrined in existing California law, while recognizing the exigencies of the COVID-19 pandemic.

3) My Administration continues working in partnership with the Secretary of State and the Legislature on requirements for in-person voting opportunities and on how other details of the November election will be implemented. Nothing in this Order is intended, or shall be construed, to limit the enactment of legislation on that subject.

IT IS FURTHER ORDERED that as soon as hereafter possible, this Order be filed in the Office of the Secretary of State and that widespread publicity and notice be given of this Order.

This Order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the State of California, its agencies, departments, entities, officers, employees, or any other person.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 8th day of May 2020.

GAVIN NEWSOM
Governor of California

ATTEST:

ALEX PADILLA
Secretary of State

EXHIBIT C

EXECUTIVE DEPARTMENT
STATE OF CALIFORNIA

EXECUTIVE ORDER N-67-20

WHEREAS on March 4, 2020, I proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19; and

WHEREAS on November 3, 2020, California—like the other states of the United States—will hold a General Election, and Californians throughout the state will exercise their right to vote; and

WHEREAS while the future course of the COVID-19 pandemic cannot be known with certainty, state, national, and international projections reflect ongoing danger from the pandemic throughout the remainder of this year, and experts believe that COVID-19 will remain a threat to public health during the November election; and

WHEREAS California and its counties must take action now—to procure supplies, secure polling places, enlist volunteers, and draw up plans, among other steps—to ensure that the November 3, 2020 General Election is held in a manner that is accessible, secure, and safe; and

WHEREAS to preserve public health in the face of the threat of COVID-19, and to ensure that the November election is accessible, secure, and safe, all Californians who are registered to vote in that election must be empowered to vote by mail, as an alternative to in-person voting, where appropriate; and

WHEREAS it is also essential to ensure that all Californians who may need access to in-person voting opportunities—including individuals with disabilities, individuals who speak languages other than English, individuals experiencing homelessness, and others who may find vote-by-mail less accessible than in-person voting—are able to access such opportunities and exercise their right to vote; and

WHEREAS it is vital that California voters not be disenfranchised as a result of the COVID-19 pandemic, and that the November election be conducted in a way that promotes eligible voters' participation in our democracy; and

WHEREAS on May 8, 2020, I issued Executive Order N-64-20, which provides that Californians registered to vote in the November 3, 2020 General Election shall receive vote-by-mail ballots; and

WHEREAS as contemplated by Executive Order N-64-20, my Administration has been working and continues to work in partnership with the Legislature and the Secretary of State concerning the implementation of requirements for in-person voting opportunities and other details and fiscal impacts of the November election, and nothing in this Order is intended to limit legislative action on those subjects; and

WHEREAS it is now critical—given counties' pressing need to take action to prepare for the November election, as recognized in Executive Order N-64-20—that counties be able to prepare to meet requirements for in-person voting opportunities and to implement other details of the November election; and

WHEREAS to curb the spread of COVID-19, in-person voting opportunities for the November election must be made available in sufficient numbers to prevent overcrowding and to otherwise maintain physical distancing at in-person voting locations; and

WHEREAS public and private entities and individuals are encouraged to cooperate with county elections officials in administering the November election (including by volunteering their time and property, where appropriate), and county elections officials are encouraged to consider using all mechanisms provided by existing law to secure voting locations and elections personnel for that election, which may include the use of public buildings (such as school buildings and state office buildings) pursuant to Elections Code sections 12283–12284, and which may (in light of the threat posed by the COVID-19 pandemic) also include the assignment of public employees as disaster services workers pursuant to Government Code section 3100; and

WHEREAS under the provisions of Government Code section 8571, I find that strict compliance with various statutes specified in this Order would prevent, hinder, or delay appropriate actions to prevent and mitigate the effects of the COVID-19 pandemic.

NOW, THEREFORE, I, GAVIN NEWSOM, Governor of the State of California, in accordance with the authority vested in me by the State Constitution and statutes of the State of California, and in particular, Government Code sections 8567, 8571, and 8627, do hereby issue the following Order to become effective immediately:

IT IS HEREBY ORDERED THAT:

1) As provided by Executive Order N-64-20, all Californians who are registered (and otherwise eligible) to vote in the November 3, 2020 General Election shall receive vote-by-mail ballots. Consistent with Elections Code section 2226, this provision is not intended, and shall not be construed, to mean that voters in an inactive voter registration status shall receive vote-by-mail ballots in connection with the November 3, 2020 General Election.

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 ballot tracking system, created pursuant to Elections Code section 3019.7, and to use Intelligent Mail Barcodes on all vote-by-mail ballot envelopes.

3) Notwithstanding any contrary provision of state law (including, but not limited to, any such provision of Elections Code sections 12200–12286 or 12288, and specifically including the requirement in Elections Code section 12286(a)(3) that at least one polling place be designated per precinct), a county that is not subject to the California Voter's Choice Act shall not, in connection with the November 3, 2020 General Election, be required to make available more than one polling place per 10,000 registered voters, as long as the county complies with all of the following conditions:

a) At least one polling place per 10,000 registered voters is made available for voting during the following hours:

   i) From Saturday, October 31, 2020, through Monday, November 2, 2020, for at least eight hours (during regular hours convenient for members of the public) each day; and

   ii) On Tuesday, November 3, 2020, from 7 a.m. until 8 p.m.

b) At least the following number of vote-by-mail ballot drop-off locations (as defined in Elections Code section 3025(a)(2)) is made available for ballot drop-off beginning no later than 9 a.m. on Tuesday, October 6, 2020, and continuing during regular business hours each day through the close of voting on Tuesday, November 3, 2020:

   i) At least one vote-by-mail ballot drop-off location per 15,000 registered voters; and

   ii) Not less than two vote-by-mail ballot drop-off locations regardless of the number of registered voters; and

c) At least one vote-by-mail ballot drop-off location required by subparagraph (b) is fully accessible to the public for at least twelve hours each day (during regular hours convenient for members of the public) between Tuesday, October 6, 2020 and Tuesday, November 3, 2020, inclusive.

4) Notwithstanding any contrary provision of state law (including, but not limited to, any such provision of Elections Code section 4005 or section 4007, as applicable), a county that is subject to the California Voter's Choice Act shall not, in connection with the November 3, 2020 General Election, be required to open any vote center (as that term is used in Elections Code sections 357.5, 4005, and 4007) prior to Saturday, October 31, 2020. Counties are nevertheless encouraged to open vote centers earlier, where feasible and as conditions warrant, to maximize opportunities for voter participation in the November 3, 2020 General Election.

5) Notwithstanding any contrary provision of state law (including, but not limited to, any such provision of Elections Code section 4005(a)(10)), no county elections official shall be required to conduct any in-person public meetings or workshops in connection with the preparation of plans for the administration of the November 3, 2020 General Election, as long as a draft of each such plan is posted on the relevant county election official's website in a manner consistent with Elections Code section 4005(a)(10)(E)(iii) and the relevant county elections official accepts public comment on the draft plan for at least 10 days. Counties are encouraged to take additional steps, where feasible, to facilitate and encourage public participation in the development of such plans.

6) Nothing in this Order is intended, or shall be construed, to limit a county's ability to fulfill the requirements imposed on that county by existing law (including, but not limited to, any provision of law conditionally suspended by Paragraph 3 as to counties not subject to the California Voter's Choice Act) concerning procedures for the November 3, 2020 General Election. In particular, any county described in Paragraph 3 that complies with all such requirements applicable to that county (and that therefore need not avail itself of the conditional suspension set forth in Paragraph 3) may do so without additionally satisfying any separate requirements that would otherwise be imposed by Paragraph 3. Additionally, where feasible, counties are encouraged to exceed the minimum requirements imposed by this Order, or otherwise imposed by law in connection with the administration of the November 3, 2020 General Election, to maximize opportunities for voter participation in that election.

7) The Legislature and the Secretary of State are requested to continue working in partnership with my Administration to ensure that the November 3, 2020 General Election is safe, secure, and accessible for all, including by ensuring (and by working with county elections officials to ensure) that there is sufficient voter education and outreach to prepare voters to participate in that election. Nothing in this Order is intended, or shall be construed, to limit in any way the enactment of legislation concerning the November 3, 2020 General Election.

IT IS FURTHER ORDERED that as soon as hereafter possible, this Order be filed in the Office of the Secretary of State and that widespread publicity and notice be given of this Order.

This Order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the State of California, its agencies, departments, entities, officers, employees, or any other person.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 3rd day of June 2020.

GAVIN NEWSOM
Governor of California

ATTEST:

ALEX PADILLA
Secretary of State

EXHIBIT D

Washington Examiner

Newsom says coronavirus is an 'opportunity for reimagining a more progressive era'

by Andrew Mark Miller, Deputy Social Media Editor | ■ | April 02, 2020 01:14 PM

Just In...

Arizona Attorney General Mark Brnovich joins 2022 race to oust Mark Kelly

The Congressional Black Caucus is blocking a black Republican from joining

Biden officials say worsening border stats 'overstate' problem because of repeat crossers

Illinois task force takes aim at statue of Martin Luther King Jr.

Heart inflammation after second COVID-19 vaccine dose more common than expected in young adults, CDC says

Biden partially restores Obama fair housing rule Trump cast as assault on suburbs

South Dakotans 'pissed off' and 'angry' over Keystone XL cancellation

Biden's top health official repeatedly ducks answering if there's a federal law banning partial-birth abortion

California Gov. Gavin Newsom suggested in a Wednesday press conference that the coronavirus pandemic is an opportunity to usher in a "progressive era" in American policy.

Newsom was asked by a *Bloomberg News* reporter if he saw "the potential, as some others in the [Democratic] Party do, for a new progressive era, if you want to call it that, in national politics and policy and whether there's the opportunity for additionally progressive steps ... on the national and state level."

Newsom's response, according to the *California Globe*, was that "the governor admittedly gave a long-winded answer which culminated in, 'yes,' admitting there is political opportunity born out of the pandemic. 'There is opportunity for reimagining a [more] progressive era as it [relates] to capitalism,' Gov. Newsom said. 'So yes, absolutely we see this as an opportunity to reshape the way we do business and how we govern.'"

The response can be seen between the 51:47 to 55:13 marks in the governor's press conference posted on Twitter.

> Governor @GavinNewsom provides an update on California's response to the #COVID19 outbreak. https://t.co/iE3RgilZ82
>
> — Office of the Governor of California (@CAgovernor) April 1, 2020

Newsom's comments echo a similar sentiment from House Majority Whip James Clyburn, who reportedly told fellow Democrats on a conference call that he saw the coronavirus relief package as a "tremendous opportunity to restructure things to fit our vision." Clyburn's office told the *Washington Examiner* those comments were taken out of context.

Former vice president and 2020 presidential candidate Joe Biden also referred to the coronavirus relief package as an "opportunity" to accomplish progressive agenda goals.

"We're gonna have an opportunity, I believe in the next round [of congressional economic aid] here, to use the — my green economy — my Green Deal to be able to generate both economic ground and consistent with the kind of infusion of money as we need into the system to keep it going," Biden told PBS NewsHour in March.

The California governor complimented Trump's response to the pandemic this week by saying he'd be "lying" if he said Trump hasn't been responsive.

> "Let me just be candid with you. I'd be lying to you to say that he hasn't been responsive to our needs. He has."@GavinNewsom says @realDonaldTrump has been responsive to California's needs amid the coronavirus pandemic and says it would be dishonest to say otherwise. pic.twitter.com/cdwexiCRy9
>
> — Washington Examiner (@dcexaminer) April 2, 2020