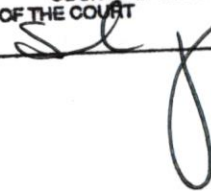


**FILED**

NOV 02 2020

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.

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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: