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10
11 SUPERIOR COURT OF CALIFORNIA
12 COUNTY OF KERN

13
14 PEGGY CHRISTENSEN and PETER MARTIN,

15 Petitioners,

16 v.

17 CALIFORNIA JUDICIAL COUNCIL,

18 Respondent.

No. BCV-20-101361

**VERIFIED PETITION
FOR PEREMPTORY
WRIT OF MANDATE
(CCP § 1085)**

1 **INTRODUCTION**

2 On April 6, 2020, the California Judicial Council responded to the coronavirus pandemic
3 by issuing 11 emergency rules of court. Among these was Emergency Rule 1 (“ER 1”), which
4 violates the fundamental rights of property owners by indefinitely suspending their right to initiate
5 unlawful detainer actions. The rule creates the perverse incentive for all tenants, whether they face
6 financial hardship or not, to refuse to pay their rent during the crisis. And it immunizes from
7 eviction even tenants who create nuisances, damage property, conduct illegal activity, or violate
8 lease terms. ER 1’s restrictions not only visit significant hardship on landlords like Petitioners; they
9 are also unconstitutional.

10 The rule effectively closes the courthouse doors to Petitioners and obstructs their right to
11 re-enter their own property. It does so because the Judicial Council determined as a matter of policy
12 that tenants should be immunized from eviction in virtually all cases. The rule therefore constitutes
13 a legislative decision forbidden to the Judicial Council under the principle of separation of powers
14 embodied in Article III, § 3, of the California Constitution.

15 Moreover, because ER 1 contradicts statutes recognizing landlords’ right to re-entry and
16 providing expedited procedures to effect that right, it violates Article VI, § 6(d), of the Constitution,
17 which requires Judicial Council rules to accord with all state statutes. Executive Order N-38-20,
18 which purports to suspend statutes conflicting with ER 1, did not excuse the Council from this
19 requirement by suspending contrary statutes. The order fails to meet the requirements of
20 Government Code § 8571, which permits the Governor to suspend certain statutes in a state of
21 emergency. Even if Executive Order N-38-20 otherwise complied with § 8571, however, the
22 Governor cannot delegate his suspension power to the Judicial Council as the order purports to.

23 Petitioners understand and are themselves affected by the difficulties of the current
24 pandemic and the impact of the lockdown orders. Both have worked and in general do work with
25 tenants who fall behind on their rent, whether due to the pandemic or other reasons. But Emergency
26 Rule 1 places Petitioners at the mercy of individuals who fail to pay rent, whether or not as a result
27 of financial hardship, and those who disturb other tenants and prevent Petitioners from welcoming
28 other renters in need of housing. The Court should hold the line on the separation of powers by

1 granting Petitioners’ petition for a peremptory writ of mandate under Code of Civil Procedure
2 § 1085 and directing the Judicial Council to revoke Emergency Rule 1.

3 **PARTIES**

4 **Petitioners**

5 1. Petitioners are property owners who seek to exercise their right to re-entry.

6 2. Peggy Christensen, 63, is a retired medical-devices consultant. She owns through
7 her living trust an 8-unit complex in Mojave. Peggy keeps the units in good condition and usually
8 has good relations with her tenants, including accepting late payments and waiving late fees. One
9 of her tenants lived in a unit with his girlfriend, but he subsequently abandoned the unit and ceased
10 paying rent. Though Peggy has not and would not have rented to the woman, Peggy allowed her to
11 continue to live in the unit out of compassion. However, she has damaged the property, disturbed
12 the other tenants, and created a nuisance. As a result, Peggy has received numerous complaints
13 from other tenants. In addition, though this individual paid rent intermittently in the past, she has
14 not paid rent since February 2020 and has not claimed any coronavirus-related hardship. Peggy
15 now wishes to evict her. Emergency Rule 1 prevents Peggy from doing so.

16 3. Peter Martin, 59, is a retired attorney who owns through his living trust a 27-space
17 mobile home park in Arcata. According to a local news outlet, one of his tenants was arrested in
18 January 2020 on drug and firearms charges. In March 2020, the Humboldt County Drug Task Force
19 served a search warrant on the tenant’s mobile home. Peter’s property managers have reported to
20 him that other tenants have complained of this tenant. In addition, this tenant has not paid rent since
21 January and has not claimed any coronavirus-related hardship. As a result, Peter attempted to evict
22 this tenant for disturbing the other tenants by engaging in unlawful drug activities on the premises.
23 The Superior Court of Humboldt County refused to issue a summons due to Emergency Rule 1.

24 **Respondent**

25 4. The California Judicial Council is an administrative body established by the
26 California Constitution “[t]o improve the administration of justice.” Cal. Const. art. VI, § 6(d).
27 Among the Judicial Council’s duties is to “adopt rules for court administration, practice and
28 procedure, and perform other functions prescribed by statute.” *Id.*

1 **JURISDICTION AND VENUE**

2 5. The Court has jurisdiction of this petition for peremptory writ of mandate pursuant
3 to Code of Civil Procedure § 1085.

4 6. Venue is proper in the county in which “the cause, or some part of the cause, arose,”
5 for a suit against a public officer’s act. Cal. Code Civ. Proc. § 393(b). Government agencies are
6 public officers for purposes of § 393. *Regents of Univ. of Cal. v. Sup. Ct.*, 3 Cal. 3d 529, 537–38
7 (1970). A cause arises where the plaintiff or petitioner is injured by the state action complained of.
8 *Cal. State Parks Found. v. Sup. Ct.*, 150 Cal. App. 4th 826, 834 (2007). Emergency Rule 1 injures
9 Peggy Christensen in Kern County, where her property is located. Venue is therefore proper in
10 Kern County. In addition, venue is proper in the Metropolitan Division of Kern County Superior
11 Court, because the instant suit is an unlimited civil action. L.R. 1.7.5(b).

12 **GENERAL ALLEGATIONS**

13 ***The Emergency Services Act and the Governor’s Orders***

14 7. On March 4, 2020, Governor Newsom proclaimed a state of emergency as a result
15 of the COVID-19 pandemic.¹

16 8. Since then, the Governor has issued a number of executive orders related to the
17 pandemic pursuant to the Emergency Services Act (“ESA”) and particularly Government Code
18 § 8571.

19 9. Section 8571 permits the Governor, “[d]uring a . . . state of emergency,” to “suspend
20 any regulatory statute, or statute prescribing the procedure for conduct of state business, or the
21 orders, rules, or regulations of any state agency . . . where the Governor determines and declares
22 that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder,
23 or delay the mitigation of the effects of the emergency.”

24 10. On March 16, 2020, the Governor issued Executive Order N-28-20 (“Order 28”).²
25 The order suspends statutory restrictions on municipalities “to impose substantive limitations on
26

27 ¹ <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

28 ² <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.16.20-Executive-Order.pdf>.

1 residential or commercial evictions” in hardship cases—that is, where the eviction is due to
2 nonpayment of rent or foreclosure as a result of a documented, COVID-19-related decrease in
3 income or increase in medical expenses. Order 28 also suspends all “statutory cause[s] of action”
4 for eviction, including Code of Civil Procedure § 725a, *et seq.* (regarding judicial foreclosures) and
5 Code of Civil Procedure § 1161, *et seq.* (regarding unlawful detainer), “only to the extent of the
6 limitation imposed by the local government” and “only as applied to any tenancy, or residential
7 real property” subject to such a limitation. These provisions were to expire on May 31, but they
8 were extended by Executive Order N-66-20 through July 28.³

9 11. On March 27, 2020, the Governor issued Executive Order N-37-20 (“Order 37”).⁴
10 The order granted residential tenants several eviction-related reprieves. It forbade the execution of
11 eviction writs for eligible tenants and extended the deadline for a tenant to respond to an unlawful
12 detainer action. The order was limited to residential tenants experiencing hardship due to COVID-
13 19, and these tenants were also required to have been current on their rent prior to the order, retain
14 documentation of their hardship, and timely notify the landlord of their hardship. Order 37 expired
15 on May 31.

16 12. Also on March 27, the Governor issued Executive Order N-38-20 (“Order 38”).⁵
17 The order states, in relevant part, that “[i]n the event that the Judicial Council or its Chairperson
18 . . . wishes to consider a rule that would otherwise be inconsistent with any statute concerning civil
19 or criminal practice or procedure, the relevant statute is suspended.” Order 38. The order states that
20 this provision is an attempt to satisfy Article VI, § 6, of the California Constitution by “ensuring
21 that the rules adopted ‘shall not be inconsistent with statute.’” *Id.*

22 ***Emergency Rule 1***

23 13. On April 4, 2020, five internal chairs of the Judicial Council recommended the
24 adoption of 11 emergency rules of court.

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27 ³ <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.29.20-EO-N-66-20.pdf>.

28 ⁴ <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.27.20-EO-N-37-20.pdf>.

⁵ <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.27.20-N-38-20.pdf>.

1 14. On April 6, 2020, the Judicial Council adopted all 11 proposed rules, including
2 Emergency Rule 1.

3 15. Emergency Rule 1 provides:

4 (a) Application

5 Notwithstanding any other law, including Code of Civil Procedure sections
6 1166, 1167, 1169, and 1170.5, this rule applies to all actions for unlawful
7 detainer.

8 (b) Issuance of summons

9 A court may not issue a summons on a complaint for unlawful detainer unless
10 the court finds, in its discretion and on the record, that the action is necessary
11 to protect public health and safety.

12 (c) Entry of default

13 A court may not enter a default or default judgment for restitution in an
14 unlawful detainer action for failure of defendant to appear unless the court
15 finds both of the following:

16 (1) The action is necessary to protect public health and safety; and

17 (2) The defendant has not appeared in the action within the time provided by
18 law, including by any applicable executive order.

19 (d) Time for trial

20 If a defendant has appeared in the action, the court may not set a trial date
21 earlier than 60 days after a request for a trial is made unless the court finds that
22 an earlier trial date is necessary to protect public health and safety. Any trial
23 set in an unlawful detainer proceeding as of April 1, 2020 must be continued
24 at least 60 days from the initial date of trial.

25 (e) Sunset of rule

26 This rule will remain in effect until 90 days after the Governor declares that
27 the state of emergency related to the COVID-19 pandemic is lifted, or until
28 amended or repealed by the Judicial Council.

16. Emergency Rule 1 therefore indefinitely bars landlords from initiating, prosecuting,
and obtaining relief through unlawful detainer actions.

17. On June 8, 2020, the Judicial Council issued a proposed amendment to Emergency
Rule 1. The amendment would have altered section (e) to read:

///

///

1 (e) Sunset of rule

2 This rule will remain in effect until August 3, 2020, or until amended or
3 repealed by the Judicial Council. Notwithstanding Code of Civil Procedure
4 section 1170.5 and this subdivision, any trial date set under (d) as of August 3,
5 2020, will remain as set unless a court orders otherwise.

6 18. The Judicial Council’s vote on the amendment was scheduled for June 10, but the
7 vote was suspended. News Release, California Courts, *Chief Justice Suspends Vote on Eviction,
8 Foreclosure Emergency Rules* (June 10, 2020).⁶

9 ***Constitutional Limitations on Judicial Council Rulemaking***

10 19. The California Constitution contains at least three relevant limits on the Judicial
11 Council’s rulemaking power.

12 20. First, the Constitution divides the legislative, executive, and judicial powers of
13 government among three separate branches and provides that: “Persons charged with the exercise
14 of one power may not exercise either of the others except as permitted by this Constitution.” Cal.
15 Const. art. III, § 3. Accordingly, the “‘core’ or ‘essential’ functions” of a branch “may not be
16 usurped by another branch.” *Le Francois v. Goel*, 35 Cal. 4th 1094, 1102–03 (2005) (quoting
17 *People v. Bunn*, 27 Cal. 4th. 1, 14 (2002)). Neither may a branch “practically defeat” or “materially
18 impair” another branch’s core powers. *Id.* (quoting *Sup. Ct. v. Cty. of Mendocino*, 13 Cal. 4th 45,
19 54 (1996)).

20 21. Second, the Judicial Council may only “adopt rules for court administration, practice
21 and procedure, and perform other functions prescribed by statute.” Cal. Const. art. VI, § 6(d). It
22 may do so only to “improve the administration of justice.” As a result, “in the absence of legislative
23 authorization,” the Council may adopt no “rules governing substantive matters.” *People v. Wright*,
24 30 Cal. 3d 705, 711–12 (1982).

25 22. Third, the Judicial Council’s rules “shall not be inconsistent with statute.” Cal.
26 Const. art. VI, § 6(d). “In this context, a rule is inconsistent with a statute if it conflicts with either
27 the statute’s express language or its underlying legislative intent.” *In re Abbigail A.*, 1 Cal. 5th 83,
28 92 (2016) (quoting *In re Alonzo J.*, 58 Cal. 4th 924, 937 (2014)).

⁶ <https://newsroom.courts.ca.gov/news/chief-justice-suspends-vote-on-eviction-foreclosure-emergency-rules>.

1 ***Petitioners' Interests***

2 23. Petitioners are beneficially interested in the revocation of Emergency Rule 1,
3 because its revocation would restore their right to re-enter their property.

4 24. Petitioners have no plain, speedy, and adequate remedy, in the ordinary course of
5 law, available to them to seek review of Emergency Rule 1. *See* Cal. Code Civ. Proc. § 1086. The
6 only means by which review of ER 1 may be had is through writ of mandate or other equitable
7 relief.

8 25. As set forth herein, the Judicial Council in issuing Emergency Rule 1 violated its
9 public duty to comply with constitutional limitations in crafting rules of court. The Council is
10 therefore under a public duty to revoke the rule. As citizens of California, Petitioners have an
11 interest in the Council's executing its duty. *See Green v. Obledo*, 29 Cal. 3d 126, 144 (1981).

12 26. Without the Petitioners' action, other persons beneficially interested in the legality
13 of ER 1 would be unable to vindicate that interest, because of their inability to comment adequately
14 on the proposed rule, as well as the burden imposed on them by the time and cost of litigation.
15 Petitioners are ably positioned to represent the public interest in this action, given their beneficial
16 and other interests as landlords and property owners. Finally, Petitioners' action will confer a broad
17 and important benefit on the public and will inure to the public interest by confirming important
18 limitations on the Council's rulemaking power that will in turn safeguard the public from agency
19 overreach.

20 27. Petitioners have lost rent as a result of the Judicial Council's issuance of Emergency
21 Rule 1 and its failure to rescind the rule. In the absence of Emergency Rule 1, Petitioners would
22 have evicted their respective tenants and been able to welcome others in need of housing.

23 28. Peggy Christensen's property is almost always full. Other than gaps of less than one
24 month for cleaning and repairs between tenants, the property has been full since mid-2017, when
25 Peggy acquired the property. The property has been full for the duration of Emergency Rule 1. Her
26 last vacancy, when a tenant moved out at the end of February 2020, received 20 inquiries and was
27 filled by March 9. In early March, she received a rental application from a well-qualified
28 prospective tenant. But for Emergency Rule 1, Peggy would have initiated the evictions process

1 against the disruptive tenant in April in order to accommodate this applicant. In the months since
2 Emergency Rule 1 issued, Peggy has received multiple unsolicited requests to rent. In addition, two
3 of her current tenants have contacted Peggy urgently seeking housing for their friends. But for
4 Emergency Rule 1, Peggy would have been able to effect an eviction and been able to welcome a
5 rent-paying tenant in need of housing. The rent she has lost as a result of Emergency Rule 1
6 increases with each month.

7 29. Peter Martin’s mobile home park is almost always full, and it has been full for the
8 duration of Emergency Rule 1. The property’s last vacancy was in January, and it typically receives
9 one to five inquiries per week from individuals seeking a vacancy. Peter filed an unlawful detainer
10 action against the disruptive tenant on April 13, 2020, but the court declined to issue a summons
11 two days later due to Emergency Rule 1. But for Emergency Rule 1, Peter would have been able to
12 effect an eviction and been able to welcome a rent-paying tenant in need of housing. The rent he
13 has lost as a result of Emergency Rule 1 increases with each month. In addition to this tenant, Peter
14 has at least one other tenant who has ceased paying rent and has not claimed a coronavirus-related
15 hardship. But for Emergency Rule 1, Peter could have evicted these tenants. The resulting lost rent
16 increases with each month

17 **FIRST CAUSE OF ACTION FOR PEREMPTORY WRIT OF MANDATE**

18 **(Cal. Code Civ. Proc. § 1085; Cal. Const. art. III, § 3)**

19 30. The above paragraphs are hereby realleged.

20 31. In adopting Emergency Rule 1, the Judicial Council usurped the Legislature’s core
21 functions in violation of the separation-of-powers guarantee in Article III, § 3, of the state
22 Constitution.

23 32. Foremost amongst the Legislature’s core powers is the “power to make the law.”
24 *Carmel Valley Fire Prot. Dist. v. State*, 25 Cal. 4th 287, 299 (2001) (quoting *Loving v. United*
25 *States*, 517 U.S. 748, 758 (1996)). “This essential function embraces the far-reaching power to
26 weigh competing interests and determine social policy.” *Bunn*, 27 Cal. 4th at 14–15. Thus, only the
27 Legislature may “resol[ve] . . . fundamental policy issues” and “provide . . . direction for the
28 implementation of that policy.” *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.*, 3 Cal.

1 5th 1118, 1146 (2017) (quoting *Carson Mobilehome Park Owners' Ass'n v. City of Carson*, 35 Cal.
2 3d 184, 190 (1983)). “[A]bsent a constitutional prohibition, the choice among competing policy
3 considerations in enacting laws is a legislative function,” and “[t]he judiciary . . . may not undertake
4 to evaluate the wisdom of the policies embodied in such legislation.” *County of Mendocino*, 13 Cal.
5 4th at 53.

6 33. In adopting Emergency Rule 1, the Judicial Council made a classic policy decision
7 that is properly the Legislature’s domain, not the Judicial Council’s. Specifically, in explaining its
8 reasons for adopting the rule, the Council improperly weighed social interests and struck a balance
9 amongst them.

10 34. Emergency Rule 1 was motivated by at least four reasons: (1) Order 37’s eviction
11 moratorium “cannot by itself provide sufficient assistance to tenants and courts to avert this crisis”;
12 (2) unlawful detainer actions “require very fast legal responses (within five days) from defendants
13 who are often self-represented and at a time when court self-help centers and legal aid services are
14 not readily available”; (3) unlawful detainer actions “threaten to remove people from the very
15 homes they have been instructed to remain in”; and (4) “the number of such actions for both
16 commercial and residential properties is likely to explode in coming months . . . resulting in a surge
17 of unlawful detainer filings and trials in the courts.” Judicial Council of California, Report to the
18 Judicial Council, Item No. 20-141, at 7 (Apr. 4, 2020).

19 35. These reasons, particularly the first, show that ER 1 constitutes a forbidden policy
20 judgment. ER 1 effectively overruled Order 37 for, in the Judicial Council’s determination,
21 insufficiently protecting tenants. Whereas Order 37 created limited reprieves for certain, qualified
22 residential tenants only until May 31, 2020, ER 1 creates an indefinite blanket ban on unlawful
23 detainers actions against all residential and commercial tenants, subject only to a discretionary
24 health-and-safety exception.

25 36. Even in considering whether to sunset ER 1 on August 3, the Judicial Council
26 admitted it stepped into the Legislature’s shoes when it issued the rule. The circulating order
27 memorandum accompanying the proposed amendment states that ER 1’s purpose was to “address[]
28 the immediate crisis,” Judicial Council of California, Circulating Order Memorandum, No. CO-20-

1 10, at 7 (June 8, 2020), at a time when “the Legislature was not in session to address these issues.”
2 *Id.* at 4. Likewise, the Chief Justice, in suspending the Judicial Council vote on the amendment,
3 stated that ER 1 was adopted because “the Legislature was not in session.” *Chief Justice Suspends*
4 *Vote on Eviction, Foreclosure Emergency Rules, supra.* But “now that the Legislature is
5 considering these areas of the law, the chairs [of the Judicial Council] concluded that it was
6 appropriate to cede the balancing of the substantive policy to the consideration of the Legislature.”
7 Circulating Order Memorandum, *supra*, at 7.

8 37. The power to determine substantive policy is not one that the Judicial Council may
9 seize and return as it deems “appropriate.” Making substantive policy is a core power inherent in
10 the Legislature and forbidden to the Judicial Council. The Constitution does not permit the judiciary
11 to assume legislative power simply because the Legislature is not in session. Chief Justice Cantil-
12 Sakauye also appeared to acknowledge ER 1’s tension with the separation of powers when, in
13 suspending the vote on the ER 1 amendment, she stated that “[t]he judicial branch cannot usurp the
14 responsibility of the other two branches to deal with the myriad impacts of the pandemic.” *Chief*
15 *Justice Suspends Vote on Eviction, Foreclosure Emergency Rules, supra.*

16 38. ER 1 also “practically defeat[s]” the Legislature’s determination that summonses,
17 defaults, and default judgments should immediately issue when statutory conditions are met.
18 *Le Francois*, 35 Cal. 4th at 1102 (quoting *County of Mendocino*, 13 Cal. 4th at 54). In addition,
19 ER 1 practically defeats statutes recognizing landlords’ right to re-entry and property owners’ right
20 to possess their property. Finally, it practically defeats the Legislature’s decision to grant only
21 limited emergency powers to the judiciary. *See* Cal. Gov’t Code § 68115.

22 39. Because ER 1 violates Article III, § 3, of the Constitution, it must be withdrawn.

23 **SECOND CAUSE OF ACTION FOR PEREMPTORY WRIT OF MANDATE**

24 **(Cal. Code Civ. Proc. § 1085; Cal. Const. art. VI, § 6(d))**

25 40. The above paragraphs are hereby realleged.

26 ***Emergency Rule 1 Is Inconsistent with Statute***

27 41. The Constitution forbids the Judicial Council from issuing rules that are
28 “inconsistent with statute.” Cal. Const. art. VI, § 6(d).

1 42. Emergency Rule 1 directly conflicts with several statutes.

2 43. First, it explicitly purports to abrogate Code of Civil Procedure §§ 1166 and 1169,
3 which require the immediate issuance of summonses, defaults, and default judgments when
4 statutory conditions are met. It also explicitly purports to abrogate the trial timeline provisions of
5 Code of Civil Procedure § 1170.5.

6 44. Second, by denying landlords the only procedure for vindicating their right of re-
7 entry under the terms of a lease, the rule undermines the letter and intent of Civil Code §§ 790–92,
8 which recognize landlords’ right to re-entry and express the Legislature’s intent that the right be
9 enforced by expedited proceedings. *See In re Abbigail A.*, 1 Cal. 5th at 92 (“In this context, a rule
10 is inconsistent with a statute if it conflicts with either the statute’s express language or its underlying
11 legislative intent.” (quoting *In re Alonzo J.*, 58 Cal. 4th at 937)). The rule also undermines Civil
12 Code § 654, which recognizes property owners’ “right . . . to possess and use [their property] to the
13 exclusion of others.”

14 45. The rule thus violates Article VI, § 6, of the California Constitution and must be
15 withdrawn.

16 46. Order 38 does not cause Emergency Rule 1 to be consistent with statute.

17 47. While the report to the Judicial Council invokes the authority of Order 38, that order
18 did not authorize and could not have authorized the Judicial Council to adopt ER 1, consistent with
19 Government Code § 8571.

20 48. First, in order to invoke § 8571, the Governor must “determine[] and declare[] that
21 strict compliance with [an eligible] statute . . . would . . . prevent, hinder, or delay the mitigation of
22 the effects of the emergency.” Cal. Gov’t Code § 8571. The determination and declaration are key
23 statutory prerequisites, because they ensure that the Governor suspends only statutes that he judges
24 to be an obstacle to resolving the emergency. Such provisions were enacted to preserve
25 transparency and accountability when government officials exercise extraordinary powers in times
26 of emergency.

27 49. Order 38 makes no such determination or declaration as to any statute. *Compare*
28 *with, e.g., Gavin Newsom, Proclamation of a State of Emergency*, at PDF 2 (Mar. 4, 2020)

1 (“[U]nder the provisions of Government Code section 8571, I find that strict compliance with
2 various statutes and regulations specified in this order would prevent, hinder, or delay appropriate
3 actions to prevent and mitigate the effects of the COVID-19.”)⁷; Gavin Newsom, Executive Order
4 N-62-20, at PDF 1 (May 6, 2020) (same); Gavin Newsom, Executive Order N-66-20, at PDF 2
5 (May 29, 2020) (same). Order 38 therefore has no force under § 8571 and cannot authorize ER 1.

6 50. Second, § 8571 is not a broad grant of power to the Governor to suspend any statute
7 during an emergency, but only statutes in three categories: “regulatory statute[s]”; those that
8 “prescrib[e] the procedure for conduct of state business”; or “orders, rules, or regulations of any
9 state agency.” Cal. Gov’t Code § 8571. None of the statutes with which ER 1 conflicts fall into any
10 of these categories, and so Order 38 cannot save ER 1 from invalidity under Article VI, § 6(d), of
11 the California Constitution.

12 51. Third, even if § 8571 permitted the Governor to suspend all statutes with which
13 ER 1 conflicts, Order 38’s suspension is limited by its own terms to “statute[s] concerning civil or
14 criminal practice or procedure.” Order 38(3). The Judicial Council therefore may not rely on Order
15 38 to suspend Civil Code §§ 654 and 790–91, which do not concern practice or procedure but rather
16 recognize and codify substantive rights. For reasons set forth above, ER 1 conflicts with these
17 provisions.

18 52. Fourth, § 8571 requires the Governor to decide which statutes to suspend; he may
19 not turn that choice over to the Judicial Council, based on whatever emergency rules the Judicial
20 Council might consider, as Order 38 purports to do.

21 53. “When the Legislature has made clear its intent that one public body or official is to
22 exercise a specified discretionary power, the power is in the nature of a public trust and may not be
23 exercised by others in the absence of statutory authorization.” *Bagley v. City of Manhattan*, 18 Cal.
24 3d 22, 24 (1976) (en banc) (citations omitted), *superseded by statute on other grounds as stated in*
25 *San Diego Hous. Comm’n v. Pub. Emp’t Relations Bd.*, 246 Cal. App. 4th 1 (2016). Such
26 authorization must be “express[.]” *City of Los Angeles v. Sup. Ct.*, 56 Cal. 4th 1086, 1094 (2013).

27 _____
28 ⁷ <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

1 54. Section 8571 empowers only the Governor to suspend statutes, and no statute
2 permits the Governor to delegate the choice of statutes to suspend to the Judicial Council. *Compare*
3 *with* Cal. Gov't Code § 8587 (“[T]he Governor may delegate any of the powers vested in him or
4 her under this chapter to the secretary [of emergency services] except the power to make, amend,
5 and rescind orders and regulations, and the power to proclaim a state of emergency.”). Indeed,
6 § 8571’s declaration requirement necessarily requires the *Governor* to decide which statutes
7 impede recovery and should be suspended.

8 55. Therefore, by transferring the choice of statute to suspend to the Judicial Council,
9 Order 38 violates the ESA and overrides the Legislature’s will in violation of the separation of
10 powers. *See County of Mendocino*, 13 Cal. 4th at 53 (“The executive branch . . . may not disregard
11 legislatively prescribed directives . . .”); *Knudsen Creamery Co. of Cal. v. Brock*, 37 Cal. 2d 485,
12 492 (1951) (Executive officers may not “vary or enlarge the terms or conditions” of their statutory
13 power. (quoting *Boone v. Kingsbury*, 206 Cal. 148, 161 (1928))). The Judicial Council therefore
14 could not have issued ER 1 in reliance on Order 38’s delegated suspension of contrary statutes.

15 56. Fifth, suspensions under § 8571 are valid only “[d]uring a state of war emergency
16 or a state of emergency.” Cal. Gov’t Code § 8571. As a result, when the Governor sunsets the
17 declaration of emergency, suspended statutes will automatically return to effect. The Judicial
18 Council therefore cannot rely on Order 38 to sustain ER 1 for 90 days beyond the end of the declared
19 emergency.

20 ***Emergency Rule 1 Is Ultra Vires***

21 57. The Judicial Council may issue only rules “for court administration, practice and
22 procedure.” Cal. Const. art. VI, § 6(d). It may also “perform other functions prescribed by statute.”
23 *Id.* As a result, “in the absence of legislative authorization,” the Council may adopt no “rules
24 governing substantive matters.” *People v. Wright*, 30 Cal. 3d 705, 711–12 (1982).

25 58. When considering the procedural or substantive nature of a legal provision, courts
26 examine its effect. *See, e.g., Tapia v. Sup. Ct.*, 53 Cal. 3d 282, 289 (1991) (holding, in context of
27 retroactivity analysis, the determination of a statute’s substantive or procedural nature turns on “the
28 law’s effect, not its form or label”); *see also Duran v. U.S. Bank Nat’l Ass’n*, 59 Cal. 4th 1, 40

1 (2014) (“Procedural innovation must conform to the substantive rights of the parties.”); *Morris v.*
2 *Pac. Elec. Ry. Co.*, 2 Cal. 2d 764, 768 (1935) (holding that “the Legislature may not, under pretense
3 of regulating procedure . . . , deprive a party of a substantive right, such as a good cause of action
4 . . . which existed theretofore”).

5 59. By blocking all evictions unless an individual court grants an exception, “in its
6 discretion” and pursuant to unspecified procedures and standards, ER 1 has the effect of destroying
7 property owners’ right to re-entry. It is therefore a substantive rule, not one “for court
8 administration, practice and procedure.” Cal. Const. art. VI, § 6(d).

9 60. The Judicial Council also did not issue ER 1 pursuant to its “other functions
10 prescribed by statute.” *Id.*

11 61. Therefore, ER 1 is ultra vires of the Judicial Council’s powers under Article VI,
12 § 6(d), of the California Constitution.

13 **PRAYER FOR RELIEF**

14 WHEREFORE, Petitioners pray for relief as follows:

15 1. For a peremptory writ of mandate directing the Judicial Council to rescind
16 Emergency Rule 1.

17 2. For compensatory damages pursuant to Code of Civil Procedure § 1095.

18 3. For an award of attorneys’ fees and costs pursuant to Code of Civil Procedure
19 § 1021.5, or other authority as appropriate.

20 4. For any other relief that the Court determines to be warranted.

21 DATED: June 15, 2020.

22 Respectfully submitted,

23 DAMIEN M. SCHIFF
24 MICHAEL A. POON
25 OLIVER J. DUNFORD

26 By s/Damien M. Schiff
27 DAMIEN M. SCHIFF

28 Attorneys for Petitioners

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VERIFICATION

I, Michael A. Poon, declare:

I am an attorney for Petitioners Peggy Christensen and Peter Martin in this action. Petitioners are absent from the counties where I and the other attorneys for Petitioners maintain our offices, and I submit this verification on behalf of Petitioners for that reason. Cal. Code Civ. Proc. § 446(a). I have read the foregoing Verified Petition for Peremptory Writ of Mandate. I am informed and believe, and on that ground allege, that the matters stated in that pleading are true.

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

DATED: June 15, 2020.



MICHAEL A. POON