Case No. H051570

Exempt from Fees
(Gov. Code, § 6103)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

COUNTY OF SANTA CLARA,
Petitioner,
v.
PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent,

REGISTERED NURSES PROFESSIONAL ASSOCIATION, and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521,
Real Parties in Interest.

Appeal of Public Employment Relations Board
Decision No. 2876-M
(Case No. SF-CE-693-M)

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER COUNTY OF SANTA CLARA

---

*Amy S. Ackerman (SBN 124346)
Ryan P. McGinley-Stempel (SBN 296182)
Imran M. Dar (SBN 326502)
RENNE PUBLIC LAW GROUP
350 Sansome Street, Suite 300
San Francisco, California 94104
Telephone: (415) 848-7200
Facsimile: (415) 848-7230
aackerman@publiclawgroup.com

Attorneys for *Amici Curiae* League of California Cities and California State Association of Counties

Document received by the CA 6th District Court of Appeal.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 4

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF 9

INTEREST OF AMICI CURIAE 9

ABSENCE OF PARTY ASSISTANCE 10

AMICI CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES 12

I. INTRODUCTION 12

II. ARGUMENT 14

A. PROTECTING THE HEALTH AND SAFETY OF THE PUBLIC DURING AN EMERGENCY IS A FUNDAMENTAL DUTY OF GOVERNMENT. 14

B. TO PROTECT THE PUBLIC, THE VOTERS AND LEGISLATURE HAVE GRANTED EXTENSIVE AND EXCLUSIVE POWERS TO GOVERNMENT TO RESPOND TO EMERGENCIES. 17

1. Police Power 17

2. California Emergency Services Act 19

3. Public Employees are Disaster Services Workers 23

4. Powers of the Health Officer 24

C. DEFERENCE MUST BE GRANTED TO GOVERNMENT'S EXERCISE OF ITS EMERGENCY POWERS 25

Document received by the CA 6th District Court of Appeal.

TABLE OF CONTENTS (CONTINUED)

Page

1. The Determination to Exercise Emergency Powers is Exclusively Vested in Elected Officials. 25

2. Deference Must Be Granted to a County's Decision to Declare an Emergency and to Exercise Its Emergency Powers. 26

D. PERB'S DECISION MUST BE VACATED. 29

III. CONCLUSION 35

CERTIFICATE OF WORD COUNT 37

CERTIFICATE OF SERVICE 38

Document received by the CA 6th District Court of Appeal.

TABLE OF AUTHORITIES

Page(s)

Cases

640 Tenth, LP v. Newsom
(2022) 78 Cal.App.5th 840 21

Abeel v. Clark
(1890) 84 Cal. 226 17

Adkins v. *State of California*
(1996) 50 Cal.App.4th 1802 19

Apartment Association of Los Angeles County v. City of Los Angeles
(9th Cir. 2021) 10 F.4th 905 15

Boling v. Public Employment Relations Bd.
(2018) 5 Cal.5th 898 33

Calm Ventures LLC v. Newsom
(C.D. Cal. 2021) 548 F. Supp.3d 966 27

City of Moorpark v. Superior Court
(1998) 18 Cal.4th 1143 19

Claremont Police Officers Assn. v. City of Claremont
(2006) 39 Cal.4th 623 ..... 30, 31, 32

County of Los Angeles Dept. of Public Health v. Superior Court
*(*2021) 61 Cal.App.5th 478 ..... 28, 29

County of Sonoma v. Public Employment Relation Board
(2022) 80 Cal.App.5th 167 31

County of Sonoma v. Superior Court
(2009) 173 Cal.App.4th 322 35

Document received by the CA 6th District Court of Appeal.

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

Deputy District Attorneys for Los Angeles v. County of Los Angeles
(2024) B331881, --- Cal.Rptr.3d ---, 2024 WL 4834247 1 31

Farmers Ins. Exchange v. State of California
(1985) 175 Cal.App.3d 494 19

Ghost Golf, Inc. v. Newsom
(2024) 102 Cal.App.5th 88 21

Givens v. Newsom
(E.D. Cal. 2020) 459 F.Supp.3d 1302 28

Jacobson v. Commonwealth of Massachusetts
(1905) 197 U.S. 11 ..... *passim*

Macias v. State of California
(1995) 10 Cal.4th 844 35

Martin v. Municipal Court
(1983) 148 Cal.App.3d 693 21

McKay Jewelers v. Bowron
(1942) 19 Cal.2d 595 17

Miller v. City of Scottsdale
(9th Cir. 2023) 88 F.4th 800 28

Mott v. Cline
(1927) 200 Cal. 434 18

Richeson v. Helal
(2007) 158 Cal.App.4th 268 19

San Francisco Police Officers' Assn. v. San Francisco Police Com.
(2018) 27 Cal.App.5th 676 31

San Jose Peace Officer's Assn. v. City of San Jose
(1978) 78 Cal.App.3d 935 ..... 30, 35

Document received by the CA 6th District Court of Appeal.

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

Seaplane Adventures, LLC v. County of Marin
(9th Cir. 2023) 71 F.4th 724 ..... 14, 16, 27, 28

Sonoma County Organization etc. Employees v. County of Sonoma
(1991) 1 Cal.App.4th 267 ..... 29, 32, 33

Sonoma County Organization of Public Employees v. County of Sonoma
(1979) 23 Cal.3d 296 30

South Bay United Pentecostal Church v. Newsom
(2020) 140 S.Ct. 1613 (Roberts, C.J., concurring in the denial of application for injunctive relief) 14, 27, 33

Tandon v. Newsom
(N.D. Cal. 2021) 517 F.Supp.3d 922 ..... 15, 27, 33, 34

Williams v. Alameda County
(N.D. Cal. 2024) Case Nos. 3:22-cv-01274-LB and 3:22-cv-02705-LB, 2024 WL 4050393 28

Statutes

California Government Code
§ 3100 ..... 23, 30
§ 3101 23
§ 3504 30
§ 3504.5 32
§ 8550 ..... 14, 20, 25
§ 8558 20,22
§ 8567 25

Document received by the CA 6th District Court of Appeal.

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

California Government Code (continued)
§ 8571 21
§ 8610 23
§ 8629 26
§ 8630 ..... 21, 25
§ 8634 22

California Health & Safety Code
§ 120175 24
§ 120215 24

Other Authorities

California Constitution
Art. XI, § 7 19

Boston Public Health Commission, City of Boston website at: https://www.boston.gov/government/cabinets/boston-public-health-commission/about-health-commission/our-history 24

California Rules of Court
Rule 8.200(c) 9, 10

Governor Newsom "Proclamation of a State of Emergency" (March 4, 2020) 15

Governor Newsom "Proclamation of a State of Emergency" (March 4, 2020): www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf 15

Governor's Office of Emergency Services website at: https://www.caloes.ca.gov/office-of-the-director/operations/planning-preparedness-prevention/planning-preparedness/2024-state-emergency-plan/ 16

Document received by the CA 6th District Court of Appeal.

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

Governor's Office of Emergency Services website at: https://www.caloes.ca.gov/office-of-the-director/policy-administration/legal-affairs/emergency-proclamations/ 16

San Francisco Department of Public Health COVID-19 Health Orders and Directives, City and County of San Francisco website at: https://sfbos.org/health-orders-and-directives-covid-19 34

PERB Decision No. 2876-M 13, 31, 32

Document received by the CA 6th District Court of Appeal.

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to Rule 8.200, subdivision (c), of the California Rules of Court, the League of California Cities and the California State Association of Counties hereby respectfully apply for permission to file the attached *amici curiae* brief in support of Petitioner County of Santa Clara. This application is timely made within 14 days after the filing of the final reply brief on the merits.

INTEREST OF *AMICI CURIAE*

The League of California Cities (the "Cal Cities") is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee (the "Committee"), which is comprised of 25 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels

Document received by the CA 6th District Court of Appeal.

throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

CSAC represents the interests of counties throughout California and Cal Cities represents the interests of cities throughout California. Therefore, both are uniquely situated to present their views and analysis related to this case. Counsel for *amici* has reviewed the briefs filed in this matter to date and *amici* do not seek to duplicate arguments set forth in those briefs.

ABSENCE OF PARTY ASSISTANCE

Pursuant to California Rules of Court, rule 8.200(c)(3), *amici* confirm that no party or counsel for a party in the pending appeal authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

Accordingly, Cal Cities and CSAC respectfully request that the Court grant this application and accept and file the attached proposed *amici curiae* brief.

Document received by the CA 6th District Court of Appeal.

Dated: December 10, 2024

Respectfully Submitted,

RENNE PUBLIC LAW GROUP

By: _____

Amy S. Ackerman
Ryan P. McGinley-Stempel
Imran M. Dar

Attorneys for *Amici Curiae* League of California Cities, California State Association of Counties

Document received by the CA 6th District Court of Appeal.

AMICI CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES

I. INTRODUCTION

The COVID-19 pandemic posed a threat unlike any in recent times. Faced with a new highly communicable and deadly disease, no vaccination to prevent the disease, and no established treatments, the federal, state, and local governments declared states of emergencies to mobilize all resources to slow the spread of the disease and protect lives.

Protecting the health and safety of Californians during disasters is the most fundamental duty of the state and local governments. To exercise that vital responsibility, California law grants extraordinary powers to governments during states of emergencies to make the most effective use of all manpower, resources, and facilities. State law also expressly makes all public employees disaster services workers required to be deployed as necessary to protect the health and safety of Californians. Because of the extraordinary powers granted during states of emergencies, the decision to declare a state of emergency is vested in elected officials: at the state level, the Governor, and at the local level, the elected boards of supervisors or city councils.

Despite these express grants of power, the Public Employment Relations Board ("PERB") concluded that, in the midst of responding to a world-wide and deadly pandemic, the

Document received by the CA 6th District Court of Appeal.

County's deployment of disaster services workers was subject to bargaining "to the extent practicable in the particular circumstances" and that the County failed to comply with this duty. (PERB Decision No. 2876-M at p. 2.)

As argued below, PERB ignored the explicit and exclusive grant to cities and counties of emergency powers, derived from the Constitution, to deploy disaster services workers where needed to protect Californians.

PERB also disregarded a century of federal and state judicial decisions requiring deference to the decisions of government made during emergencies. Courts have recognized that the passage of time and the receding of a crisis is not a basis for second guessing the best avenue of action for a state or local government when the crisis was raging.

PERB failed to defer to the County's decision about what resources and personnel to deploy to minimize the deaths of Santa Clara County's 1.9 million residents. Assuming there was some duty to bargain deployments, PERB failed, as required, to defer to the County's decision about when, under these unique circumstances, bargaining could occur. PERB's substitution of its judgment for when bargaining could occur in the midst of the County's emergency response was not only erroneous but also carries grave consequences for government responses to future emergencies.

Accordingly, the counties and cities of California respectfully request that this Court vacate the PERB's decision.

Document received by the CA 6th District Court of Appeal.

II. ARGUMENT

A. Protecting the Health and Safety of the Public During an Emergency Is a Fundamental Duty of Government.

A fundamental duty of government is to protect the health and safety of the public. "Our Constitution principally entrusts '[t]he safety and the health of the people to the politically accountable officials of the States to guard and protect.'" (*South Bay United Pentecostal Church v. Newsom* (2020) 140 S.Ct. 1613, 1613 (Roberts, C.J., concurring in the denial of application for injunctive relief); see also *Seaplane Adventures, LLC v. County of Marin* (9th Cir. 2023) 71 F.4th 724, 730 ["When it comes to health and safety measures, the judiciary has long recognized that the safety and health of a constituency are, in the first instance for a state to guard and protect"].)

That duty is particularly pronounced during emergencies and disasters. As the Legislature has declared, "[t]he state has long recognized its responsibility 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 generally to protect the health and safety and preserve the lives and property of the people of the state." (Gov. Code § 8550.)[1]

[1] Unless otherwise specified, all further statutory references are to the Government Code.

Document received by the CA 6th District Court of Appeal.

The COVID-19 epidemic required the federal, state, and local governments to exercise extensive emergency powers.[2] As of February 3, 2021, "there had been 104 million confirmed cases of COVID-19 and 2.2 million deaths worldwide." (*Tandon v. Newsom* (N.D. Cal. 2021) 517 F.Supp.3d 922, 932-933.) "On February 7, 2020, about two months after COVID-19 had first been detected in China, Patricia Dowd, a 57-year-old woman living in Santa Clara County, died of COVID-19, becoming the first known COVID-19 death in the United States." (*Id.* at p. 932.) "As of February 3, 2021, Santa Clara County, which has a population of 1.9 million, ha[d] 5 percent remaining ICU capacity, which corresponds to just 16 ICU beds." (*Id.* at p. 934.)

As the Ninth Circuit stated in 2023, "[i]n March 2020, the United States confronted a threat unlike any in recent times: the COVID-19 pandemic. As of the filing of this opinion, the Centers for Disease Control and Prevention has reported over 1.1 million deaths from the virus in the United States alone, while millions of others suffered from the direct and indirect effects of the

---

[2] Following the spread of COVID-19 to the United States, on January 31, 2020, the Secretary of Health and Human Services declared a nationwide public health emergency. (*Apartment Association of Los Angeles County v. City of Los Angeles* (9th Cir. 2021) 10 F.4th 905, 909.) On March 4, 2020, Governor Newsom declared a state of emergency for California. (Governor Newsom "Proclamation of a State of Emergency" (March 4, 2020) at: www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf.)

Document received by the CA 6th District Court of Appeal.

virus." (*Seaplane Adventures, supra,* 71 F.4th at p. 726.)[3] The Court noted that, "[a]lthough they varied in their responses, different levels of government operated in distinct, yet interlocked fashion to address this drastic challenge facing our nation and world." (*Ibid.*)

While the COVID-19 epidemic may be the most striking example of recent emergencies, epidemics are not the only type of disasters that Californians experience. As of November 8, 2024, Governor Newsom has proclaimed 19 declarations of emergencies in 2024 due to fires, land movements, and storms affecting counties and cities throughout the state. (See "Open State of Emergency Proclamations," Governor's Office of Emergency Services website at: https://www.caloes.ca.gov/office-of-the-director/policy-administration/legal-affairs/emergency-proclamations/.) "Between 2017 and 2020, California experienced no fewer than 80 proclaimed states of emergency including wildfires, flooding, earthquakes, severe storms, drought, power shutoffs, and a global pandemic." ("2024 California State Emergency Plan," Governor's Office of Emergency Services website at: https://www.caloes.ca.gov/office-of-the-director/operations/planning-preparedness-prevention/planning-preparedness/2024-state-emergency-plan/.)

---

[3] As of July 2023, over 100,000 Californians died for causes associated with COVID-19. (Cal. Dept. of Health, "COVID-19 Age, Race and Ethnicity Data (May 12, 2023) available at: COVID-19 Age, Race and Ethnicity Data.)

Document received by the CA 6th District Court of Appeal.

Responding to emergencies to protect Californians is perhaps the most important function of state and local government.

B. To Protect the Public, the Voters and Legislature Have Granted Extensive and Exclusive Powers to Government to Respond to Emergencies.

The authority of the state and local governments to protect public health and safety during disasters derives from the United States and California Constitutions, as well as by legislative act.

1. Police Power

As the U.S. Supreme Court noted in 1905, the states have the authority to enact "quarantine laws and health laws of every description" under their "police power" authority, "a power which the state did not surrender when becoming a member of the Union under the Constitution." (*Jacobson v. Commonwealth of Massachusetts* (1905) 197 U.S. 11, 25.) "According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." (*Ibid.*; see also *Abeel v. Clark* (1890) 84 Cal. 226, 230 ["The legislature has power to enact such laws as it may deem necessary, not repugnant to the constitution, to secure and maintain the health and prosperity of the state"]; *McKay Jewelers v. Bowron* (1942) 19 Cal.2d 595, 600 ["The term 'police power'… is an attribute of sovereignty and is founded on the duty

Document received by the CA 6th District Court of Appeal.

of the state to protect its citizens and provide for the safety, good order and well-being of society"].)

"The police power being in its nature a continuous one, must be reposed somewhere, and cannot be barred or suspended by contract or irrepealable law. It cannot be bartered away even by express contract. It is to be presumed that parties contract in contemplation of the inherent right of the state to exercise unhampered the police power that the sovereign always reserves to itself for the protection of peace, safety, health and morals." (*Mott v. Cline* (1927) 200 Cal. 434, 446 internal citations omitted.)

California's cities and counties also exercise police power. In *Jacobson*, the Supreme Court stated that, "[i]t is equally true that the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the state, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a state, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument." (*Jacobson*, *supra*, 197 U.S. at p. 25.)

Californians have granted cities and counties broad police power in the Constitution: "A county or city may make and enforce within its limits all local, police, sanitary, and other

Document received by the CA 6th District Court of Appeal.

ordinances and regulations not in conflict with general laws." (Cal. Const., Art. XI, § 7.) Courts have long held that the police power granted to local entities "under this constitutional provision is as broad as that of the state Legislature itself." (*Richeson v. Helal* (2007) 158 Cal.App.4th 268, 277, citing *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885.)

"Police powers are rooted in the law of necessity. Thus, in an emergency, the scope of permissible regulation may increase." (*Adkins* v. *State of California* (1996) 50 Cal.App.4th 1802, 1810 overruled on other grounds in *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143.) Indeed, courts have explained "'[i]n such cases calling for immediate action the emergency constitutes full justification for the measures taken to control the menacing condition, and private interests must be held wholly subservient to the right of the state to proceed in such manner as it deems appropriate for the protection of the public health or safety.'" (*Farmers Ins. Exchange v. State of California* (1985) 175 Cal.App.3d 494, 502 quoting *House v. L.A. County Flood Control Dist.* (1944) 25 Cal.2d 384, 391.)

2. California Emergency Services Act

As an exercise of its police power, the Legislature enacted the California Emergency Services Act ("CESA") in 1970. Briefly, the Act "confer[s] upon the Governor and upon the chief executives and governing bodies of political subdivisions of this state the emergency powers provided herein," and provides for

Document received by the CA 6th District Court of Appeal.

the rendering of mutual aid and coordination of emergency services function "as far as possible" with the federal government, the state, its political subdivisions, and private agencies "to the end that the most effective use may be made of all manpower, resources, and facilities for dealing with any emergency that may occur." (§ 8550.)

CESA defines "state of emergency" quite broadly to include conditions of disaster or "extreme peril to the safety of persons and property" caused by conditions "such as air pollution, fire, flood, storm, epidemic, riot, drought, cyberterrorism, sudden and severe energy shortage, electromagnetic pulse attack, plant or animal infestation or disease, the Governor's warning of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy or conditions causing a 'state of war emergency[.]," (§ 8558(b).)

The Act grants extensive and exclusive authority to the Governor during states of emergency: "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. (§ 8627.)

Document received by the CA 6th District Court of Appeal.

In addition, 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 ... 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." (§ 8571; see *640 Tenth, LP v. Newsom* (2022) 78 Cal.App.5th 840, 852-859 [Governor's orders and public health directives issued under CESA are not subject to the Administrative Procedure Act].)

"[CESA] 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." (*Martin v. Municipal Court* (1983) 148 Cal.App.3d 693, 696; see *Ghost Golf, Inc. v. Newsom* (2024) 102 Cal.App.5th 88, 102, ["by granting the Governor authority to exercise 'all police power vested in the state,' section 8627 of the ESA plainly authorizes the Governor to issue quasi-legislative orders because 'police power' is generally the power to legislate"] citing *Newsom v. Superior Court* (2021) 63 Cal.App.5th 1099, 113.)

CESA also grants cities and counties substantial and exclusive powers in the event of a local emergency. The governing body of a city or county or an official designated by ordinance may proclaim a local emergency. (§ 8630.) CESA

Document received by the CA 6th District Court of Appeal.

similarly uses the same broad language in its definition of "local emergency."[4] (§ 8558(c)(1).)

During a local emergency, "the governing body of a political subdivision, or officials designated thereby, may promulgate orders and regulations necessary to provide for the protection of life and property, including orders or regulations imposing a curfew within designated boundaries where necessary to preserve the public order and safety." (§ 8634.)[5]

---

[4] "Local emergency" means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the territorial limits of a county, city and county, or city, caused by conditions such as air pollution, fire, flood, storm, epidemic, riot, drought, cyberterrorism, sudden and severe energy shortage, deenergization event, electromagnetic pulse attack, plant or animal infestation or disease, the Governor's warning of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy, which are or are likely to be beyond the control of the services, personnel, equipment, and facilities of that political subdivision and require the combined forces of other political subdivisions to combat, or with respect to regulated energy utilities, a sudden and severe energy shortage or deenergization event that requires extraordinary measures beyond the authority vested in the Public Utilities Commission. (§ 8558(c).)

[5] Cities and counties may also, by ordinance, create disaster councils to provide plans for dealing with disasters that "provide for the effective mobilization of all of the resources within the political subdivision, both public and private," "provide for the organization, powers and duties, divisions, services, and staff of the emergency organization," and "authorize public officers, employees, and registered volunteers to command the (continued)

Document received by the CA 6th District Court of Appeal.

3. Public Employees are Disaster Services Workers

The Legislature has also exercised its police power to declare that "all public employees" are " hereby declared to be disaster service workers subject to such disaster service activities as may be assigned to them by their superiors or by law." (§ 3100.) In making this declaration, the Legislature declared that "the protection of the health and safety and preservation of the lives and property of the people of the state from the effects of natural, manmade, or war-caused emergencies which result in conditions of disaster or in extreme peril to life, property, and resources is of paramount state importance requiring the responsible efforts of public and private agencies and individual citizens." (*Ibid.*) The term "disaster services worker" includes all "public employees," meaning "all persons employed by the state or any county, city, city and county, state agency, or public district, excluding a person who is legally employed but who is not a citizen or national of the United States." (§ 3101.)

As explained by the County, the current version of section 3100 was passed in 1971 to conform with CESA, which had been enacted a year earlier. (Santa Clara County's Opening Brief at p. 25.) The Legislature, at the request of the California Office of Emergency Services, repurposed the Levering Act of 1950, which declared all public employees as "civil defense workers" to more

---

(footnote 5 continued) aid of citizens when necessary, in the execution of their duties during a state of war emergency, a state of emergency, or a local emergency." (§ 8610.)

Document received by the CA 6th District Court of Appeal.

directly support CESA's purpose to ensure the effective use of resources in emergencies. (*Ibid.*)

4. Powers of the Health Officer

Finally, the courts have long recognized the authority of boards of health or health officers to make orders necessary to protect public health or public safety during an epidemic. (*Jacobson*, *supra*, 197 U.S. at p. 27.)[6]

The Legislature has expressly granted authority to local health officers who know or have reason to believe that any contagious, infectious, or communicable disease exists to "take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases." (Health & Saf. Code § 120175.) These powers include enforcing all orders, rules or regulations regarding quarantine or isolation. (Health & Saf. Code § 120215.)

These Constitutional grants of police power to state and local government provide government with the exclusive authority to make orders and regulations necessary to protect Californians, allocating funding and resources, and deploying any and all public employees to engage in disaster services during a state of emergency.

---

[6] Paul Revere was the nation's first local health officer when appointed in 1799 to fight a potential cholera outbreak. (Boston Public Health Commission, City of Boston website at: https://www.boston.gov/government/cabinets/boston-public-health-commission/about-health-commission/our-history.)

Document received by the CA 6th District Court of Appeal.

C. Deference Must be Granted to Government's Exercise of its Emergency Powers.

1. The Determination to Exercise Emergency Powers is Exclusively Vested in Elected Officials.

As discussed above, the state, counties, and cities are granted extensive powers to protect the public's health and safety during a state of emergency. Because the grant of powers is so broad, the authority to declare an emergency to permit the exercise of those extensive powers (and to determine when the emergency has subsided) is exclusively vested in elected officials. At the state level, the authority to determine and declare when a statewide emergency exists, how the State's resources and employees should be deployed, and when the emergency terminates is exclusively vested in the Governor. (§ 8550.)

For cities and counties, if a local emergency is declared by an official designated by ordinance, it may not remain in effect for more than seven days, unless it is ratified by the board of supervisors or city council. (§ 8630(a).) The governing body must "review the need for continuing the local emergency at least once every 60 days" and "proclaim the termination of the local emergency at the earliest possible date that conditions warrant." (§ 8630(b), (c).)[7]

[7] At the state level, the Governor must make any orders and regulations necessary during a state of emergency in writing and all orders and regulations relating to the use of funds must be prepared in advance of any commitment or expenditure of the funds. (§ 8567.) The Governor must proclaim the termination of

Document received by the CA 6th District Court of Appeal.

Thus, elected officials, who answer to Californians, have the exclusive authority to determine whether there is an emergency and how the government will exercise its emergency powers — including the deployment of its disaster services workers and the determination of when the emergency has lapsed.

2. Deference Must Be Granted to a County's Decision to Declare an Emergency and to Exercise Its Emergency Powers.

The courts uniformly defer to government's decisions when declaring emergencies and exercising emergency powers. In *Jacobson*, *supra*, the Supreme Court stated, "[t]he authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions." (*Jacobson*, *supra*, 197 U.S. at p. 27.) The Court added, "the court would usurp the function of another branch of government if it adjudged, as a matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case." (*Id*. at p. 28.) Thus, when government exercises its police powers to enact emergency health measures, courts will uphold them unless: (1) the measures have no real or substantial relation to public health; or

---

a state of emergency at the "earliest possible date that conditions warrant." (§ 8629.)

Document received by the CA 6th District Court of Appeal.

(2) the measures are "beyond all question" a "plain, palpable invasion of rights secured by ... fundamental law." (*Calm Ventures LLC v. Newsom* (C.D. Cal. 2021) 548 F. Supp.3d 966, 975, citing *Jacobson*, *supra*.)

As Justice Roberts recently stated: "Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States 'to guard and protect.' When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad. Where those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people." (*South Bay United Pentecostal Church, supra,* 140 S.Ct. at p. 1613 (Roberts, C.J., concurring in the denial of application for injunctive relief) internal citations omitted.) That deference applies regardless of the length of the public health emergency. (*Tandon*, *supra*, 517 F.Supp.3d at p. 949.)

The Ninth Circuit has similarly held that "health officials traditionally have broad discretion, through legislation and upon review by courts, to take actions to stem the transmission of a contagious disease." (*Seaplane Adventures, supra,* 71 F.4th at p. 730.) "When actions are undertaken during a time of great uncertainty with a novel disease, medical uncertainties afford little basis for judicial responses in absolute terms and that legislative authority must be especially broad in areas fraught with medical and scientific uncertainties... The passage of time

Document received by the CA 6th District Court of Appeal.

and the resulting receding of a crisis does not make us, as courts, competent to second guess what the best avenue of action was for a state or local government when the crisis was raging[.]" (*Ibid.*; see also *Miller v. City of Scottsdale* (9th Cir. 2023) 88 F.4th 800, 806 ["We reiterate as a general rule of law that in the midst of a dangerous health emergency, we must ensure the proper deference is given to local governmental officials"].)

In *Givens v. Newsom* (E.D. Cal. 2020) 459 F.Supp.3d 1302, 1310, the District Court, citing to *Jacobson*, *supra*, upheld the authority of the Governor's stay at home order which banned permits for protests or rallies at the State Capital under the Governor's emergency powers. The Court rejected the plaintiff's arguments that the ban violated their First and Fourteenth Amendment rights, stating, "in the context of this public health crisis, the judiciary must afford more deference to officials' informed efforts to protect all their citizens, especially their most vulnerable, against such a deadly pandemic." (*Id.* at p. 1311; see also *Williams v. Alameda County* (N.D. Cal. 2024) Case Nos. 3:22-cv-01274-LB and 3:22-cv-02705-LB, 2024 WL 4050393 *6 [rejecting constitutional challenge to the duration of the COVID-19 eviction moratorium, stating that "[t]he court also is not in a position to second guess the City and County's judgment as to when the emergency ended"].)

California courts similarly defer to government officials during emergencies. In *County of Los Angeles Dept. of Public Health v. Superior Court (*2021) 61 Cal.App.5th 478, the court of appeal upheld the County's emergency order temporarily banning

Document received by the CA 6th District Court of Appeal.

outdoor restaurant dining. The court stated, "[w]e now hold that courts should be extremely deferential to public health authorities, particularly during a pandemic, and particularly where, as here, the public health authorities have demonstrated a rational basis for their actions. Wisdom and precedent dictate that elected officials and their expert public health officers, rather than the judiciary, generally should decide how best to respond to health emergencies in cases not involving core constitutional freedoms." (*Id*. at p. 483.)

Similarly, in *Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, after its labor associations coordinated a series of sick outs and strikes that among other things crippled the county's healthcare system, the County adopted an emergency ordinance that enabled it to place participating employees on unpaid administrative leave. (*Id*. at pp. 270-272.) The Court of Appeal held that a County's ability to declare an emergency was entitled to substantial deference, even when facing a claim under the Myers-Milias-Brown Act ("MMBA"): "Where the facts constituting the emergency are recited in the ordinance and are such that they may reasonably be held to constitute an emergency, the courts will not interfere, and they will not undertake to determine the truth of the recited facts." (*Id*. at p. 275.)

D. PERB's Decision Must Be Vacated.

In light of the foregoing principles, PERB's decision must be vacated for at least two reasons.

Document received by the CA 6th District Court of Appeal.

First, it ignores that the police power authority to declare emergencies is exclusively vested in elected officials and necessarily falls outside the scope of representation. (See § 3504 ["the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order"]; § 3100 [declaring that the protection of life and property during emergencies "is of paramount state importance" and that "all public employees" are "disaster service workers subject to such disaster service activities as may be assigned to them by their superiors or by law"]; *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 305 ["a legislative body 'cannot bargain away the public health'"].) Such elected officials and, in the case of health emergencies, their appointed experts, are charged with exercising the extraordinary powers necessary to save lives. That power is not granted to the disaster services workers or their bargaining representatives.

Viewed through the lens of the Supreme Court's *Claremont* test, in the face of a public health emergency, "'the employer's need for unencumbered decision making in managing its operations'" is particularly acute, and certainly cannot be "'outweighed by the benefit to employer-employee relations of bargaining about the action in question.'" (See *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 638; see also *San Jose Peace Officer's Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935, 948 ["The forum of the bargaining table with its postures, strategies, trade-offs, modifications and compromises is

Document received by the CA 6th District Court of Appeal.

no place for the 'delicate balancing of different interests: the protection of society from criminals, the protection of police officers' safety, and the preservation of all human life, if possible'" (citation omitted)]; *San Francisco Police Officers' Assn. v. San Francisco Police Com.* (2018) 27 Cal.App.5th 676, 688 [similar conclusion regarding deadly use-of-force policies].)

PERB's decision ignores the plain authority granted solely to elected officials and erroneously fails to apply *Claremont* in the specific context of an emergency that poses a serious threat to public safety. (See PERB Decision No. 2876-M at pp. 23-24.) In PERB's view, it did not need to "reinvent the wheel" by applying *Claremont*'s three-part test from scratch, because PERB's own "precedent establishes subject-specific standards that show how the framework applies to a given topic." (PERB Decision No. 2876-M at p. 24.) But courts have repeatedly rejected this approach, holding that PERB should apply the *Claremont* test when substantial issues concerning a local agency or government official's discretion are at issue. (See *County of Sonoma v. Public Employment Relation Board* (2022) 80 Cal.App.5th 167, 182 ["application of the full *Claremont* test was required to resolve whether the decision … was within the scope of representation" where "PERB itself acknowledged" that applying the test "in these circumstances was novel"]; *Deputy District Attorneys for Los Angeles v. County of Los Angeles* (2024) B331881, --- Cal.Rptr.3d ---, 2024 WL 4834247 1, 7 [rejecting argument that "the balancing test in *Claremont* does not apply"].)

Document received by the CA 6th District Court of Appeal.

Second, even if the County's actions fell within the scope of representation under *Claremont*, PERB's decision ignores a century of judicial deference to the exercise of emergency powers by state and local governments by refusing to defer to the County's determination of the "earliest practicable time" to meet and confer in the face of a public health emergency (§ 3504.5(b)). (See, e.g., *Sonoma County Organization etc. Employees*, *supra*, 1 Cal.App.4th at p. 279 ["The possibility of misestimation inheres in the concept of a perceived peril's imminence, in the discretionary nature of the power to declare an emergency, and in the deference courts must accord such a determination by the responsible legislative body"].)[8] The California Constitution and CESA vest in the elected governing bodies of cities and counties to determine whether an emergency exists, how that government's resources and employees should be deployed to protect Californians during that emergency, and when the emergency terminates.

That authority cannot be usurped or second-guessed by an unelected quasi-judicial administrative board which lacks the background, competence, and expertise to assess the emergency

[8] By holding that the County's interest in management of the pandemic only should be factored into the emergency exception under section 3504.5(b), PERB effectively accorded the County's interest in managing the pandemic no weight nor deference. (PERB Decision No. 2876-M at pp. 28-29.) But the emergency exception in section 3504.5(b) applies only if the matter is within the scope of representation in the first instance under the *Claremont* test. (See *supra*.)

Document received by the CA 6th District Court of Appeal.

measures required by local conditions, and which is not accountable to Californians. (See *South Bay United Pentecostal Church, supra,* 140 S.Ct. at p. 1613 (Roberts, C.J., concurring in the denial of application for injunctive relief); *Sonoma County Organization etc. Employees*, *supra*, 1 Cal.App.4th at p. 277 ["the trial court erred in disputing the County's determination that there was an emergency warranting immediate adopting of the Ordinance"]; cf. *Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898, 912-913 [courts must defer to PERB "when the matter falls within PERB's area of expertise" but "courts retain final authority to 'state the true meaning of the statute'"].)

As the Northern District of California noted when upholding the County's COVID-19 orders, between the start of the pandemic and February 3, 2021, there were three waves of COVID-19; the third wave occurring in February 2021, was the deadliest. (*Tandon*, *supra*, 517 F.Supp.3d at p. 933.) The responses and restrictions ordered by Santa Clara County, just like the State's, were "modified as the scientific understanding of COVID-19 ha[d] progressed, as the spread of COVID-19 in the County ha[d] changed, and as the County's hospital and ICU capacity ha[d] changed."[9] (*Id*. at p. 940.) "The State and the County ha[d] compelling interests in slowing the spread of

[9] The Court noted, particularly, the County's measures "targeted towards protecting populations that are especially vulnerable to severe illness from COVID-19, including the elderly and residents of long-term care facilities." (*Tandon*, *supra*, 517 F.Supp.3d at pp. 942-943.)

Document received by the CA 6th District Court of Appeal.

COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system." (*Id.* at p. 954.)

As the waves of the epidemic hit, the scientific understanding of the virus's spread, its symptoms, risks, and treatment evolved, so did the emergency response by the State and local governments. In San Francisco, for example, in 2020, the Health Officer issued well over 100 health orders and directives related to COVID-19. (See, e.g., San Francisco Department of Public Health COVID-19 Health Orders and Directives, City and County of San Francisco website at: https://sfbos.org/health-orders-and-directives-covid-19.)

As noted in the County's brief, the County's emergency measures (including its deployment of disaster services workers) were substantially related to the protection of public health and there were no violations of any fundamental rights, including to the deployed workers. As explained by the County, the assignments were based on guidance from medical experts or from the California Department of Social Services about how to effectively navigate one of the largest public health crises in recent memory. (Santa Clara County's Opening Brief at pp. 14, 17.) PERB was required to defer to the County decisions in determining deployments.

The meet and confer process required by the MMBA for matters within the scope of representation is onerous. Employers must bargain for matters within the scope of representation

Document received by the CA 6th District Court of Appeal.

through impasse. (See *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 330.) Only then can they implement the desired employment action. (*Ibid.)* The decision of what was practicable in the midst of the County's desperate efforts to save its residents from a world-wide and deadly pandemic, caused by a new and lethal virus with no established treatments or vaccination, must be the County's to make. (Cf. *San Jose Peace Officer's Assn.*, *supra*, 78 Cal.App.3d at p. 948 ["the heavy responsibility and delicate balancing of the different interests referred to above, involved in a use of force policy, are best exercised by the appropriate legislative and executive officers, who are then directly responsible to the people for such decisions'"]; *Macias v. State of California* (1995) 10 Cal.4th 844, 858 ["A public emergency is not a time for uncoordinated, haphazard, or antagonistic action"].) Its decisions cannot be second-guessed by appointed administrators with no public health expertise and no knowledge of local conditions.

III. CONCLUSION

Amici are deeply concerned by the ramifications of PERB's decision. If left to stand, the decision will impede local governments' ability to respond promptly and effectively to emergencies by forcing them to meet and confer over the deployment of disaster workers based on the whims of an unelected, unaccountable administrative agency that has no expertise in protecting the public in times of crises. For all of the foregoing reasons, *amici curiae* League of California Cities and

Document received by the CA 6th District Court of Appeal.

California State Association of Counties respectfully request that this Court set aside PERB's decision.

Dated: December 10, 2024

Respectfully Submitted,

RENNE PUBLIC LAW GROUP

By: _____

Amy S. Ackerman
Ryan P. McGinley-Stempel
Imran M. Dar

Attorneys for *Amici Curiae*
League of California Cities
California State Association of Counties

Document received by the CA 6th District Court of Appeal.

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(1), counsel certifies that the foregoing brief contains 6,189 words, as counted by the Microsoft Word word-processing program used to prepare the brief, excluding the cover information, tables, and this certificate.

Dated: December 10, 2024

Respectfully Submitted,

RENNE PUBLIC LAW GROUP

By: _____

Amy S. Ackerman
Ryan P. McGinley-Stempel
Imran M. Dar

Attorneys for *Amici Curiae*
League of California Cities
California State Association of Counties

Document received by the CA 6th District Court of Appeal.

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I, the undersigned, am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 350 Sansome Street, Suite 300, San Francisco, California, 94104.

On December 10, 2024, I served the following documents(s) by the method indicated below:

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER SANTA CLARA COUNTY

☒ by electronic service via TRUEFILING (to all registered participants) pursuant to Local Rule 2.7.

Felix De La Torre
PERBLitigation@perb.ca.gov
fdelatorre@perb.ca.gov
General Counsel
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4124

Attorneys for Respondent, Public Employment Relations Board

Document received by the CA 6th District Court of Appeal.

Masa Shiohira, Lead Deputy County Counsel
masa.shiohira@cco.sccgov.org
Samuel Cretcher, Deputy County Counsel
samuel.cretcher@cco.sccgov.org
70 West Hedding Street, East Wing, Ninth Floor
San José, California 95110-1770
Telephone No. (408) 299-5900
Fax No. (408) 299-7240

Attorneys for Petitioner, County of Santa Clara

Kerianne Steele
ksteele@unioncounsel.net
courtnotices@unioncounsel.net
WEINBERG, ROGER & ROSENFELD
1375 55th Street
Emeryville, California 94608
Telephone (510) 337-1001
Fax (510) 337-1023

Attorneys for Real Parties in Interest, Registered Nurses Professional Association and Service Employees International Union, 521 Local

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

Executed on December 10, 2024, at San Francisco, California.

Bobette T. Bramer

Document received by the CA 6th District Court of Appeal.