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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Darrell Issa, et al,	Case No. 2:20-cv-01044-MCE-CKD
Plaintiffs,	
v.	**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**
Gavin Newsom, et al.,	
Defendants.	Hearing on July 16, 2020, at 10:00 a.m.

TABLE OF CONTENTS

Page No.

1

TABLE OF AUTHORITIES

2

Cases   **Page No(s).**

27

28

ii

Plaintiffs' Memorandum in Support
of Motion for Preliminary Injunction

Constitutional Provisions

Statutes

Plaintiffs' Memorandum in Support
of Motion for Preliminary Injunction

Regulations and Orders

Other Authorities

Plaintiffs' Memorandum in Support
of Motion for Preliminary Injunction

v

Plaintiffs' Memorandum in Support
of Motion for Preliminary Injunction

INTRODUCTION

In 2017, Judicial Watch sued Los Angeles County and Secretary Padilla after it discovered anomalies in the County's voter registration data.[1] The suit exposed that for the last *twenty years* there was no meaningful effort by California to implement the federally-mandated list maintenance program designed to cancel registrations based on the death of a voter or a change of residence. The suit revealed that a staggering 1.6 million registrants in L.A. County—almost a quarter of the County's total registrants—may have died or changed address. Subsequently, Judicial Watch and California entered into a settlement agreement resolving the largest violation of the list maintenance provisions in the history of the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20501, *et seq*. Los Angeles County is still in the initial stages of improving the accuracy of its voter registration list. Extrapolated statewide, the problem is likely much worse. There is every reason to believe that problems revealed in that suit are propagated throughout the voter registration lists in California's 57 other counties. No evidence or argument has ever materialized that would show that California's other counties were somehow immune from this systemic failure.[2] Relevant here, this settlement raises serious questions about whether California's 58 counties are ready for statewide all-mailed ballot elections.

With this violation as a backdrop, Governor Newsom issued Executive Order N-64-20 ("EO N-64-20" or "Executive Order"), ordering that "all voters who are […] registered to vote in [the November 3, 2020] election" be sent a ballot to vote by mail. (*Exhibit 2*, Executive Order N-64-20, May 8, 2020.) The Governor made this unilateral decision notwithstanding that the Elections Clause and the Electors Clause reserve for the California Legislature the power to regulate federal elections and the fact that the Legislature had already enacted laws establishing voting procedures that are at odds with his Order. *See* U.S. CONST., art.

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[1]   *Judicial Watch, Inc., et al., v. Logan, et al.*, Civil No. 17-8948, Doc. 1 (C.D. Cal. Dec. 13, 2017)
[2]   *See* discussion, *infra*, Part I.C.

Plaintiffs' Memorandum in Support
of Motion for Preliminary Injunction

I, § 4, cl. 1 and art. II, § 1, cl. 2.

Plaintiffs are a candidate for federal office and four registered California voters, including Republicans, a Democrat, and an independent. They have sued to enjoin EO N-64-20 and prevent Defendants from mandating voting changes that violate the U.S. Constitution, are *ultra vires*, and impermissibly violate Plaintiffs' constitutional and statutory rights. For the reasons set forth below, Plaintiffs respectfully request the Court issue an order enjoining EO N-64-20 and any other extraconstitutional and *ultra vires* changes by Defendants to the time, place, or manner in which California will conduct the November 2020 election.

I.   FACTUAL BACKGROUND

A. California's Two Procedures for Mail-Based Voting: Vote-by-Mail Absentee Ballot and All-Mailed Elections Under the Voter's Choice Act.

There are two procedures in California for mail-based voting with some voters being able to use one or both depending on whether their respective county has opted for all-mailed ballot elections under California's Voter's Choice Act ("VCA"). *See* S.B. 450, 2015-2016 Reg. Sess. (Cal. 2016) (enacting the VCA).

Non-VCA counties operate under California's "vote-by-mail" procedures, which are the State's procedure for traditional absentee voting. *See* CAL. ELEC. CODE §§ 3000-3026. California is a "no-excuse absentee ballot" state.[3] CAL. ELEC CODE § 3003. Registered voters simply need to request an absentee ballot using the many options for making such request and one will be sent to the voter subject to various election integrity measures the Legislature incorporated in the state's vote-by-mail procedures. Ballots must be mailed within five days following such requests. CAL. ELEC. CODE § 3001. Thus, even before EO N-64-20, any voter desiring to vote by mail for any reason, including out of concern about the COVID-19 pandemic, can request a mail-in ballot. CAL. ELEC. CODE § 3003. These

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[3]   *See generally Table 1: States With No-Excuse Absentee Voting*, NATIONAL CONF. OF STATE LEGIS., May 1, 2020, available at https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx (last visited June 11, 2020).

Plaintiffs' Memorandum in Support
of Motion for Preliminary Injunction

1   procedures still apply to *all* California voters, including the 43 counties that did not adopt the

2   VCA for 2020. In addition to other protections, this procedure has the added election integ-

3   rity protection of requiring voters to request an absentee ballot rather than counties auto-

4   matically mailing ballots based on California's voter registration lists.

5   In 2016, the California State Legislature enacted the VCA, creating a new mail-based

6   voting procedure. CAL. ELEC. CODE § 4005; *see also Short v. Brown*, 893 F.3d 671, 675 (9th

7   Cir. 2018) (discussing VCA and California's vote-by-mail procedures). The VCA established

8   an all-mailed ballot system in which counties could conduct all-mailed elections provided

9   they qualify and opted into the system. The VCA sets several qualifications that every

10   county must satisfy before being eligible. CAL. ELEC. CODE § 4005(a)(1)-(10). County adop-

11   tion is permissive and the decision to adopt it rests with each county and its election officials.

12   That is, counties and county election officials are not required to implement the VCA until

13   they, in their sole discretion, initiate the process to qualify and opt in. *Id.*, § 4005(a)(10)(E-

14   I). As part of the qualification process, local election officials are required to develop exten-

15   sive plans regarding the administration of all-mailed balloting under the VCA and a voter

16   education and outreach plan that must be approved by the Secretary of State. *Id.* None of

17   this qualification process is required under EO N-64-20.

18   Only fourteen counties could opt in initially during the 2018 election, which was the

19   first election under the VCA, with remaining counties allowed to opt in beginning January

20   2020.[4] CAL. ELEC. CODE § 4005(a). Only five counties opted in during the 2018 elections.[5]

21   Ten additional counties opted in for the 2020 elections.[6] During the March 3, 2020 federal

22   primary, fifteen counties conducted their elections pursuant to the VCA. The implementation

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24   [4]   The fourteen counties initially allowed to opt in were Calaveras, Inyo, Madera,
     Napa, Nevada, Orange, Sacramento, San Luis Obispo, San Mateo, Santa Clara, Shasta,
25   Sierra, Sutter, and Tuolumne.
             [5]   Those counties conducting all-mailed balloting were Madera, Napa, Nevada,
26   Sacramento, and San Mateo.
             [6]   The ten new counties opting to conduct their elections by mail are Amador,
27   Butte, Calaveras, El Dorado, Fresno, Los Angeles, Mariposa, Orange, Santa Clara, and
     Tuolumne.

28   3

of the VCA has not been without controversy, especially in Los Angeles County, which was panned by the local media as demonstrating "legitimate incompetence,"[7] while the national media referred to it as a "voting fiasco."[8]

B. Executive Order N-64-20 and Governor Newsom's Unilateral Decision to Impose a New All-Mail Ballot Procedure.

On March 4, 2020, Governor Newsom proclaimed a state of emergency in response to the COVID-19 epidemic and began issuing a series of executive orders. (*Exhibit 5, Proclamation of a State of Emergency*, March. 4, 2020.) On May 8, 2020, he issued EO N-64-20, which changed the time, place, and manner for voting during the November 3, 2020 federal election.[9] (*Exhibit 2*.) In that order the Governor announced a number of findings, including that "all Californians must be empowered to vote by mail." (*Id.* at 1.) The order mandated that "[a]ll voters who are […] registered to vote" in the November 2020 election must be sent all-mailed ballots, regardless of whether requested by the voter. (*Id.* at 2.) The Order includes several assertions regarding the Governor's authority, including that CAL. GOV'T CODE §§ 8567, 8571, and 8627 provided him authority to impose an entirely new all-mailed ballot procedure. (*Exhibit 2* at 2.)

In effect, the Order abrogated the permissive aspects of the VCA, imposing a mandatory new regime that contravenes the decisions of the California legislature and the 43 California counties not to "opt in." It is important to recognize, however, that Governor Newsom did not merely compel these 43 counties to comply with the VCA. To the contrary, his order set aside mandatory conditions that counties previously had to meet to even qualify to

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[7]   *See Exhibit 3*, attached, John Myers, et al., *California Officials Demand Changes to L.A. Voting After Election Day Chaos*, L.A. TIMES, Mar. 4, 2020, available at https://rb.gy/5hpx42 (last visited June 11, 2020).

[8]   *See Exhibit 4*, attached, Wall. St. J. Editorial, "*California Steals Its Own Election,*" WALL ST. J., Mar. 6, 2020 https://rb.gy/dimkie (last visited June 11, 2020).

[9]   In addition to any state or local races, Californians will elect a new delegation to the U.S. House of Representatives and select which slate of presidential electors to appoint. Though the names of presidential and vice-presidential candidates appear on the ballot, voters are actually casting a vote in favor of the appointment of a group of electors that have pledged to support those candidates. *See* CAL. ELEC. CODE §§ 6902 and 8304.

4

Plaintiffs' Memorandum in Support
of Motion for Preliminary Injunction

"opt in" to all-mail elections under the VCA. *See* CAL. ELEC. CODE § 4005(a)(1)-(10) ("any county may conduct any election as an all-mailed ballot election if *all of the following apply*") (emphasis added); *Exhibit 1*, ¶ 1 ("Notwithstanding any limitation on the distribution of vote-by-mail ballots in Elections Code sections [...] 4000-4007 . . ."). On June 3, 2020, the Governor issued Executive Order N-67-20 ("EO N-67-20) in which he again claimed authority to change the time, place, and manner of holding the November 2020 election. (*Exhibit 6*, Executive Order N-67-20, June 3, 2020.) Among other things, EO N-67-20 clarified which of the qualifications contained in the VCA were "conditionally suspended" for the November 2020 elections. (*Id.*, ¶¶ 4, 5, 6.) The Order seeks to supersede and replace the VCA with a system of rules and procedures of the Governor's own devising, which conflict with laws enacted by the California Legislature.

Following the commencement of this suit, and the related suit by the Republican National Committee, California's general assembly has been considering legislation in response to Governor Newsom's order, including Assembly Bill 860.[10]

C. California's Voter Registration Lists Are Not Ready for All-Mailed Voting.

Judicial Watch has long been investigating violations of federal voting law committed by California, including violations of the NVRA, 52 U.S.C. § 20501, *et seq*. Congress enacted the NVRA with two stated purposes: first, to "increase the number of eligible citizens who register to vote" and "enhance[]" their "participation . . . as voters in elections for Federal office"; and second, "to protect the integrity of the electoral process" and "ensure that accurate and current voter registration rolls are maintained." *Id.*, § 20501(b). The second goal was embodied in Section 8, which requires each state to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of

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[10]   *See Exhibit 7*, John Wildermuth, "*California Lawmaker Scrambles to Fix Bill to Make it Clear Ballots Won't Go to Phantom Voters,*" S.F. CHRONICLE, June 4, 2020 available at   https://www.sfchronicle.com/politics/article/California-lawmaker-scrambles-to-fix-bill-to-15317858.php (last visited June 11, 2020).

Plaintiffs' Memorandum in Support
of Motion for Preliminary Injunction

eligible voters by reason of" death or a change in the residence of the registrant. 52 U.S.C. § 20507(a)(4).

The NVRA specifies a particular procedure for confirming the addresses of those who may have changed residence without informing the State. If a forwardable notice requesting address confirmation is mailed to a voter's last known residence, and if the voter fails to respond to it and then does not "vote[] or appear[] to vote" for two general federal elections—basically, a period of from two to four years—that voter's name is removed from the rolls. *Id.*, § 20507(d)(1)(B). Until the statutory period has run, voters who have not responded to address confirmation notices are said to be "inactive." *e.g.*, 11 C.F.R. § 9428.7 and Cal. Code Regs. tit. 2, § 20108.1. Such voters are registered voters who may vote at any time during that period, at which point they are considered "active" again, and the removal process stops. 52 U.S.C. § 20507(e). But if a notice is sent and not responded to and the statutory period runs, these registrations must be removed. *See Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1841-42 (2018) ("Not only are States allowed to remove registrants who satisfy these requirements, but federal law makes this removal mandatory.").

Relying on data concerning California contained in a report from the Election Assistance Commission ("EAC") and other information, Judicial Watch sued California and Los Angeles County in December 2017 for violating the NVRA by failing to remove the registrations of voters who had moved elsewhere.[11] The case was settled in January 2019. (*Exhibit 8*, Settlement Agreement, *Judicial Watch v. Logan*, 2:17-cv-8948 (C.D. Cal. Jan. 3, 2019) (ECF No. 96-1).) The agreement was noteworthy for a number of reasons, not the least of which was that the defendants admitted one of the most startling allegations in the complaint: "Defendants represent that, as of April 27, 2018, there were approximately 1,565,000

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[11]   In June of each odd-numbered year, the federal EAC is required to report to Congress its findings relating to state voter registration practices. 52 U.S.C. § 20508(a)(3). Federal regulations require states to provide registration statistics directly to the EAC for use in this biennial report, including recent numbers of active and inactive registered voters and of registrations removed from the rolls for any reason. 11 C.F.R. § 9428.7(b)(1), (2), (5).

6

Plaintiffs' Memorandum in Support
of Motion for Preliminary Injunction

1 registrations on Los Angeles County's inactive file of registered voters." (*Id.* at 6.) This

2 staggering number amounts to nearly a quarter of the county's voter registration list. It also

3 exceeds the *total* populations of twelve individual states.[12] The defendants accounted for

4 this high number on the ground that they had believed, and "maintained in this litigation, that

5 the removal from the rolls of a registrant who meets the conditions specified in Section

6 8(d)(1) of the NVRA is permissive, not mandatory." (*Id.* at 5.) They basically conceded,

7 however, that this position had become untenable after the Supreme Court's *Husted* deci-

8 sion in June 11, 2018. (*Id.*)

9   In the course of litigating that case, Judicial Watch learned that the source of the

10 defendants' mistaken interpretation of the NVRA, pursuant to which inactive registrants need

11 *never* be removed, was a decades-old consent judgment with the U.S. Department of Jus-

12 tice. In 1998, the Justice Department and the State of California entered into a consent

13 order wherein California agreed to stop enforcing state law regarding the removal of inactive

14 registrants. (*Exhibit 9*, Stipulated Order in *Wilson v. United States*, Civ. No. C-95-20042-JW

15 and C-94-20860-JW (February 2, 1998).) This basically ended the State's efforts to comply

16 with one of the NVRA's core election integrity requirements—to remove ineligible voters who

17 have changed residence. Whatever the misguided reasoning behind the Justice Depart-

18 ment's decision to relieve California of its obligations under federal law, the basis for it was

19 squarely rejected by the Supreme Court in *Husted*.

20   In the intervening 20 years since that consent judgment, however, California has

21 largely failed to remove the registrations of voters who have changed residence. (Popper

22 Decl., ¶ 3.) In the EAC report issued in 2017, some of the largest counties in California,

23 including Orange County, Riverside County, Alameda County, Contra Costa County, San

24 Mateo County, Ventura County, San Joaquin County, Sonoma County, and Santa Cruz

25 County, responded "Not applicable" when asked how many address confirmation notices

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27   [12]   Wyoming, Vermont, North Dakota, Alaska, South Dakota, Delaware, Montana, Rhode Island, New Hampshire, Maine, Hawaii, and Idaho.

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Plaintiffs' Memorandum in Support
of Motion for Preliminary Injunction

1   they had sent. (*Id*., ¶ 6.) The damage done to the integrity of California's voter rolls has

2   been incalculable. Because mailing address confirmation notices has for years had few real

3   consequences in California, such mailings have not been systematic and have been poorly

4   tracked. (*Id*., ¶ 6.) For example, almost all of those on Los Angeles County's inactive list

5   had to receive *another* address confirmation notice. Given that there is no way to speed up

6   the NVRA's statutory waiting period, its voter rolls will not be corrected for years. (*Id*., ¶ 7.)

7   When there is no real incentive to send confirmation notices to those who are believed

8   to have moved, the accuracy of the *active* list becomes impaired as well. Ever greater num-

9   bers of registrants who have moved are *not* sent address confirmation notices, and so re-

10   main listed as active voters. (*Id*., ¶ 8.) The parlous condition of California's voter rolls en-

11   sures that mailing ballots to the addresses of every active voter in the 43 non-VCA counties

12   will mean that such ballots will be sent to the addresses of many voters who have moved.[13]

13   These unmonitored, live ballots present substantial risks of abuse and, more importantly,

14   show that California is not ready for all-mailed ballots statewide.

15   The particular risks associated with mailed ballots were acknowledged 15 years ago

16   by the bi-partisan Carter-Baker Commission. It observed that "[a]bsentee ballots remain the

17   largest source of potential voter fraud." REPT. OF COMM'N ON FED. ELECTION REFORM, BUILD-

18   ING CONFIDENCE IN U.S. ELECTIONS at 46 (2005) available at https://rb.gy/y6dtx8 (last visited

19   June 11, 2020).

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21   Absentee balloting is vulnerable to abuse in several ways: Blank ballots mailed to the wrong address or to large residential buildings might get intercepted. Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation. Vote
22   buying schemes are far more difficult to detect when citizens vote by mail.

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25   **13**   Whether ballots ultimately will be mailed to inactive registrants under EO N-64-20 remains unclear. While the original executive order called for the mailing of ballots to all voters "registered to vote," which would include inactive registrants by definition, his sub-

26   sequent order stated that "this provision is not intended, and shall not be construed, to mean that voters in an inactive voter registration status shall receive vote-by-mail ballots." (*Exhibit*

27   *2*, ¶ 1; and *Exhibit 6*, ¶ 1.) The California legislature, however, may not agree to this restriction. (*Exhibit 7*.)

28

Plaintiffs' Memorandum in Support
of Motion for Preliminary Injunction

Id. Only last month, similar concerns were expressed by a Stanford University study, which was commenced prior to the onset of the COVID-19 pandemic. (*Exhibit 10, Signature Verification and Mail Ballots: Guaranteeing Access While Preserving Integrity*, STANFORD LAW SCHOOL, Law and Policy Lab, May 15, 2020.) The study noted that there are "concerns around vote-by-mail relat[ing] to preserving election integrity and voter confidence in the process." (*Id*. at 13.) "When a voter votes from home, they are doing so outside the supervision of election officials." (*Id*.) Opportunities for "foul play" occur "throughout the chain of custody of the ballot, beginning with how a voter requests a ballot and then receives, completes, and returns it." (*Id*.) The study noted a number of related risks inherent in voting by mail:

> At-home voters could be more susceptible to pressure from family members. And there are a significant number of votes lost in the vote-by-mail process that might not be lost at traditional polling places. For example, not all requested vote-by-mail ballots actually make it to the voter. A significant number of vote-by-mail votes are rejected for errors such as over-voting or incorrect completion that might have been detected and fixed in person. Lastly, many vote-by-mail ballots are rejected for missing or mismatched signatures. In the 2012 general election, 23% of uncounted vote-by-mail ballots in California were rejected due to mismatched signatures.

(*Id.*) Indeed, the primary safeguard against voter fraud is signature verification, which the study characterizes as prone to error and uncertainty. "There are limited statewide uniform criteria or standards for signature verification, and what 'counts' as a matching signature varies enormously from county to county." (*Id.* at 2.)

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted). In evaluating these criteria, the Ninth Circuit employs a "sliding scale," under which a "preliminary injunction is appropriate" if a plaintiff shows that there are "serious questions going to the merits" and that "the balance of hardships tips sharply in the plaintiff's favor." *Alliance For The Wild Rockies v.*

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1 *Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (internal quotations and citation omitted).

2 ## ARGUMENT

3 **II. Plaintiffs Are Likely to Succeed on the Merits Because EO N-64-20 Violates the
4 Elections Clause and the Electors Clause.**

5 **A. Governor Newsom Has No Power to Regulate Federal Elections Under the
   Elections Clause and the Electors Clause.**

6 EO N-64-20 violates the Elections Clause and the Electors Clause because it was

7 not enacted pursuant to California's lawmaking power or some unique lawmaking function

8 that is prescribed under the California constitution. *Smiley v. Holm*, 285 U.S. 355, 368

9 (1932) (striking down an effort by Minnesota's Legislature to implement a vetoed redistricting

10 plan because it was not enacted according to the state's prescribed method for legislative

11 enactments); s*ee also Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct.

12 2652, 2659 (2015). "Legislature" has never been extended to include executive orders,

13 emergency or otherwise. Neither Congress nor the California Legislature ever delegated

14 such powers to the executive branch.

15 "The Times, Places and Manner of holding Elections for Senators and Representa-

16 tives, shall be prescribed in each State by the *Legislature* thereof; but the Congress may at

17 any time by Law make or alter such Regulations[.]" U.S. CONST. art. I, § 4 (emphasis added).

18 "In practice, the [Elections] Clause functions as a default provision; it invests the States with

19 responsibility for the mechanics of congressional elections, but only so far as Congress de-

20 clines to pre-empt state legislative choices." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570

21 U.S. 1, 9 (2013) (citation and internal quotation omitted). Similarly, the Electors Clause

22 reserves for state legislatures the power to regulate the appointment of electors, providing

23 that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct[.]" U.S.

24 CONST. art. II, § 1, cl. 2. Governor Newsom has no legislative power, and EO-N-64-20 did

25 not arise out of any legislative lawmaking function.

26 The California Constitution makes clear that its legislative power "is vested in the

27 California Legislature which consists of the Senate and Assembly, but the people reserve to

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Plaintiffs' Memorandum in Support
of Motion for Preliminary Injunction

1   themselves the powers of initiative and referendum." CAL CONST., art. IV, § 1. "The powers

2   of state government are legislative, executive, and judicial. Persons charged with the exer-

3   cise of one power may not exercise either of the others except as permitted by this Consti-

4   tution." CAL CONST., art. III, § 3. "[U]nlike the United States Congress, which possesses

5   only those specific powers delegated to it by the federal Constitution, it is well established

6   that the California Legislature possesses *plenary* legislative authority except as specifically

7   limited by the California Constitution." *Howard Jarvis Taxpayers Ass'n v. Padilla*, 62 Cal.

8   4th 486, 498 (2016) (citation omitted). "Lying at the core of that plenary authority is the

9   power to enact laws." *Id.* (citation omitted). The California Governor, in fact, is forbidden to

10   have such power, except as expressly provided under the state constitution.[14] *Lukens v.*

11   *Nye*, 156 Cal. 498, 501 (1909).

12   In evaluating whether a state action emanates from the "Legislature," the Supreme

13   Court takes a contextual and functional approach. *Ariz. State Legis.*, 135 S. Ct. at 2666-68

14   (2015). The Court noted that "the meaning of the word 'legislature,' used several times in

15   the Federal Constitution, differs according to the connection in which it is employed, depend-

16   ing upon the character of the function which that body in each instance is called upon to

17   exercise." *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434 (1932) (citations

18   omitted). For example, in the context of ratifying constitutional amendments under Art. V,

19   "Legislature" is narrowly interpreted because "[r]atification … 'has its source in the Federal

20   Constitution' and is not an 'act of legislation in the proper sense of the word.'" *Ariz. State*

21   *Legis.*, 135 S. Ct. at 2668 (quoting *Hawke v. Smith*, 253 U.S. 221, 40 (1920)); *see also U.S.*

22   *Term Limits, Inc. v. Thornton*, 514 U.S. 779, 800-801 (1995) (explaining the distinction be-

23   tween powers of the newly created Federal Government and those retained by the pre-

24   existing sovereign states).

25   In *Ariz. State Legis.*, the Court determined that "Legislature" in the Elections Clause

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27   **14**   The Governor's principal legislative function under the state's constitution is
     his veto power, which is not at issue here. *See* CAL CONST., art. III, § 10.

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                                                    Plaintiffs' Memorandum in Support
                                                    of Motion for Preliminary Injunction

context means certain legislative functions or lawmaking power that are performed according to state-specific lawmaking prescriptions, such as gubernatorial vetoes and citizen initiatives related to redistricting.[15] *Ariz. State Legis.*, 135 S. Ct. at 2668 (citations omitted). EO N-64-20 does not fit any of the lawmaking prescriptions that have been recognized by the Court, such as the California's Legislature's lawmaking process or part of a citizen initiative.

"The general principle is unquestionably true, that our system is not a pure democracy, but a representative republican government; one of whose departments, the Legislature, has the exclusive faculty of enacting laws." *Hobart v. Supervisors of Butte Cty.*, 17 Cal. 23, 30 (1860). To hold that executive orders are part of the state lawmaking power risks introducing "a virus which destroys that power, which in effect annihilates representative government and causes a State where such condition exists to be not republican in form in violation of the guarantee of the Constitution." *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916) (citation omitted).

B. The Governor Lacks the Authority He Assumes Under State Law.

EO N-64-20 identified three provisions from the California Emergency Services Act, CAL. GOV'T CODE § 8550, *et seq*., which Governor Newsom claimed granted him authority to regulate federal elections. (*Exhibit 2*.) CAL. GOV'T CODE §§ 8567, 8571, and 8627. However, these provisions do not grant him lawmaking power of the type "prescribed for legislative enactments." *See Smiley*, 285 U.S. at 367. Even if the California Legislature could grant Governor Newsom authority to prescribe legislative enactments, EO N-64-20 is *ultra vires* under state law.

1.   CAL. GOV'T CODE §§ 8567 and 8627.

Section 8567 grants the Governor authority to "make, amend, and rescind orders and

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[15]   Alternatively, Plaintiffs submit that "Legislature" may be more strictly construed under the Electors Clause since the power to appoint electors is sourced from the Federal Constitution and is not one of the original powers retained by the pre-existing sovereign States. *See Ariz. State Legis.*, 135 S. Ct. at 2668. However, because EO N-64-20 fails under the Elections Clause analysis from *Ariz. State Legis.*, this Court need not resolve that question here. *Id.*

Plaintiffs' Memorandum in Support
of Motion for Preliminary Injunction

regulations necessary to carry out the provisions of [the California Emergency Services Act]" which "shall have the force and effect of law." Section 8627 grants the Governor authority to commandeer state agencies and exercise "all designated police powers" as well as issue "orders and regulations" he deems necessary under § 8567. Neither § 8567 nor § 8627 give the Governor the authority to unilaterally change state election laws and do not apply here.

The power to make, amend, or rescind orders and regulations is not the power to legislate or make "legislative enactments." *Smiley*, 285 U.S. at 367. Moreover, the Governor is not amending or rescinding any orders or regulations. He is attempting to enact new law that conflicts with existing law enacted by the California Legislature. Section 8627 further fails to provide him authority because "the regulation of congressional elections is not a subject of state police power[.]" *Fish v. Kobach*, 840 F.3d 710, 727 (10th Cir. 2016).

2.   CAL. GOV'T CODE § 8571.

Section 8571 provides that during a state of emergency Governor Newsom "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" provided he "determines and declares that strict compliance … would in any way prevent, hinder, or delay the mitigation of the effects of the emergency." But the Governor is not seeking to suspend anything in his Order. Instead, he is attempting to impose an entirely new election system on the State and transform permissive provisions under California law into mandatory provisions. Such transformation is not "suspending" even under the most deferential interpretation of his emergency authority. Whatever "suspend" means in § 8571, it is not the power to enact legislation as required under *Smiley*.

Section 8571 limits the Governor's power to suspend only "regulatory statutes," statutes that "proscrib[e] the *procedure* for conduct of state business," and "orders, rules, and regulations of any state agency." CAL. GOV'T CODE § 8571 (emphasis added). Neither the California Code nor state authority define "regulatory statutes." Section 8571 has never been extended by state courts to include election laws. All the regulatory statutes that have

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1 come before California courts involve, as one would expect, licensing, business regulation,

2 and public welfare.**16** Similarly the "procedure for conducting state business" is not defined

3 under state law. It would be beyond peculiar for the State to claim that election laws are

4 regulations prescribing the "procedures for conduct of state business."   Likewise, enacted

5 election laws are not covered by "orders, rules, and regulations of any state agency." More

6 than likely § 8571 means the Governor is authorized to cut red tape and eliminate roadblocks

7 that can slow the government's responsiveness to a crisis, as Plaintiffs in the related case

8 explain. *See* ECF No. 24-1 at 20-23, *Memorandum in Support of Preliminary Injunction,*

9 *Rep. Nat. Comm. et al., v. Newsom*, et al., 2:20-cv-01055 (E.D. Cal. June 6, 2020).

10 **III. The Remaining *Winter* Factors Weigh Heavily in Favor of Preliminary Relief.**

11   EO N-64-20 will cause irreparable harm because it violates the constitution and will

12 confuse and disenfranchise voters unless enjoined. The Ninth Circuit has long recognized

13 that constitutional violations in general constitute irreparable harm. *Rodriguez v. Robbins*,

14 715 F.3d 1127, 1144 (9th Cir. 2013); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th

15 Cir. 2009); and *Griffin v. Padilla*, 417 F. Supp. 3d 1291, 1307 (E.D. Cal. 2019), vacated on

16 other grounds, 2019 U.S. App. LEXIS 38890 (9th Cir. Dec. 16, 2019). The loss of constitu-

17 tional rights "for even minimal periods of time, unquestionably constitutes irreparable injury."

18 *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (citation omitted). Two years ago, California

19 argued to the Ninth Circuit that "changing voting systems between the primary and general

20 elections would result in voter confusion and disenfranchisement." *Short*, 893 F.3d at 680.

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23 **16**   *See generally, e.g., Alvarado v. Selma Convalescent Hosp.*, 153 Cal. App. 4th 1292, 1304 (2007) (noting that a statute limiting nursing hours is a "regulatory statute"); *Bronco Wine Co. v. Jolly*, 129 Cal. App. 4th 988 (2005) (upholding regulatory statute con-

24 cerning wine labeling); *Horeczko v. State Bd. of Registration*, 232 Cal. App. 3d 1352, 1358 (1991) (upholding "regulatory statute" requiring license and restricting use of "engineer");

25 *Carleton v. Tortosa* 14 Cal. App. 4th 745, 755 (1993) (noting that real estate agents are subject to certain "regulatory statutes"); and *In re Jennings*, 106 Cal. App. 4th 869, 891

26 (2003) (noting that restrictions on the sale of alcohol is a "regulatory statute enacted for the protection of public morals and public health"), rev'd on other grounds, 34 Cal. 4th 254

27 (2004); *see also Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (upholding California "reg-ulatory statute" restricting crab fishing).

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1   Yet, that is exactly what the Governor is doing now, ignoring the irreparable harm the State

2   previously recognized.

3   Moreover, given that California failed to comply with the NVRA's list maintenance

4   provisions for twenty years, this harm will be significant because the State's voter registration

5   lists are not ready for a broad-based, all-mailed ballot election and will not be ready by No-

6   vember 3, 2020.   California will flood the state with ballots mailed to countless voters at

7   locations they no longer reside, including some that moved almost twenty years ago.   Be-

8   cause of its longstanding list maintenance failures there is reason to believe these problems

9   apply to both active and inactive registered voters.   Further, since it takes at least two federal

10 election cycles before most voters can be removed under the National Voter Registration

11 Act, 52 U.S.C. § 20507, there is no quick fix to the problems identified with California's voter

12 registration lists. Just the damage this will do to the confidence in California's elections is

13 significant and irreparable.   *Cf. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197

14 (2008) (finding that confidence in electoral integrity "encourages citizen participation in the

15 electoral process.").   Without preliminary relief, it will be impossible to reverse or enjoin EO

16 N-64-20 once ballots are mailed out.

17   The public interest and the balance of the equities weigh heavily in favor of granting

18 the preliminary relief requested.   On one hand, the State "can derive no legally cognizable

19 benefit from being permitted to further enforce" a constitutional violation.   *Sanders Cnty.*

20 *Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 749 (9th Cir. 2012) (citation omitted).

21 "[I]t is always in the public interest to prevent the violation of a party's constitutional rights."

22 *Am. Bev. Ass'n v. City & Cty. of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019) (citation and quota-

23 tion marks omitted).

24   On the other, it is in the public's interest to grant preliminary relief and resolve these

25 legal questions now.   Without preliminary relief, there is a high likelihood that federal courts

26 will be called upon to evaluate the legality of EO N-64-20 post-election.   Given the nature of

27 federal offices, it will be virtually impossible for a court to provide aggrieved persons post-

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Plaintiffs' Memorandum in Support
of Motion for Preliminary Injunction

election relief.   "[I]t is 'clear that it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there are no adequate remedies available.'"   *Griffin*, 417 F. Supp. 3d at 1308 (quoting *Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013)).

Further, unresolved questions about the legality of EO N-64-20 may lead to more serious disputes later, possibly having a nationwide impact. The 117th Congress will meet on January 6, 2021 to certify each state's electoral votes. *See* U.S. CONST. AMEND. XII; and 3 U.S.C. § 15. During that process, Congress will have the right to voice its objection to the counting of any state's electoral votes. *See Bush v. Gore*, 531 U.S. 98, 130 (2000) ("[3 U.S.C. § 5] sets certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under 3 U.S.C. § 15."). If on that date the electoral margin between the President Trump and Vice-President Biden is less than 55 electoral votes, the dispute over the legality of EO N-64-20 may take on even greater significance. Granting preliminary relief now resolves the legal question before it deteriorates into an intractable political question later.[17] It is in the public interest to have the courts resolve this legal question to ensure that California's electors are counted.

CONCLUSION

For all the above reasons, the Court should grant Plaintiffs' motion for preliminary injunction.

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[17]   That is not to say that this litigation is a political dispute, or the resolution will eliminate post-election political disputes. However, it is in the public's interest to have the legal question about whether EO N-64-20 violates the Elections or Electors Clauses resolved by the courts now.

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June 11, 2020

Respectfully submitted,

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17

Plaintiffs' Memorandum in Support
of Motion for Preliminary Injunction