Case No. C093006

IN THE CALIFORNIA COURT OF APPEAL, THIRD DISTRICT

Gavin Newsom, Governor of California,

Petitioner,

v.

Superior Court of Sutter County,

Respondent.

Court of Appeal, Third District, Case No. C093006
Sutter County Superior Court, Case No. CVCS200912
The Honorable Sarah Heckman, Judge

APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND AMICUS CURIAE BRIEF OF CALIFORNIA CONSTITUTION CENTER SUPPORTING PETITIONER

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Under California Rule of Court 8.520(f), California Constitution Center requests leave to file the attached *amicus curiae* brief in support of petitioner Gavin Newsom, Governor of California. There are no disclosures to make under California Rule of Court 8.200(c)(3).

California Constitution Center is a nonpartisan academic research center wholly owned and operated by the University of California, Berkeley, School of Law. It is the first and only center at any law school devoted exclusively to studying California's constitution and high court.

The proposed brief will assist the Court by exploring the deep principle that governs this case: the California core powers doctrine permits branches of the state government to share some powers, allowing the branches to cooperate for the state's benefit while keeping them separate enough. California separation of powers doctrine does not hermetically seal the branches from each other — instead, it permits temporary, limited delegations from the legislature, especially of emergency powers to the executive like those at issue here.

Amicus is interested in this case because it raises an important issue of California constitutional law. The trial court's injunction, if upheld, will bar the current and future governors from using emergency executive powers to save the state from whatever calamity befalls it. The proposed brief will assist the Court by exploring the constitutional error in the trial court's injunction and explaining the negative implications for California's current and future emergency responses.

Dated: December 10, 2020

Respectfully submitted,
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AMICUS CURIAE BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

When the legislature and the governor cooperate to combat an emergency like the current pandemic, the courts should give the political branches maximum flexibility. California's separation of powers doctrine contemplates an adaptable government ready to solve the state's problems, especially when a crisis compels swift action and the government branches must join forces. In an emergency, California's legislature can temporarily delegate some of its authority to the executive until the crisis abates. The legislature did so here by enacting the Emergency Services Act (ESA); the governor issued emergency executive orders; and the legislature endorsed those orders by statute. And the legislature can terminate the emergency and retrieve the powers it temporarily ceded — whenever it wishes — by concurrent resolution. Gov. Code § 8629. The core powers doctrine permits that procedure because judicial intervention is only required when one branch defeats or materially impairs another branch's constitutional functions. That did not occur here; indeed, neither branch complains its powers were arrogated.

The trial court erred by finding a constitutional violation, when instead California's government was employing the pragmatic problem-solving the core powers doctrine intends. This Court should reverse.

ARGUMENT

I. California's core powers doctrine permits the limited overlap here.

Under the California Supreme Court's standard for evaluating core powers issues, the question here is whether the governor's orders, viewed from a realistic and practical perspective, defeat or materially impair the legislature's exercise of its constitutional functions. *Marine Forests Society v. Cal. Coastal Com*. (2005) 36 Cal.4th 1, 45. By that standard, no core legislative power was materially impaired by these orders.

California's core powers doctrine is more permissive of shared powers (like those at issue here) than the analogous federal doctrine, because the two governments are different. Unlike the federal constitution, the California constitution is not a grant of power — it restricts the legislature's otherwise plenary powers. *State Personnel Bd. v. Dept. of Personnel Admin*. (2005) 37 Cal.4th 512, 523. Because California is a state government with plenary powers, *Marine Forests Soc. v. Cal. Coastal Comm*. (2005) 36 Cal.4th 1, 31, the federal separation of powers doctrine does not apply to the states. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection* (2010) 560 U.S. 702, 719; *Marine Forests Society v. Cal. Coastal Com*. (2005) 36 Cal.4th 1, 28. Instead, California has its own separation of powers doctrine — one that does not demand "a hermetic sealing off of the three branches of Government from one another." *Hustedt v. Workers' Comp. Appeals Bd*. (1981) 30 Cal.3d 329, 338; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48.

That distinction explains why (unlike their federal counterparts) from the state's inception "each branch has exercised all three kinds of powers." *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 76. As a result, California Supreme Court decisions apply a flexible, functional understanding of separation of powers, where each branch has some exclusive powers that are expressly or implicitly conferred by the California constitution, and some shared powers and areas of responsibility. David A. Carrillo and Danny Y. Chou, *California Constitutional Law: Separation of Powers* (2011) 45 USF L.Rev. 655, 675. One cannot "in every instance neatly disaggregate executive, legislative, and judicial power. Treating these domains as entirely separate and independent spheres contrasts with the more nuanced treatment of these powers — and their frequent overlap — under our state constitutional system." *United Auburn Indian Community of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538, 558. Consequently, the California Supreme Court recognizes "that the three branches of government are interdependent," and so government officials may frequently perform actions that "significantly affect" those of another branch. *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 298.

The governor's emergency orders have no impact on the legislature's core powers. The core legislative constitutional function implicated here is its power to make laws by passing statutes. Cal. Const., art. IV, § 8; *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 299. That includes the power to weigh competing interests and determine social policy. *Carmel Valley Fire*

Protection Dist. v. State of California (2001) 25 Cal.4th 287, 299; *Perez v. Roe 1* (2006) 146 Cal.App.4th 171, 177. The orders here did not unduly limit the role and function of the legislative branch. In judging whether the core legislative power of making laws has been defeated or materially impaired, there are several relevant considerations here:

- Does the ESA assign all lawmaking power to the governor? No, the legislature at all times remains fully vested with all its legislating power. Its core lawmaking power is not defeated.
- Does the ESA give the governor the final word on legislation? No, the legislature always retains its power to adopt new laws — to supplement, confirm, or override emergency orders. Its core lawmaking power is not materially impaired.
- Does the ESA permit a governor to make emergency orders permanent? No, the legislature can by concurrent resolution end an emergency whenever it wishes, terminating existing emergency orders and ending a governor's power to issue new emergency orders.

At most, the legislature's core lawmaking power is significantly affected, which the core powers doctrine permits. The doctrine only prohibits one branch of government from exercising the complete power constitutionally vested in another, or exercising power in a way that undermines the authority and independence of another coordinate branch. *United Auburn Indian Community of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538, 559. As a result, even if the governor's orders

coincide somewhat with legislative powers — even if they significantly affected the legislature's core powers — that is permitted. One branch can "significantly affect" the core powers of another branch, so long as it does not "defeat or materially impair" the other's core power. *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52, 58. Nothing in the orders impaired the core legislative power to make laws, weigh competing interests, or determine social policy, because the legislature retained all its powers to overrule or validate those orders by statute. Courts have long understood that the branches of California's government share common boundaries, and no sharp line between their operations exists. *People v. Bunn* (2002) 27 Cal.4th 1, 14. That reality permits the limited overlap here.

Even to the extent that the governor exercised some limited legislative powers here, that too is permitted. Only the exercise of a *complete* power that has been expressly limited to one branch is barred to the other branches. *Laisne v. State Bd. of Optometry* (1942) 19 Cal.2d 831, 835. Consequently, it is "commonplace" for the executive and judicial branches to employ some legislative powers: "The exercise of such quasi-legislative authority . . . has never been thought to violate the separation-of-powers doctrine." *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 76. That standard contemplates emergency executive orders that have the temporary force of law. If by contrast the ESA purported to permanently assign all final lawmaking power to the governor, even for one subject, that would materially impair the core legislative power of making laws, because the legislature would be forever barred from making any laws on that subject. But the ESA does not so impair

any part of the legislature's core power — it permits only temporary executive orders that make no final policy decisions and no permanent changes to any laws. That is no intrusion on any core zone of legislative authority.

The California constitution expresly permits the governor to exercise some legislative powers. Granted, the governor is not part of the legislature. *Brooks v. Fischer* (1889) 79 Cal. 173, 176. But California constitution article III, section 3 allows for persons charged with the exercise of one power to exercise some of the others "as permitted" elsewhere in the state constitution. And the California constitution does grant the governor some legislative powers. When considering whether to sign bills that have passed both houses of the legislature, the governor "is acting in a legislative capacity, and not as an executive. He is for that purpose a part of the legislative department of the state." *Lukens v. Nye* (1909) 156 Cal. 498, 501. Similarly, in vetoing legislation the governor acts in a legislative capacity. *St. John's Well Child & Family Center v. Schwarzenegger* (2010) 50 Cal.4th 960, 971. And the governor can call the legislature into session. Cal. Const., art. IV, § 3(b). Those constitutional grants of legislative powers to the executive show that the governor cannot be barred from exercising *any* legislative power.

Indeed, the core powers doctrine itself bars the courts from interfering in the legislature's exercise of its core power to make laws. *Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 520–21. It is the legislature's prerogative to decide where to assign statutory powers. For example, the legislature can give courts the power to suspend criminal sentences without impairing the functions of the

executive branch. *Ex parte Giannini* (1912) 18 Cal.App. 166, 170. The legislature could have used the ESA to grant emergency powers to the courts, the 58 county sheriffs, or the attorney general, or created a new agency and vested it with those powers. None of those scenarios calls for judicial intervention in the legislative policy process.

The implications of upholding this injunction are dire. Assume for example that a California statute required elections to be held indoors in county courthouses, and that a wildfire burned Sutter County's courthouse to the ground. The legislature may, as it did here, empower the executive to enact quasi-legislative rules with "the dignity of statutes," thereby "truly 'making law.'" *Yamaha Corp. v. Bd. of Equalization* (1998) 19 Cal.4th 1, 10. The ESA permits a governor to declare a state of emergency in that county and order that the election be held indoors in another building, outdoors in a tent, or anywhere else that might be safe and convenient. It is proper for the legislature to delegate the emergency discretion necessary to make that decision — otherwise, county election officials would face the dilemma of violating the law by using their common sense to hold the election somewhere else, or by not holding the election at all. Yet this injunction would force those county officials into exactly that predicament.

Accepting the trial court's conclusion that the governor's emergency order powers invade core legislative functions would also require invalidating other powers granted by the ESA. For example, Government Code section 8645 permits the governor to spend available state funds in an emergency. But by this injunction's

reasoning, that statute overrides the legislature's otherwise-exclusive appropriation power. Ordinarily appropriating state money is a core legislative power, and legislative determinations on expenditures are binding on the executive. *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 299. If, as the trial court ruled, the legislature cannot temporarily delegate limited power to suspend statutes (Gov. Code § 8571) because that materially impairs a core legislative power, then neither can the legislature temporarily delegate power to rearrange appropriations. That conclusion is contrary to the California Supreme Court's decision in *Mandel v. Myers* (1981) 29 Cal.3d 531, 547–550, that the legislature's appropriation authority is not so exclusive that the other branches can never make spending decisions. Surely the courts will not bar the governor from using available state funds to purchase lifesaving COVID-19 vaccines, forcing the state's residents to wait for a legislative appropriation, when the legislature has already delegated that discretion by statute.

II. The legislature can delegate emergency authority to the governor.

The governor's emergency powers are consistent with the delegation principle, which is part of the core powers doctrine. Courts use the delegation principle to preserve core branch powers against excessive dilution — even when a branch itself assents to diluting its own power. Just as a branch cannot submit to its core powers being stolen, neither may a branch give its core powers away. But the delegation principle is a limit, not a bar: the legislature can delegate some of its core powers. Although it is charged with policy formulation, the legislature "properly

may delegate some quasi-legislative or rulemaking authority." *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 299. Doing so "is not considered an unconstitutional abdication of legislative power." *Id*. An 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." *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 190.

The ESA meets that lenient standard because the legislature made the fundamental policy decisions and gave adequate direction. The legislature declared the ESA's purpose is to "mitigate the effects of natural, manmade, or war-caused emergencies" and "generally to protect the health and safety and preserve the lives and property of the people of the state." Gov. Code § 8550. The legislature provided detailed policy findings and declarations to guide the exercise of emergency powers, all to "ensure that preparations within the state will be adequate to deal with such emergencies." Gov. Code § 8550. And the legislature provided adequate direction for the governor: ESA powers are to be exercised to the extent "necessary" to "effectuate the purposes" of the ESA and to issue orders "necessary to carry out the provision of this chapter." Gov. Code §§ 8627, 8567(a).

Those legislative declarations, findings, and direction satisfy the delegation principle because only a total abdication of the legislature's power to make basic policy decisions is prohibited. *Kugler v. Yocum* (1968) 69 Cal.2d 371; *People v. Wright* (1982) 30 Cal.3d 705, 712. The legislature can even delegate discretion, with

an ascertainable standard to guide its exercise. *People ex rel. Department of Public Works v. Superior Court of Merced County* (1968) 68 Cal.2d 206, 215. The legislature did so here, requiring that the governor act "in accordance with the State Emergency Plan" (Gov. Code § 8570) and suspend laws only when compliance would "prevent, hinder, or delay the mitigation of the effects of the emergency" (Gov. Code § 8571). Here, the legislature made the fundamental policy determination that California should be preserved from the calamities that frequently befall it; it delegated responsibility to the governor for taking executive action to combat emergencies; and the legislature provided detailed standards for emergency actions in the ESA. That is a sufficiently clear guide to adequately safeguard against abuse, *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd*. (2017) 3 Cal.5th 1118, 1150–51, which satisfies any delegation concerns.

The legislature could have been more specific in the ESA; it could have predicted this pandemic and devised means for adapting election procedures to that scenario. But it did not, instead preferring to grant the governor general authority to sort out whatever needs sorting in any disaster. Courts will not second-guess such policy choices or inquire into their wisdom. *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461. Instead, the well-settled principle that the legislative branch is entitled to judicial deference applies here. *People v. Vangelder* (2013) 58 Cal.4th 1, 34. And specificity is not required for the governor to have power to order the secretary of state to take the actions at issue here. Absent designation by the legislature of a specific course of action, it was the governor's duty in seeing that

the laws were executed to provide a means for conducting an election in a pandemic. Cal. Const, art. V, § 1. In discharging that duty, it was not necessary that the governor personally attend to the matter — it was sufficient that he provided for its doing by directing the secretary of state to make it so. See *Spear v. Reeves* (1906) 148 Cal. 501, 505.

Finally, even if this Court is concerned about the standards for delegation here, the legislature created a safeguard strong enough to match the degree of emergency discretion conferred. The legislature provided an emergency brake that is unique in all of California law, giving itself the option of terminating a governor's emergency powers by concurrent resolution. Gov. Code § 8629; see also Lab. Code § 6725 (section in effect until state of emergency has been terminated by governor's proclamation or by concurrent legislative resolution). Adequate safeguards can justify even a delegation with weak standards: "Only in the event of a total abdication of that 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. The legislature's reservation of the extraordinary power to undo its delegation shows that the legislature recognized the potential separation of powers concerns and installed a safety feature to mollify any judicial anxiety.

And the legislature made no objection to the emergency orders at issue here. On the contrary — the legislature validated them by approving bills to that effect, which the governor signed into law. Indeed, two members of the legislature are

amici here supporting the governor's position. When the legislature codifies executive orders by statute, that ratifies and validates the orders. *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1000, 1043–1044, 1051. Ratification cures all ills.

III. A court violates the separation of powers by enjoining police power acts like the ESA.

The legislature properly exercised its police power when it enacted the ESA. The police power is "the power of sovereignty or power to govern — the inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare." *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 878. It extends to "legislation enacted to promote the public health, safety, morals and general welfare." *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436, 440. But it is not limited to those subjects: "Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it." *Berman v. Parker* (1954) 348 U.S. 26, 32. Police power acts are proper when they constitute "a reasonable exertion of governmental authority for the public good." *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436, 440. The broad extent of the police power, and the caution required by separation of powers concerns, explains the strong judicial deference to legislative policymaking decisions.

That deference, along with the lenient standard of review applied to police power acts, favors upholding the legislative action here. The police power is limited by just a few broad principles that resemble rational basis review. "The Legislature, in the first instance, is the judge of what is necessary for the public welfare, and, in the absence of a showing of arbitrary interference with property rights or of the lack of a substantial relation between means and a legitimate subject for regulation," a court will not declare legislation invalid. *Serve Yourself Gasoline Stations Assn. v. Brock* (1952) 39 Cal.2d 813, 820. For example, the California Supreme Court decided over a century ago that that the legislature can use the police power to mandate vaccinations. *French v. Davidson* (1904) 143 Cal. 658, 662 (it is within the lawmaking power's discretion to exercise the state's police power to require all school children to be vaccinated); *Abeel v. Clark* (1890) 84 Cal. 226, 230 (it was for the legislature to determine whether public school students should be vaccinated).

It is the legislature's police power prerogative to make the policy decision to empower the governor in the emergency context. Making the governor the locus of power and responsibility in a disaster "is a task for which the Legislature is peculiarly well suited." *Macias v. State of California* (1995) 10 Cal.4th 844, 858. Nor is that unwise — the governor "is the natural and logical repository of such power and responsibility." *Id.* Yet the injunction here attacks the legislature's police power act of vesting emergency powers in the governor to combat a crisis. In relying on separation of powers to enjoin that police power act, the trial court itself invaded another branch's domain. The "judicial department has no power to revise even the

most arbitrary and unfair action of the legislative department, . . . taken in pursuance of the power committed exclusively to that department by the constitution." *French v. Senate of State of Cal.* (1905) 146 Cal. 604, 606. Both separation of powers and the police power's breadth require more judicial flexibility than the trial court showed. As the state progresses "the police power, within reason, develops to meet the changing conditions" and courts will not second-guess policy decisions underlying police power acts. *Max Factor & Co. v. Kunsman* (1936) 5 Cal.2d 446, 460. That should be especially true in a pandemic.

The emergency powers at issue here are political branch functions, and in the exercise of the powers committed to them they are supreme. Cal. Const., art. IV, § 8 (state's lawmaking power is vested in the legislature); art. V, § 1 (state's supreme executive power is vested in the governor). An attempt by a court to direct or control the legislature or the executive in exercising their respective lawmaking and executive powers would be an attempt to exercise legislative and executive functions, which a court "is expressly forbidden to do." *French v. Senate of State of Cal.* (1905) 146 Cal. 604, 607. Yet the injunction here does exactly that: it substitutes judicial judgment for the legislature's policy decision about where to vest emergency powers, and for the governor's executive discretion about how best to exercise those powers. Those are not judicial functions.

Instead, the California Supreme Court interpreted the ESA to require courts to view the governor's emergency powers broadly. In situations of "extreme peril" to the public welfare the state "may exercise its sovereign authority to the fullest

extent possible consistent with individual rights and liberties." *Macias v. State of California*, *supra*, 10 Cal.4th at 854; Gov. Code § 8627 (governor shall exercise all police power vested in the state). The ESA "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 of extreme peril to life, property, and the resources of the state." *Macias, supra*, 10 Cal.4th at 854. Given its purpose to protect and preserve health, safety, life, and property, "the act makes equally evident the overriding necessity of a broadly coordinated effort to deal with emergencies, and places the primary responsibility, and the means for carrying out such efforts, with the State." *Id*. Yet the trial court disapproved of such a broadly coordinated effort between the legislature and the governor here.

That was error. The traditional and well-founded deference courts show to ordinary police power acts means that closely scrutinizing those acts in an emergency is the last thing a court should contemplate. Two consequences flow from the fact that California's legislature can do all things not barred by the state constitution: any constitutional limitations on legislative power are to be narrowly construed, and a strong presumption of constitutionality supports the legislature's acts. *California Housing Finance Agency v. Patitucci* (1978) 22 Cal.3d 171, 175. The imperatives for deferring to legislative policy decisions are even greater in an emergency, and courts are similarly less well-suited to evaluating executive actions taken in an ongoing crisis than in calmer times. A once-in-a-century pandemic is

the classic case for judicial deference to the political branches, and the power to protect must be commensurate with the threatened danger.

IV. The governor holds inherent emergency powers.

The governor has inherent emergency powers. Even in the absence of an express grant of authority, each branch of government possesses certain inherent and implied powers. *United Auburn Indian Community of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538, 550–551. The governor's power is rooted in our state constitution and expanded by the legislature in statutes. *United Auburn Indian Community of Auburn Rancheria*, *supra*, 10 Cal.5th at 549. The governor's duties are executive in their nature, and upon that office rests "the great obligation to see that the laws are faithfully executed." *Harpending v. Haight* (1870) 39 Cal. 189, 212. And some executive powers arise by implication. It is well settled that an executive officer "may exercise . . . powers as are necessary for the due and efficient administration of powers expressly granted by statute" or as may fairly be implied from the statute granting the powers. *United Auburn Indian Community of Auburn Rancheria*, *supra*, 10 Cal.5th at 551.

The governor's emergency authority has the characteristics of an executive, rather than a legislative act, and so the governor's emergency power does not depend on legislative delegation. As discussed above, responding to emergencies is a proper exercise of the legislature's police power. Emergency response is also a proper exercise of the "supreme executive power" that Article V, section 1 vests in the governor. That grant of supreme power to take executive action implicitly includes

the inherent power to make emergency orders because swift action is the nature of the executive. *United Auburn Indian Community of Auburn Rancheria*, *supra*, 10 Cal.5th at 551 (each branch of government possesses certain inherent and implied powers); *Scheuer v. Rhodes* (1974) 416 U.S. 232, 246–247 (executive crisis decisions must have a broad range of discretion), *overruled on other grounds by Davis v. Scherer* (1984) 468 U.S. 183. Conversely, nothing in the California constitution restricts the governor's power to declare emergencies and take emergency action. Because the California constitution is a restriction, not a grant of power, the governor — like the legislature — has all necessarily implied powers of the branch. That includes the executive power to act in an emergency.

Yet because the governor's constitutional emergency powers are inherent and implicit, rather than textual, they fall within a "zone of twilight" in which the governor and the legislature may have concurrent authority, and where legislative "inertia, indifference or quiescence" invites the exercise of executive power. *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579, 636. That overlap permits exactly the coordinated action here: the legislature codified executive emergency powers; the governor exercised them with the orders at issue; and the legislature validated those orders by statute. For example, in *United Auburn Indian Community of Auburn Rancheria v. Newsom*, the California Supreme Court held that the governor has an inherent power to confer and concur with the federal government. But because neither the California constitution nor other state law speaks directly to the governor's concurrence power, the legislature may restrict or

eliminate the governor's implicit power to concur. *United Auburn Indian Community of Auburn Rancheria*, *supra*, 10 Cal.5th at 564. That explains the situation here: the legislature codified and regulated the governor's inherent emergency powers in the ESA.

Despite the concurrent authority shared by the legislature and governor, this Court need not resolve questions about which branch has exclusive emergency powers. The lines between the three branches of government are not always clearly defined, and some powers may not strictly belong to any one branch. *People ex rel. Attorney Gen. v. Provines* (1868) 34 Cal. 520, 540–541 (conc. opn. of Sawyer, C.J.). It is enough here to hold that the governor has some emergency powers under the ESA, and those powers were properly exercised. Neither the governor nor the legislature claims to be the sole source of California's emergency powers, and with both branches acting in concert to exercise those powers, this Court need not decide who owns the big red ball.

V. The trial court erred by not avoiding the constitutional issue.

The trial court should have seen the legislature and the governor cooperating and refrained from creating an unnecessary constitutional issue. By acting here the trial court ignored well-established principles of avoidance and deference. To avoid encroaching on the legislative function, courts may not simply disregard the language of a statute in defiance of the legislature's clear intent and policy judgments. *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 661. And when possible, a legislative enactment must be construed in such a way as to preserve its

constitutionality. *Kraus v. Trinity Management Services, Inc*. (2000) 23 Cal.4th 116, 129. The California Supreme Court accords deference to the legislative and executive branches in matters of constitutional interpretation. *O'Hare v. Superior Court* (1987) 43 Cal.3d 86, 98, abrogated on another ground by *Price v. Superior Court* (2001) 25 Cal.4th 1046. Here, the trial court should have deferred to the collective judgment of the legislature and the executive, where both branches concurred in the action at issue.

To resolve its concerns, the trial court only needed to consult the maxims of jurisprudence. Here, the legislature granted the governor emergency powers, and the trial court should have presumed that the grant included the power to issue these orders, which were essential to safely conducting an election during a pandemic. Civ. Code § 3522 (one who grants a thing is presumed to grant also whatever is essential to its use). The trial court should have presumed that the governor was acting lawfully. Civ. Code § 3548 (the law has been obeyed). And the trial court's interpretation of the ESA should have been reasonable. Civ. Code § 3542. Construing the ESA to permit emergency orders — but to bar orders that affect existing statutes, as the injunction does — would create absurd results. Courts should avoid construing a statute to create such anomalies. *People v. Oliver* (1961) 55 Cal.2d 761, 767. The trial court erred by unreasonably creating a constitutional issue that it should have avoided.

CONCLUSION

The California legislature and governor hold all necessary emergency powers, and they may share them. California's core powers doctrine is flexible enough that the branches have wide latitude to cooperate and share their powers in mundane circumstances. In emergency situations such as the ongoing COVID-19 pandemic, the state's courts must view this cooperation with even greater deference.

Both the state and federal constitutions principally entrust "[t]he safety and the health of the people" to the politically accountable officials of the states "to guard and protect." *Jacobson v. Massachusetts* (1905) 197 U.S. 11, 38. When those officials act "in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States* (1974) 414 U.S. 417, 427. Within those broad limits, the legislature and the governor should not be subject to second-guessing by the judiciary, which lacks the background, resources, and expertise to make public health policy decisions in a pandemic.

This Court should reverse the trial court's order granting an injunction.

Dated: December 10, 2020

Respectfully submitted,
California Constitution Center
By: /s/ David A. Carrillo
David A. Carrillo
By: /s/ Brandon V. Stracener
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CERTIFICATE OF COMPLIANCE

I certify that the attached brief uses a 13-point Times New Roman font and contains 5152 words as counted by the Microsoft Word software program used to prepare this brief.

Dated: December 10, 2020

California Constitution Center
By: /s/ David A. Carrillo
David A. Carrillo

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California Constitution Center

CERTIFICATE OF SERVICE

Gavin Newsom v. Superior Court of Sutter County
Third Appellate District Case No. C093006
Sutter County Superior Court No. CVCS200912

The undersigned hereby certifies as follows:

I am an employee of the University of California, Berkeley, School of Law, 215 Law Building, Berkeley, California. I am over 18 years of age and am not a party to the within action. On December 11, 2020 I served a true copy of the following document:

APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CALIFORNIA CONSTITUTION CENTER SUPPORTING RESPONDENTS

on the parties in this action as described on the attached service list as follows:

BY MAIL: The envelope was mailed with postage thereon fully prepaid. I personally placed it in the mail at the post office on the date below. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on the service list on the date below, from the court authorized efiling service at TrueFiling.com. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

I declare under penalty of perjury by the laws of the State of California that the foregoing is true and correct.

Executed on December 11, 2020 at El Cerrito, California.

By: /s/ Alexander H. Burr
Alexander H. Burr

SERVICE LIST

Respondent Honorable Sarah H. Heckman Judge of the Sutter County Superior Court 1175 Civic Center Blvd. Yuba City, CA 95993	BY MAIL
Respondent The Superior Court of Sutter County 1175 Civic Center Blvd. Yuba City, CA 95993	BY MAIL
Petitioner John W. Killeen Jay Russell Office of the Attorney General P.O. Box 944255 1300 I Street, Suite 125 Sacramento, CA 94244-2550	Via TrueFiling
Real Parties in Interest James Gallagher Kevin Kiley 437 Century Park Drive, Suite C Yuba City, CA 95991	Via TrueFiling
Amicus curiae for petitioner Tom Umberg et al. Benjamin R. Herzberger Office of Legislative Counsel 925 L Street, Suite 9000 Sacramento, CA 95814	Via TrueFiling