

FILED

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SUTTER
CLERK OF THE COURT
By  Deputy

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SUTTER**

**JAMES GALLAGHER and KEVIN
KILEY**

Plaintiffs,

Case No. CVCS20-0912

-vs.-

**TENTATIVE DECISION FOLLOWING
COURT TRIAL**

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

Defendant.

This cause came on regularly for court trial on October 21, 2020. The parties introduced documentary evidence pursuant to stipulation set forth in Plaintiffs' and Defendant's Statement of Evidence and Exhibits filed October 16, 2020. No witnesses were called. The cause was argued and submitted for decision. The Court, having considered the evidence and the arguments of counsel, issues the following Tentative Decision.

**1. ON THE ISSUE OF WHETHER THE CAUSE IS MOOT, THE COURT FINDS
THE CAUSE IS NOT MOOT.**

There are two distinct reasons for finding the cause is not moot. First and foremost, the legal controversy for which plaintiffs have requested declaratory relief is not limited to the validity of Executive Order N-67-20 (Def. Ex. 5), which concerns only the 2020 General Election. The controversy at issue in this case is broader, specifically whether the Governor has the authority under the California Emergency Services Act (Govt. Code §§8550-8669.7.) ("CESA") to

exercise legislative powers by unilaterally amending, altering, or changing existing statutory law or making new statutory law. Plaintiffs take the position in these proceedings the Governor does not have such authority under the California Constitution or the CESA to legislate by unilaterally amending existing statutory law. The Governor takes the position the CESA's grant of authority to exercise "all police power vested in the state," allowing him to "promulgate, issue, and enforce such orders and regulations as he deems necessary" authorizes him to legislate by unilaterally amending existing statutory law. Not only is this an active and ongoing controversy between the parties, but it is a critically important one for the Judicial Branch to resolve. The State of Emergency brought about by the COVID-19 pandemic which was proclaimed by the Governor on March 4, 2020 continues in effect, indefinitely, and the Governor continues to have authority to act under the CESA. The Governor has issued three executive orders during the current state of emergency specifically regarding the November 3, 2020 general election (Def. Exs. 4 and 5; Pl. Ex. D) and has issued more than 50 different executive orders changing numerous California statutes since the state of emergency was declared. (Pl. Ex. F)

Further, despite representations by the Governor's legal counsel that Executive Order N-67-20 dated June 3, 2020 is "withdrawn," there is no evidence it has been formally rescinded, and the Executive Order includes provisions controlling the election process for the November 3, 2020 General Election which were not superseded by the subsequently enacted legislation. Specifically, despite the subsequent legislation, the Executive Order 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. The fact that subsequent legislation did not entirely supersede the Executive Order is shown by California Assembly Bill 860 (Def. Ex. 6) which took effect June 18, 2020; California Secretary of State's office memorandum to County Elections Officials dated July 14, 2020 (Pl. Ex. I); and California Senate Bill 423 (Def. Ex. 7) which took effect August 6, 2020.

In *Davis v. Superior Court* (1985) 169 Cal.App.3d 1054, 1057-1058, the Court of Appeal made it clear that the enactment of subsequent legislation does not automatically render a matter moot; superseding changes may or may not moot the original challenges. In addition, "if a pending case poses an issue of broad public interest that is likely to recur, the court may exercise

an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot.” *In re William M.* (1970) 3 Cal.3d 16, 23-24. Further, an appeal (and by extension a case still at the trial stage) “will not be dismissed where, despite the happening of the subsequent event, there remain material questions for the court’s determination. This qualification or exception has been applied to actions for declaratory relief upon the ground that the court must do complete justice once jurisdiction has been assumed... and the relief thus granted may encompass future and contingent legal rights.” *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541, internal citation omitted.

2. ON THE ISSUE OF WHETHER THE CESA IS UNCONSTITUTIONAL, THE COURT FINDS THE CESA IS NOT UNCONSTITUTIONAL.

The plain meaning of the CESA does not delegate to the Governor the power to legislate, and therefore does not violate the separation of powers under California Constitution Article Three, Section 3. Article Three of the CESA (Gov’t Code §8565 -8574) enumerates the powers of the Governor during a declared state of emergency. Section 8567 provides in part:

- (a) The Governor may make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter. The orders and regulations shall have the force and effect of law.
- (b) Orders and regulations, or amendments or rescissions thereof, issued during a state of war or state of emergency shall be in writing and shall take effect immediately upon their issuance. Whenever the state of war or state of emergency has been terminated, the orders and regulations shall be of no further force or effect.

Section 8571 of the CESA provides:

During a state of war emergency or a state of emergency the Governor may suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency, including subdivision (d) of Section 1253 of the Unemployment Insurance Code, 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.

Article Thirteen of the CESA contains provisions specific to a proclaimed “State of Emergency” and Section 8627 of that Article 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 Governor relies on these three sections of the CESA as his authority to amend statutory law during a state of emergency. Plaintiffs argue this is not a correct interpretation of the CESA and if it were, the Act would be an unconstitutional delegation of power to legislate in violation of the separation of powers. Interpretation of a statute that renders the statute unconstitutional is disfavored, and “statutes are to be so construed, if their language permits, as to render them valid and constitutional rather than invalid and unconstitutional.” *People v. Amor* (1974) 12 Cal.3d 20, 30; *City of Los Angeles v. Belridge Oil Co.* (1954) 42 Cal.2d 823, 832.

The plain language of Section 8567 only allows the Governor to “make, amend, and rescind orders and regulations.” Clearly the legislature understands the distinction between an order or regulation on the one hand, and a statute on the other. Section 8567 does not empower to Governor to make or amend statutes. The plain language of Section 8571 empowers the Governor to “suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules or regulations of any state agency.” The term “statute” is used in this section, but the section only authorizes the Governor to suspend certain statutes, not to amend any statutes or create new ones. Finally, Section 8627 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. In qualifying this authority, Section 8627 further states that the Governor “shall promulgate, issue and enforce such orders and regulations as he deems necessary in accordance with the provisions of Section 8567.” Section 8627 does not empower a governor to make or amend statutory law, by its own language and by specifying that the powers shall be exercised in accordance with Section 8567. The Court has been provided no authority interpreting the phrase “police powers” as used in Section 8627 and the Court does not interpret “police powers” in a manner which violates the separation of powers under the California Constitution. The Constitution gives the legislative branch the exclusive authority to make law and the executive branch the power to see that the law is faithfully executed.

3. ON THE ISSUE OF WHETHER EXECUTIVE ORDER N-67-20 WAS AUTHORIZED BY THE CESA, THE COURT FINDS THE EXECUTIVE ORDER WAS NOT AUTHORIZED BY THE CESA BECAUSE IT IMPROPERLY AMENDED EXISTING STATUTORY LAW, EXCEEDING THE GOVERNOR'S AUTHORITY AND VIOLATING THE SEPARATION OF POWERS.

Article Three, Section 3 of the California Constitution declares “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.” “The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.” Cal. Const. art. IV, § 1. “The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed.” Cal. Const. art. V, § 1.

The CESA allows the Governor, during a state of emergency, to issue orders and regulations and to suspend certain statutes, but the plain and unambiguous language of CESA does not permit the Governor to amend statutes or make new statutes. The Governor does not have the power or authority to assume the Legislature’s role of creating legislative policy and enactments. Because Executive Order N-67-20 amended sections of the Elections Code it exceeds the Governor’s authority under CESA and renders Executive Order N-67-20 invalid.

The Governor may not exercise legislative powers unless permitted by the Constitution. *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1084. Article V, Section 1 of the California Constitution does not grant the governor the power to exercise those functions that have been given to the Legislature, absent the Legislature’s delegation of a portion of its legislative authority to such executive officials or entities through statutory enactments. See eg. *Prof. Engineers in CA Gov. v. Schwarzenegger* (2010) 50 Cal.4th 989, 1014-1015 holding Governor’s unilateral implementation of state employee furloughs under a declared fiscal emergency was in excess of his authority. “The separation of powers doctrine limits the authority of each one of the three branches of government to arrogate to itself the core functions of another branch.” *Carmel Valley Fire Prot. Dist. v. State of California* (2001) 25 Cal. 4th 287, 297. “The core functions of the legislative branch include passing laws, levying taxes, and making appropriations. Essentials of the legislative function include the determination and formulation of legislative policy.” *Id.* at p. 298-299; internal citations omitted.

The doctrine of the separation of powers prohibits any of the three branches of government exercising the complete power constitutionally vested in another or exercising power in a way which undermines the authority and independence of another. *United Auburn Indian Cmty. of Auburn Rancheria v. Newsom* (2020) 10 Cal. 5th 538, 559 citing *Younger v. Superior Court* (1978) 21 Cal.3d 102, 117 and *Carmel Valley*, supra, at p. 297-298. The Governor cites *Macias v. State of California* (1995) 10 Cal. 4th 844, 858 for the proposition his police powers under the CESA are so broad as to encompass unilateral amendment of statutory law. However broad are the police powers given to a governor by the CESA, those powers remain subject to constitutional restraints, and the *Macias* case, involving a failure to warn claim against a pesticide manufacturer, does not hold otherwise. The *Macias* court specifically references a governor's power to "suspend regulatory statute or the orders, rules or regulations of any state agency," to "commandeer or utilize any private property or personnel" deemed to be necessary to carry out his responsibilities, and "to make expenditures from any fund 'legally available to deal with actual or threatened conditions of [the emergency].'" The Supreme Court's opinion in *Macias* makes no mention or suggestion that the powers include amending statutory law. *Id.* at p. 854.

The Governor also points to prior governors' executive orders to demonstrate "the Legislature's long-time acquiescence" in the practice of amending statutory law, in particular the Elections Code, during a state of emergency. (Def. Trial Brief, p. 7 lines 2-4) The executive orders provided by the Governor as Exhibits 12-16 do not support his argument, nor are they legal precedent, as none of the historical executive orders presented by the Governor amended or created statutory law. To the contrary, the orders are all very limited in scope to suspend specific statutes, as the Governor is expressly permitted to do under the CESA, but do not amend statutory law or create new statutes. The distinction is key. Further, none of the historical executive orders cite "police powers" under Section 8627 as the source of authority for their issuance. Finally, the Governor asserts the Constitutional checks and balances between the executive branch and the legislative branch of government are preserved even if an executive order amends statutory law because the legislature has the option of terminating the state of emergency, which would have the effect of terminating any change in statutory law resulting from an executive order issued under the CESA. Terminating a state of emergency for an emergency which continues to exist is not a realistic or effective manner in which to address an

unconstitutional exercise of power by a governor under the CESA and does not preserve the separation of powers intended by the Constitution.

4. ON THE ISSUE OF WHETHER PLAINTIFFS ARE ENTITLED TO DECLARATORY RELIEF, THE COURT'S DECISION IS PLAINTIFFS ARE ENTITLED TO DECLARATORY RELIEF.

An actual controversy exists relating to the legal rights and duties of the parties under the CESA and the California Constitution. It is the Court's determination that a declaration pursuant to Code of Civil Procedure Section 1060 is necessary and proper at this time to provide certainty as to the correct interpretation of Sections 8567, 8571, and 8627 of the CESA, not only to identify Executive Order N-67-20 specifically, as unconstitutional but also to avoid further violations of the CESA and the California Constitution during the ongoing state of emergency by clarifying that the CESA does not give the Governor the power or authority to amend statutory law or create new statutory law even during a state of emergency. On the controversy of whether or not the CESA allows the Governor to amend statutory law or create new statutory law, the parties' positions are diametrically opposed and the controversy is one of widespread public interest which deserves the consideration of the Judicial Branch.

A court may resolve a concrete dispute that is before it in a declaratory relief action when the consequences of a deferred decision would be lingering uncertainty in the law, particularly if there is widespread public interest in the answer to the particular legal question. *Communities for a Better Environment v. State Energy Resources Cons. & Dev. Commission* (2017) 19 CA5th 725, 735, 739. The correct interpretation of a statute is not only a proper matter for declaratory relief but is a matter "particularly suitable" for judicial declaration. *Kirkwood v. Cal. State Auto Assn.* (2011) 193 CA4th 49, 59, citing *Baxter Healthcare Corp. v. Denton* (2004) 120 CA4th 333, 360 and *In re Claudia E.* (2008) 163 CA4th 627, 633.

The Court finds and declares:

Executive Order N-67-20 issued by the Governor on June 3, 2020 is void as an unconstitutional exercise of legislative power and shall be of no further force or effect. The California Emergency Services Act (CA Government Code §8550 et seq.) does not authorize or empower the Governor of the State of California to amend statutory law or

make new statutory law, which is exclusively a legislative function not delegated to the Governor under the CESA.

5. ON THE ISSUE OF WHETHER PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF, THE COURT'S DECISION IS INJUNCTIVE RELIEF IS PROPER IN THIS CASE.

Permanent injunctive relief may be granted pursuant to Code of Civil Procedure Section 526 when plaintiff is entitled to the relief demanded and which consists, at least in part, in restraining the commission or continuance of the act complained of, when pecuniary compensation would not afford adequate relief, or where the restraint is necessary to prevent a multiplicity of judicial proceedings. Civ. Proc. Code §526(a)(1)(4)(6).

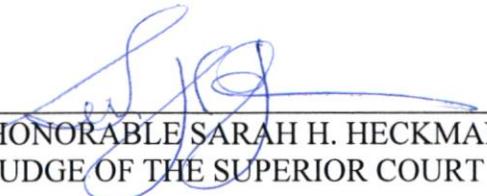
Injunctive relief is proper in this case for the following reasons: The Governor has issued a multitude of executive orders under the purported authority of the CESA, many of which have amended statutory law. (Pl. Ex. F) The Governor has asserted both publicly and consistently through the course of these proceedings his belief that Executive Order N-67-20 amending the Elections Code is “on firm legal ground,” Legislative enactment “is not strictly necessary,” and the Executive Order was a lawful exercise of his emergency powers under the CESA. (Pl. Ex. H, p. 5, referencing statements made at May 22, 2020 press conference; Defendant’s Trial Brief p. 6-9) The state of emergency proclaimed on March 4, 2020 due to the COVID-19 pandemic continues, with no end date in sight. (Def. Ex. 2) The amendments to the Elections Code made by AB 860 pertain only to the November 3, 2020 General Election and Chapter 7 (§§1600-1606.) of the Elections Code added by SB 423 is only effective until January 1, 2021 and as of that date is repealed. Based on the history of special elections since 2008, it is very likely a Special Election will become necessary in early 2021. (Pl. Ex. J) The Governor continues to issue executive orders which create legislative policy (Pl. Ex. G.) The evidence persuades the Court it is reasonably probable the Governor will continue issuing executive orders which amend statutory law and create legislative policy under the purported authority of the CESA, violating the California Constitution and the rights of plaintiffs thereunder and giving rise to a multiplicity of judicial proceedings, unless restrained by a permanent injunction.

The Court finds good cause to issue a permanent injunction consistent with the request set forth in paragraph 21 of plaintiffs’ complaint (Def. Ex. 1), as follows:

Gavin Newsom, in his official capacity as Governor of the State of California is enjoined and prohibited from exercising any power under the California Emergency Services Act (Government Code § 8550 et seq.) which amends, alters, or changes existing statutory law or makes new statutory law or legislative policy.

This Tentative Decision is the Court's proposed statement of decision, and will become the statement of decision unless, within 10 days after service of this Tentative Decision, a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the Tentative Decision, in accordance with Cal Rules of Court, Rule 3.1590(c)(4). The Clerk shall mail a copy of this Tentative Decision to all counsel and parties forthwith.

Dated: 11/2/20


HONORABLE SARAH H. HECKMAN
JUDGE OF THE SUPERIOR COURT