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# California Constitutional Law: The Emergency Police Power

By DANIEL H. BROMBERG\*

## Introduction

THE COVID-19 PANDEMIC created the greatest public health crisis in a century. In response, Gavin Newsom, the governor of California, made unprecedented use of the emergency powers granted by the California Emergency Services Act (“ESA”),<sup>1</sup> including its rarely used section 8627, which grants the Governor authority to exercise “all police power vested in the state.”<sup>2</sup> In the *Gallagher* case,<sup>3</sup> the California Court of Appeal became the first, and so far only, appellate court to consider the Governor’s emergency police power. It held that section 8627 grants the Governor authority to exercise broad, quasi-legislative power during emergencies and that this delegation of authority is constitutional.<sup>4</sup>

*Gallagher* was correct in holding both that the ESA grants the Governor broad emergency power, and that this grant is constitutional. The decision, however, misconstrued the scope of the Governor’s emergency police power. In particular, it missed two restrictions—the nexus and practicability requirements—that the ESA imposes on the Governor’s exercise of the emergency police power.<sup>5</sup> In addition, the decision mistakenly asserted that this power may be exercised for only

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\* Partner at Pillsbury Winthrop Shaw Pittman LLP, a senior research fellow at the California Constitution Center at the University of California, Berkeley School of Law, and the Director of the California Appellate Advocacy Program at the Center for Litigation and Courts at UC Hastings Law. The opinions expressed in this Article are stated solely in the author’s academic capacity.

1. California Emergency Services Act, CAL. GOV’T CODE §§ 8550–8668 (2021).
2. *Id.* § 8627.
3. *Newsom v. Cal. Superior Court (Gallagher)*, 278 Cal. Rptr. 3d 397, 410 (Ct. App. 2021). The underlying case was *Gallagher v. Newsom*, and the writ petition in the Court of Appeal was *Newsom v. Cal. Superior Court*. The case will be referred to as *Gallagher*.
4. *Id.* at 406–10.
5. See Gov’t § 8567(c) (stating that, when practicable, orders and regulations should be prepared in advance of an emergency); *id.* § 8627 (stating that the Governor has the authority to exercise police power to serve the purpose of the chapter).

one purpose and failed to recognize the other purposes expressly authorized by the statute.<sup>6</sup> These mistakes did not affect the validity of the executive orders at issue in *Gallagher* or the constitutionality of the emergency police power delegated to the Governor. However, these mistakes may affect the Governor's authority to take action in future emergencies, and therefore these aspects of *Gallagher* should not be followed.

Because *Gallagher's* mistakes reflect unawareness of the origin and development of the Governor's emergency police power, Part I traces the history of that power and the ESA more generally. Part II analyzes *Gallagher's* interpretation of the scope of this emergency police power. This Part concludes that the decision failed to recognize the nexus and practicability requirements limiting the exercise of that power, and that it interpreted the purposes of the ESA too narrowly. Finally, Part III addresses the constitutionality of the emergency police power as properly interpreted. This Part concludes that the Governor's emergency police power satisfies the non-delegation doctrine in light of the restrictions imposed on its use and the safeguards against abuse of that power.

## I. The Origin and Development of the Governor's Emergency Police Power

Little has been written about the origin of the Governor's emergency police power granted by the ESA or, indeed, about the ESA in general. Even though the statute was enacted more than fifty years ago, the California Supreme Court has considered the ESA only once, in a case addressing a tangential issue,<sup>7</sup> and few lower court decisions address it.<sup>8</sup> Nor is there any treatise or law review article devoted to

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6. *Gallagher*, 278 Cal. Rptr. 3d at 408.

7. *See Macias v. California*, 897 P.2d 530, 540 (Cal. 1995) (holding that pesticide manufacturers have no duty to warn about alleged defects in warnings provided by the state).

8. Before *Gallagher*, only nine or so published California Court of Appeals decisions, none of which discussed the constitutionality of the Governor's emergency powers, addressed the ESA. *See Joannou v. City of Rancho Palos Verdes*, 162 Cal. Rptr. 3d 158, 164–65 (Ct. App. 2013); *Cal. Corr. Peace Officers' Ass'n v. Schwarzenegger*, 77 Cal. Rptr. 3d 844, 854 (Ct. App. 2008); *Thousand Trails, Inc. v. Cal. Reclamation Dist. No. 17*, 21 Cal. Rptr. 3d 196, 202 (Ct. App. 2004); *City of Morgan Hill v. Bay Area Air Quality Mgmt. Dist.*, 13 Cal. Rptr. 3d 420, 430 (Ct. App. 2004); *Soto v. State*, 65 Cal. Rptr. 2d 11, 12–13 (Ct. App. 1997); *Adkins v. State*, 59 Cal. Rptr. 2d 59, 64–65 (Ct. App. 1996); *LaBadie v. State*, 256 Cal. Rptr. 604, 605–06 (Ct. App. 1989); *Farmers Ins. Exch. v. State*, 221 Cal. Rptr. 225, 228–29 (Ct. App. 1985); *Martin v. Municipal Court of Santa Clara Cnty.*, 196 Cal. Rptr. 218, 221 (Ct. App. 1983).

the ESA, much less any in-depth analysis of the emergency powers it confers. The history of the Governor's emergency police power is important, however, because it illuminates the purpose and scope of the power.

### A. The War Powers Act

The emergency police power granted by the ESA originated in World War II. In January 1943, during a special session called by then-Governor Earl Warren, the Legislature passed the War Powers Act.<sup>9</sup> After the December 1941 attack on Pearl Harbor, California experienced an “invasion fever,” in which numerous sightings of Japanese aircraft and naval ships were reported.<sup>10</sup> While most sightings were false, after Pearl Harbor there was a serious threat of Japanese attacks on the West Coast, particularly on aircraft and ship building facilities.<sup>11</sup> Indeed, in February 1942, a Japanese submarine attacked an oil refinery in Santa Barbara, California,<sup>12</sup> and later that year the federal government was concerned about reprisals for the Doolittle raid on Tokyo.<sup>13</sup>

The War Powers Act was enacted to give the Governor and other California officials “certain emergency war powers” needed “to defend the State, protect the public peace, health, and safety and preserve the lives and property of the people of the State” in case of an enemy act.<sup>14</sup> The Act authorized the Governor to proclaim a “state of extreme emergency” in areas facing “conditions of extreme peril to the safety of persons and property” from enemy attacks, air raids, sabotage, or other causes beyond the capability of local officials to combat.<sup>15</sup>

During a “state of extreme emergency,” the War Powers Act granted the Governor several emergency powers. First, the Act granted the Governor emergency authority to suspend and temporarily replace public officials. In addition to requiring state and local

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9. California War Powers Act, CAL. MIL. & VET. CODE §§ 1500–1601 (Deering 1943), *repealed by* California Disaster Act, CAL. MIL. & VET. CODE §§ 1500–1602 (Deering 1954), *itself repealed by* California Emergency Services Act, CAL. GOV'T CODE §§ 8550–8668 (2021).

10. [I PLANS AND EARLY OPERATIONS JANUARY 1939 TO AUGUST 1942] U.S. OFF. A.F. HIST., THE ARMY AIR FORCES IN WORLD WAR II 278–79 (Wesley F. Craven & James L. Cate eds., 1948).

11. *Id.* at 272–73, 280.

12. *Id.* at 282.

13. *Id.* at 298–99.

14. California War Powers Act, CAL. MIL. & VET. CODE § 1500 (Deering 1943).

15. *Id.* §§ 1505, 1580.

officials to comply with lawful rules, regulations, and orders issued by the Governor during an emergency, the Act authorized the Governor to “temporarily suspend” any official refusing or willfully neglecting to obey such rules, regulations, and orders.<sup>16</sup> And it authorized the Governor to “designate the person who shall carry” on the office in question for the duration of the suspension.<sup>17</sup> Second, the Act granted the Governor emergency authority to “commandeer or utilize any private property or personnel” needed to respond to the emergency, albeit subject to payment of the reasonable value of the persons or property commandeered.<sup>18</sup> Third, the Act granted the Governor emergency police power: During a state of extreme emergency, it gave the Governor “complete authority” over state agencies and—even more important—the right to exercise “all police power vested in the State by the Constitution and the laws of the State of California . . . .”

During a period of a state of extreme emergency the Governor shall have complete authority over all agencies of the State Government and the right to exercise within the protective regions designated all police power vested in the State by the Constitution and the laws of the State of California, in order to effectuate the purposes of this chapter.<sup>19</sup>

The primary restriction on this emergency police power was a nexus requirement: The Governor could exercise the state’s police power during emergencies “to effectuate the purposes of this chapter,” that is, the War Powers Act.<sup>20</sup>

The War Powers Act contained other safeguards as well. It required any rules, regulations, or orders issued in exercising this power to be in writing and filed with the Secretary of State and the relevant county clerks.<sup>21</sup> Even more important, the emergency police power could be exercised only “within the protective regions” designated by

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16. *Id.* § 1584.

17. *Id.*

18. *Id.* § 1585. The compensation requirement was included because at the time it was not believed that takings claims for just compensation could be based on exercises of the police power. *See, e.g., Freeman v. Contra Costa Cnty. Water Dist.*, 95 Cal. Rptr. 852, 855 (Ct. App. 1971) (“[T]he constitutional guarantee of just compensation attached to an exercise of the power of eminent domain does not extend to the state’s exercise of its police power . . . .”).

19. California War Powers Act, CAL. MIL. & VET. CODE § 1581 (Deering 1943).

20. *Id.*

21. *Id.* (“Such rules, regulations, and orders shall be in writing and shall take effect upon their issuance. They shall be filed in the office of the Secretary of State as soon as possible after their issuance. A copy of such rules and orders shall likewise be filed in the office of the county clerk of each county . . . wherein a state of extreme emergency has been proclaimed.”).

an emergency proclamation and only for the duration of the emergency.<sup>22</sup> And the War Powers Act gave the Legislature an emergency brake, which allowed it to terminate a state of extreme emergency by concurrent resolution.<sup>23</sup>

As the War Powers Act expressly reserved the Governor’s right to exercise his inherent powers, including the power “to proclaim the existence of martial law,”<sup>24</sup> it is possible that the Legislature granted broad emergency powers in part to avoid imposing martial law. Martial law is painful medicine: “[W]ithin districts or localities where ordinary law no longer adequately secures public safety and private rights,”<sup>25</sup> it allows government to be carried on “by military agencies, in whole or in part, with the consequent suppression of some or all civil agencies.”<sup>26</sup> By granting the Governor the ability to proclaim a state of extreme emergency and broad powers to deal with such emergencies, the War Powers Act created a way to respond to emergencies without declaring martial law and relinquishing civil authority.

Although the War Powers Act was primarily focused on assisting the war effort, it also granted the Governor power to proclaim a state of extreme emergency based on “other cause[s] such as a fire, flood, storm, epidemic or earthquake . . . .”<sup>27</sup> In addition, it granted the Governor the same emergency powers—including “all police power vested in the State”—to deal with such civilian emergencies.<sup>28</sup>

## B. The California Disaster Act

Because the War Powers Act was temporary and intended to terminate at the conclusion of World War II,<sup>29</sup> in June 1945, the Legislature replaced it with the California Disaster Act, which was permanent in nature.<sup>30</sup> This statute retained the War Powers Act’s key provisions,

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22. *Id.* (“Whenever the period of a state of extreme emergency has been ended by either of the methods provided for in this chapter, the rules, regulations or orders promulgated or issued by the Governor during such period shall be of no further force and effect.”).

23. *Id.* § 1506.

24. *Id.* § 1588.

25. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 142 (1866).

26. FREDERICK BERNAYS WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 10 (The Military Service Publishing Co. 1940) (emphasis omitted); *see also* WILLIAM E. BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW ¶ 357, at 371 (2d ed. 1904) (“Martial law is the rule which is established when civil authority in the community is made subordinate to the military . . .”).

27. California War Powers Act, CAL. MIL. & VET. CODE § 1505 (Deering 1943).

28. *Id.* §§ 1581–1585.

29. *Id.* §§ 1503–1503.5.

30. California Disaster Act, CAL. MIL. & VET. CODE §§ 1500–1602 (Deering 1954).

including the provision granting the Governor emergency police power.<sup>31</sup> A major amendment in 1950 shifted the California Disaster Act's focus towards preparation<sup>32</sup> and, most importantly for present purposes, introduced the practicability requirement, which demands a relaxed form of unforeseeability.

### 1. The Original Enactment

Far from radically changing the War Powers Act, the California Disaster Act declared that the State should take advantage of "war-time experience" and the "implements and methods, organizations and arrangements" developed during World War II.<sup>33</sup> Accordingly, other than effectively abolishing several positions and offices created by the War Powers Act by making the Governor the successor to them,<sup>34</sup> the California Disaster Act largely tracked its predecessor and retained its key provisions concerning emergency powers.

For example, other than excluding labor controversies, the California Disaster Act contains essentially the same definition of "state of extreme emergency."<sup>35</sup> In addition, it granted the Governor largely the same powers to commandeer property<sup>36</sup> and to temporarily suspend and replace officials.<sup>37</sup>

Even more important, the California Disaster Act reenacted its predecessors' grant of emergency police power. The Act granted the Governor the same "complete authority" over state agencies and the right to exercise "all police power vested in the State" of California, subject to the same nexus requirement that this power be used "to effectuate the purposes" of the statute:

During a period of a state of extreme emergency the Governor shall have complete authority over all agencies of the State Government and the right to exercise within the are or regions designated all police power vested in the State by the Constitution and the laws

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31. *Id.* § 1581.

32. *Id.* § 1500.

33. *Id.*

34. *See, e.g., id.* §§ 1530, 1540–1541 (eliminating the directors of civilian defense and civilian protection services and making the Governor their successor).

35. *Id.* § 1505.

36. *Id.* §§ 1585–1586. Initially, the California Disaster Act created some confusion over the status of the commandeering provision by repealing the War Powers Act's provision authorizing commandeering, 1945 Cal. Stat. 1973, while retaining the provision describing procedures for obtaining compensation for commandeering, 1945 Cal. Stat. 1980. The Legislature dispelled this confusion by amending the Act to restore the provision expressly authorizing commandeering, 1951 Cal. Stat. 3262.

37. *Id.* § 1584.

of the State of California, in order to effectuate the purposes of this chapter.<sup>38</sup>

The California Disaster Act also granted the Governor the same authority to issue rules, regulations, and orders subject to the same requirements.<sup>39</sup> For example, the Act required that such directives be publicized and in writing, and that they terminate at the end of the emergency.<sup>40</sup> The Act also retained the emergency brake allowing the Legislature to terminate an emergency by concurrent resolution.<sup>41</sup>

The California Disaster Act, however, imposed a new safeguard: It provided for automatic termination of the state of extreme emergency if the Governor failed either to call a meeting of the Disaster Council within seven days, or to convene the Legislature within thirty days, of proclamation.<sup>42</sup>

## 2. The Civil Defense Act Amendments

In 1950, in response to federal pressure to improve civil defense planning, the Legislature amended the California Disaster Act.<sup>43</sup> Following World War II, the military concluded that civil defense operations had been deficient,<sup>44</sup> and the federal government published a civil defense plan requiring increased coordination and planning by the states.<sup>45</sup> To bring California “into conformity with the federal plan,” the California Legislature passed the Civil Defense Act and related amendments to the California Disaster Act.<sup>46</sup>

In addition to expanding the Governor’s authority to cooperate with the federal government and coordinate with other states,<sup>47</sup> the Civil Defense Act and later amendments created a new organization, the Office of Civil Defense,<sup>48</sup> and granted the Governor authority to make advance preparations, conduct training, and issue rules prior to formal proclamation of an emergency.<sup>49</sup>

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38. *Id.* § 1581.

39. *Id.*

40. *Id.*

41. *Id.* § 1506.

42. *Id.* § 1589.

43. *Id.* §§ 1502.5–1503, 1508–1509, 1518–1518.3, 1535–1535.6.

44. See PATRICK S. ROBERTS, *Disasters and the American State* 47–48 (2013).

45. *Id.* at 52.

46. California War Powers Act, CAL. MIL. & VET. CODE §§ 1502.5–1503, 1508–1509, 1518–1518.3, 1535–1535.6 (Deering 1943).

47. *Id.* §§ 1508, 1535.2, 1535.5, 1582(b).

48. *Id.* §§ 1518–1518.3.

49. *Id.* §§ 1509.7, 1535.1, 1535.3–1535.4, 1541–1542, 1562, 1582.



In connection with this new authority to issue rules absent an emergency, the Legislature added a new restriction on the Governor's emergency police power: the practicability requirement.<sup>50</sup> This requirement obligated the Governor to deal with foreseeable problems prior to an emergency by imposing a duty to prepare orders in advance of an emergency "whenever practicable":

In exercise [of the emergency police power, the Governor] is authorized to promulgate, issue and enforce rules, regulations and orders which he considers necessary for the protection of life and property. *Such rules, regulations and orders shall whenever practicable be prepared in advance of a state of extreme emergency* and the Governor shall cause widespread publicity and notice to be given such rules, regulations and orders. Rules, regulations and orders issued under the authority of this section and prepared in advance of a state of extreme emergency shall not become operative until the Governor proclaims a state of extreme emergency.<sup>51</sup>

### 3. The Subsequent Amendments

As Cold War concerns receded, the Legislature focused more on natural disasters, and it amended the California Disaster Act to provide separate authority to proclaim civilian disasters and granted new emergency powers to deal with such disasters.

In particular, the Legislature granted the Governor authority to proclaim a "state of disaster,"<sup>52</sup> which was defined as a condition of extreme peril other than a "war-caused disaster" beyond the capacity of local jurisdictions.<sup>53</sup> The Legislature also granted the Governor new powers for dealing with a state of disaster.<sup>54</sup> Although it did not grant emergency police power or the power to suspend and temporarily replace non-compliant officials, the Legislature granted the Governor power during a state of disaster to direct state agencies to perform "any and all activities" to mitigate disasters and to make available money "irrespective of the particular purpose for which the money was appropriated."<sup>55</sup> In addition, the Legislature granted power to sus-

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50. *Id.* § 1581.

51. *Id.* (emphasis added).

52. California Disaster Act, CAL. MIL. & VET. CODE §§ 1540, 1575 (Deering Supp. 1970).

53. *Id.* § 1505.

54. *Id.* §§ 1576–1577.

55. *Id.* § 1576; *see also* Cal. Disaster Act (Chap. 1024, Stats. 1945) Construed in Respect (1) to Orientation of State Agencies to Plan, and (2) to Continuity of Chap. 920, Stats. 1943 Pertaining to Volunteer Civilian Def. Workers, 6 Op. Cal. Att'y. Gen. 162, 164 (1945) (concluding that the Governor could assign state agencies tasks beyond their statutory authorization under the emergency police power).

pend regulatory statutes if strict compliance with them would “prevent, hinder or delay the mitigation of the disaster.”<sup>56</sup>

### C. The Emergency Services Act

In 1970, the California Legislature repealed the California Disaster Act and replaced it with the California Emergency Services Act, or ESA.<sup>57</sup> This change was prompted in part by the need to alter the civil service status of certain individuals to ensure eligibility for federal funds<sup>58</sup> and in part by the desire “to eliminate confusion existing as a result of a great many amendments” to the California Disaster Act.<sup>59</sup> While the resulting changes were “primarily technical in nature,”<sup>60</sup> the ESA made two important changes to the Governor’s emergency powers: (1) it modified the nexus requirement for exercising the Governor’s emergency police power during civilian emergencies, and (2) it imposed a duty on the Governor to terminate emergencies promptly.<sup>61</sup>

The ESA drew a sharp distinction between civilian and military emergencies, eliminating the potentially confusing overlap between the two in the California Disaster Act. It replaced the latter’s “state of extreme emergency,” which was both civilian and military, and “state of disaster,” which was only civilian, with a purely military “state of war emergency”<sup>62</sup> and a purely civilian “state of emergency.”<sup>63</sup> The ESA also clarified the Governor’s powers during military and civilian emergencies. It provided that in both, the Governor has the power to suspend statutes and to commandeer private property.<sup>64</sup> The ESA, however, limited the power to temporarily suspend and replace non-compliant officials to state of war emergencies.<sup>65</sup> And it granted other emergency powers—the authority to use state employees for “any and all activities” and to redirect appropriations “irrespective of the partic-

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56. California Disaster Act, CAL. MIL. & VET. § 1577 (Deering Supp. 1970).

57. Act of Sept. 19, 1970, ch. 1454, 1970 Cal. Stat. 2845.

58. *Id.* at 2870–71.

59. R. DALE DESTAFFANY, CAL. DISASTER OFF., GOVERNOR’S OFFICE ENROLLED BILL REPORT REQUEST – AB 560, at 1 (1970).

60. CAL. DEP’T OF FIN., ANALYSIS OF ASSEMB. BILL NO. 560, 1970 Reg. Sess. Cal. State Leg. (1970). Among other things, the ESA moved most of the California Disaster Act’s provisions from the Military and Veterans Code to the Government Code. *See also* California Emergency Services Act, CAL. GOV’T CODE §§ 8550–8668 (2021).

61. GOV’T §§ 8627, 8629.

62. *Id.* § 8558(a).

63. *Id.* § 8558(b).

64. *Id.* §§ 8571–8572.

65. *Id.* § 8621.

ular purpose for which the money was appropriated”—only in civilian emergencies.<sup>66</sup>

Even more pertinently, the ESA tightened the nexus requirement in civilian emergencies. Although the ESA moved the provisions concerning the issuance of emergency rules, regulations, and orders to a separate section,<sup>67</sup> it gave the Governor virtually the same emergency police power in state of war emergencies as the California Disaster Act had in states of extreme emergency.<sup>68</sup> For civilian emergencies, however, the ESA modified the Governor’s emergency police power by adding a new requirement to the nexus requirement: that the Governor exercise the police power only “to the extent he deems necessary . . . to effectuate the purposes” of the Act:

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*.<sup>69</sup>

The ESA also added a safeguard against abuse of the emergency power in civil emergencies. In addition to retaining the Legislature’s ability to terminate the emergency by joint resolution,<sup>70</sup> the ESA requires the Governor to terminate an emergency “at the earliest possible date that conditions warrant.”<sup>71</sup> This determination may be subject to judicial review: The one court of appeal decision to consider the issue held that this determination is subject to judicial review, but that decision was subsequently depublished.<sup>72</sup>

Although the Legislature later added numerous planning responsibilities and safeguards to the ESA,<sup>73</sup> the emergency powers granted

66. *Id.* § 8628.

67. *See id.* § 8567.

68. *Compare id.* § 8620 (giving the Governor “complete authority over all agencies of the state government,” the right to exercise “all police power vested in the state,” and authority to promulgate “orders and regulations” deemed “necessary for the protection of life and property”), *with* California Disaster Act, CAL. MIL. & VET. CODE § 1581 (Deering 1954) (giving the Governor “complete authority over all agencies of the State Government,” the right to exercise “all police power vested in the state,” and authority to promulgate “regulations and orders” deemed “necessary for the protection of life and property”).

69. Gov’t § 8627 (emphasis added).

70. *Id.* § 8629.

71. *Id.*

72. Nat’l Tax-Limitations Comm. v. Schwarzenegger, 8 Cal. Rptr. 3d 4, 13 (Ct. App. 2003) (depublished).

73. *See, e.g.*, 1972 Cal. Stat., ch. 1325, § 1 (codified at CAL. GOV’T CODE §§ 8574.1–8574.4) (oil spill planning); 1980 Cal. Stat., ch. 805, § 1 (codified at CAL. GOV’T CODE §§ 8574.7–8574.9) (toxic disaster planning); 1986 Cal. Stat., ch. 1503, § 1 (codified

by the statute—and the emergency police power in particular—remain essentially unchanged.<sup>74</sup>

## II. Scope of the Governor’s Emergency Police Power

Before the COVID-19 pandemic, California governors used the emergency police power granted by the ESA only sporadically and in limited ways that do not appear to have been controversial.<sup>75</sup> In response to the pandemic, however, Governor Newsom issued dozens of executive orders, many based on the emergency police power.<sup>76</sup> Many of those orders were controversial and prompted an array of legal

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at CAL. GOV’T CODE §§ 8574.11–8574.15) (hazardous substance emergency response training); 1987 Cal. Stat., ch. 1332, § 1 (codified at CAL. GOV’T CODE §§ 8589.8–8589.19) (firefighting equipment assistance); 1988 Cal. Stat., ch. 1206, § 1 (codified at CAL. GOV’T CODE §§ 8584–8584.1) (urban rescue preparation); 2000 Cal. Stat., ch. 698, § 1 (codified at CAL. GOV’T CODE § 8570.5 (agricultural disaster planning); 2002 Cal. Stat., ch. 1091, § 2 (codified at CAL. GOV’T CODE §§ 8592–8592.5) (public safety information); 2016 Cal. Stat., ch. 508, § 2 (codified at CAL. GOV’T CODE §§ 8592.30–8592.45) (cybersecurity planning); 2019 Cal. Stat., ch. 391, § 4 (codified at CAL. GOV’T CODE §§ 8654.2–8654.10) (wildfire mitigation preparation).

74. GOV’T §§ 8571–8572, 8621, 8627–8628.

75. Office of Governor Ronald Reagan, Regulations for California’s Gasoline Emergency, (Feb. 28, 1974), <https://www.library.ca.gov/wp-content/uploads/GovernmentPublications/executive-order-proclamation/220-222.pdf> [<https://perma.cc/9U9G-PWDZ>] (the first apparent use of the ESA’s emergency police power was in 1974, four years after the statute’s enactment, when Governor Reagan issued emergency regulations during a gas shortage directing, among other things, when consumers could fill up their gas tanks); Office of Governor Edmund G. Brown Jr., Regulations for California’s Gasoline Emergency, (May 8, 1979), <https://www.library.ca.gov/wp-content/uploads/GovernmentPublications/executive-order-proclamation/10938-10943.pdf> [<https://perma.cc/SE9W-QJLR>] (in his first stint in office, Governor Jerry Brown issued similar emergency regulations); Office of Governor Edmund G. Brown Jr., Mediterranean Fruit Fly Emergency Proclamation Order No. 2 at 3, (July 23, 1981), <https://www.library.ca.gov/wp-content/uploads/GovernmentPublications/executive-order-proclamation/9783-9787.pdf> [<https://perma.cc/4BXB-2KMR>] (during the medfly infestation in 1981, Governor Brown also issued an emergency order requiring residents to remove various fruits from quarantined areas); Office of Governor Pete Wilson, Executive Order W-69-93 ¶¶ 1–2, (Nov. 1, 1993), <https://www.library.ca.gov/wp-content/uploads/GovernmentPublications/executive-order-proclamation/4046.pdf> [<https://perma.cc/PN3N-NK56>]; Office of Governor Arnold Schwarzenegger, Executive Order S-17-09 ¶¶ 1–2, (Aug. 31, 2009), <https://www.library.ca.gov/wp-content/uploads/GovernmentPublications/executive-order-proclamation/38-S-17-09.pdf> [<https://perma.cc/44UF-HPXJ>]; Office of Governor Edmund G. Brown, Jr., Executive Order B-43-17 ¶ 6, (Oct. 18, 2017), <https://www.library.ca.gov/wp-content/uploads/GovernmentPublications/executive-order-proclamation/39-B-43-17.pdf> [<https://perma.cc/9QMK-FBC6>] (several governors have issued orders permitting mail-in or provision balloting in areas affected by wildfires).

76. *Executive Orders and Proclamations*, CAL. STATE LIBRARY, <https://www.library.ca.gov/government-publications/executive-orders?SelectedGovernor=54> [<https://perma.cc/CE6H-9WG8>] (consisting of executive orders issued by Governor Newsom, starting with Order N-25-20).

challenges.<sup>77</sup> Only a few of those challenges, however, raised questions about the Governor's emergency police power. Most of the cases were decided on other grounds, and the question of the Governor's emergency police power was not even reached.<sup>78</sup> The lone exception was *Gallagher*, where for the first time, the Court of Appeal for the Third District considered the scope and constitutionality of the Governor's emergency police power.

Unlike most COVID-19 restrictions that were challenged,<sup>79</sup> the executive orders at issue in *Gallagher* did not restrict public gatherings or business operations. Instead, the orders concerned voting procedures in the November 2020 election and were issued at the request of congressional leaders pending legislation concerning the election.<sup>80</sup> Two Republican Assembly Members, James Gallagher and Kevin Kiley, challenged the second order in Sutter County Superior Court on the ground that it either exceeded the Governor's authority or, alternatively, that the authority delegated to the Governor was unconstitu-

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77. See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (discussing Free Exercise Clause); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (discussing Free Exercise Clause); *BK Salons, LLC v. Newsom*, No. 2:21-370, 2021 U.S. Dist. LEXIS 147226 (E.D. Cal. Aug. 5, 2021) (granting motion to dismiss substantive due process, procedural due process, Eighth Amendment, and freedom of assembly claims); *Mission Fitness Ctr. v. Newsom*, No. 2:20-09824, 2021 U.S. Dist. LEXIS 89055, at \*6–10 (C.D. Cal. May 10, 2021) (discussing Takings Clause, substantive due process, and procedural due process); *Calm Ventures, LLC v. Newsom*, No. 20-11501, 2021 U.S. Dist. LEXIS 77298, at \*4–7 (C.D. Cal. Mar. 25, 2021) (discussing substantive due process, procedural due process, equal protection, and freedom of assembly); *Steel MMA, LLC v. Newsom*, No. 21-49, 2021 U.S. Dist. LEXIS, at \*2–4 (S.D. Cal. Mar. 1, 2021) (discussing free speech, equal protection, and procedural due process); *Six v. Newsom*, 462 F. Supp. 3d 1060, 1069–75 (C.D. Cal. 2020) (discussing right to travel, substantive due process, freedom of association, equal protection, and procedural due process); *PCG-SP Ventures I v. Newsom*, No. 20-1138, 2020 U.S. Dist. LEXIS 137155, at \*6–10 (C.D. Cal. June 23, 2020) (discussing right to labor, substantive due process, vagueness, and Takings Clause).

78. See *Ghost Golf, Inc. v. Newsom*, No. 20CECG03170, at 3 (Cal. Super. Ct. Fresno Cnty. Jan. 29, 2021) (order denying preliminary injunction based on the California Department of Public Health's authority to issue the restrictions in question), *appeal denied*, *Ghost Golf, Inc. v. Newsom*, No. F082357, 2021 WL 3483271 (Cal. Ct. App. Aug. 9, 2021); *Cnty. of San Bernardino v. Newsom*, No. S266106 (Cal. Jan. 13, 2021) (summarily denying writ petition); *Burfitt v. Newsom*, No. BCV-20-102267, 2020 WL 9763083 (Cal. Super. Ct. Kern Cnty. Dec. 2, 2020) (granting temporary restraining order on alternative ground).

79. See, e.g., *S. Bay United Pentecostal Church*, 141 S. Ct. at 716 (considering restrictions on indoor worship services); *Mission Fitness Ctr.*, 2021 WL 1856552, at \*3 ("stay-at-home" order prohibiting fitness centers and other non-essential businesses from operating in-person at beginning of pandemic); *Calm Ventures, LLC*, 2021 WL 1502657, at \*1 (discussing spacing and capacity requirements on restaurants).

80. *Newsom v. Cal. Superior Court (Gallagher)*, 278 Cal. Rptr. 3d 397, 400 (Ct. App. 2021) (discussing Cal. Exec. Order N-64-20 (May 8, 2020) and Cal. Exec. Order N-67-20 at 1–2 (June 3, 2020)).

tional.<sup>81</sup> After an initial temporary restraining order was vacated because it was issued without proper notice to the Governor,<sup>82</sup> the trial court issued an order declaring that the ESA “does not authorize the Governor to make or amend statutes” and enjoined the Governor from issuing executive orders.<sup>83</sup> The appellate court reversed this order and directed the trial court to enter judgment in the Governor’s favor.<sup>84</sup>

In making this ruling, the appellate court considered both the scope and the constitutionality of the Governor’s emergency police power. First, the court ruled that, 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.”<sup>85</sup> Second, the court found that this emergency police power was not an unconstitutional delegation of legislative authority.<sup>86</sup> Although the court found that the ESA does not impose any express standards on exercise of that power,<sup>87</sup> it implied a requirement that the power be exercised to further the purpose of the ESA, which the court determined was to provide a coordinated response to emergencies.<sup>88</sup> The court also noted that the ESA imposes several safeguards on the exercise of the emergency police power, including, most importantly, that the Governor terminate the state of emergency at the earliest possible date and that the Legislature may terminate an emergency by passing a concurrent resolution.<sup>89</sup>

*Gallagher* was correct in holding that the executive orders challenged in that case were valid and constitutional. As the court recognized, when an emergency has been proclaimed under the ESA, the “police power” delegated to the Governor plainly includes quasi-legislative authority,<sup>90</sup> a conclusion supported—and, indeed, compelled—by the power’s World War II origins.<sup>91</sup> However, the court misinterpreted the scope of that power. Contrary to the court’s assertion, the

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81. *Id.* at 400–01.

82. *Id.* at 399, 401.

83. *Id.* at 402.

84. *Id.* at 410.

85. *Id.* at 406.

86. *Id.* at 406–10.

87. *Id.* at 407 (discussing CAL. GOV’T CODE § 8627).

88. *Id.* at 408.

89. *Id.* at 408–09; *see also id.* at 409–10 (noting that the ESA requires that orders be in writing and publicly noticed).

90. *See supra* text accompanying note 4.

91. *See supra* text accompanying notes 19–21.

emergency police power granted by the ESA is subject to two express restrictions: (1) a nexus requirement, which is similar to the restriction implied by the court; and (2) a practicability requirement, which imposes an additional restriction. In addition, the ESA's purposes extend beyond merely coordinating emergency responses and include, among other things, mitigating the impact of a disaster.<sup>92</sup>

### A. Nature of the Emergency Police Power

As the *Gallagher* court recognized, “police power” is a well-established term of art that refers to the authority to regulate individual conduct to promote public health, safety, morals, and general welfare.<sup>93</sup> Dictionaries define the term to mean “[t]he inherent authority of a government to impose restrictions on private rights for the sake of public welfare, order, and security.”<sup>94</sup> The U.S. Supreme Court has used the term to refer to “the powers of government inherent in every sovereignty,”<sup>95</sup> including, most pertinently, the “power to govern men and things within the limits of its dominion.”<sup>96</sup> California courts similarly have defined the police power as “the power inherent in a gov-

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92. *Gallagher* also correctly noted that the ESA's termination provisions provide a safeguard against abuse of the emergency police power granted by the statute. It failed, however, to recognize another safeguard: the statute's definition of emergency. While the term “emergency” is used colloquially to describe a vast range of problems, the ESA defines a “[s]tate of emergency” as the “duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state . . . which, by reason of their magnitude, are or are likely to be beyond the control” of local governments and regions. CAL. GOV'T CODE § 8558(b) (2021). The statute also provides a number of examples indicating the types of conditions that create disasters or perils of this magnitude, *id.*, and the Governor's proclamation that a “state of emergency” may be subject to judicial review. *See supra* text accompanying note 72.

93. *Gallagher*, 278 Cal. Rptr. 3d at 406.

94. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1358 (4th ed. 2006); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 1754 (Merriam-Webster Inc., 2002) (defining “police power” as “the inherent power of a government to exercise reasonable control over persons and property within its jurisdiction in the interest of the general security, health, safety, morals, and welfare except where legally prohibited (as by constitutional provision)”); *Police Power*, BLACK'S LAW DICTIONARY (11th ed. 2019) (“The inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice.”).

95. *Nebbia v. New York*, 291 U.S. 502, 524 (1934) (quoting *License Cases*, 46 U.S. (5 How.) 504, 583 (1847)).

96. *Id.* (quoting *License Cases*, 46 U.S. (5 How.) at 583); *see also* *Bond v. United States*, 572 U.S. 844, 853 (2014) (noting that the “broad authority to enact legislation for the public” is “often called a ‘police power’”).

ernment to enact laws within constitutional limits to protect the order, safety, health, morals and general welfare of society.”<sup>97</sup>

It should come as no surprise then that the emergency police power granted by the ESA has been understood to confer broad, quasi-legislative authority. When asked whether the Governor could order water rationing under the ESA, the Attorney General answered that the Governor could do so during a state of emergency “if the purpose . . . is to protect the order, safety, health, and general welfare of the society”—that is, an exercise of the police power.<sup>98</sup> Similarly, in *Macias v. State of California*, the California Supreme Court observed that under the ESA, “the State may exercise its sovereign authority to the fullest extent possible consistent with individual rights and liberties.”<sup>99</sup>

The Oregon Supreme Court has interpreted its emergency statute similarly. Like the ESA, the Oregon statute grants the State’s Governor the “right to exercise . . . all police powers vested in the state” during emergencies.<sup>100</sup> Construing this statute, the Oregon Supreme Court concluded that “[t]he term ‘police power’ refers to ‘the whole sum of inherent sovereign power which the state possesses, and, within constitutional limitations, may exercise for the promotion of the order, safety, health, morals, and general welfare of the public.’”<sup>101</sup>

This conclusion is confirmed—and, indeed, compelled—by the historical origin of the Governor’s emergency police power. As recounted earlier, the emergency police power granted in the ESA is directly from the War Powers Act passed in the midst of World War II. The language describing that power—that during an emergency, the Governor shall have “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”<sup>102</sup>—is virtually identical to the language in the

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97. *Lees v. Bay Area Pollution Control Dist.*, 48 Cal. Rptr. 295, 299 (Ct. App. 1965) (quoting *In re Rameriz*, 226 P. 914, 921 (Cal. 1924)); *see also* *Sacramentans for Fair Plan. v. City of Sacramento*, 250 Cal. Rptr. 3d 261, 269 (Ct. App. 2019) (“The police power is the right to enact and enforce laws to protect public health, safety, and welfare.”).

98. *Governor’s Power to Order Mandatory Rationing of Water*, 60 Op. Cal. Att’y Gen. 99, 103 (1977).

99. *Macias v. California*, 897 P.2d 530, 536–37 (Cal. 1995).

100. OR. REV. STAT. § 401.168(1) (2019).

101. *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 42 (Or. 2020) (quotations omitted).

102. CAL. GOV’T CODE § 8627 (2021).



War Powers Act.<sup>103</sup> Moreover, this is the power that the Legislature granted in order to enable the Governor to respond to enemy attacks,<sup>104</sup> including, among other things, ones involving atomic weapons.<sup>105</sup> There is no reason to think that the Legislature used the term police power in an unusually narrow fashion that hamstring the Governor's ability to respond to such potentially existential threats.

In arguing for a narrower construction, the *Gallagher* plaintiffs argued that the Governor's emergency police power should be interpreted narrowly to avoid doubt about its constitutionality.<sup>106</sup> As the court recognized, however, this principle applies only where a statute is ambiguous and susceptible to two different, but nonetheless plausible, interpretations.<sup>107</sup> In addition, the *Gallagher* plaintiffs failed to offer any reasonable alternative interpretation of the ESA's grant of "all police power vested in the state by the Constitution and laws of the State of California . . . ."<sup>108</sup> They asserted that the grant of all police power merely concentrates executive power in the Governor during emergencies.<sup>109</sup> But the plaintiffs failed to explain how that interpretation can be reconciled with the established—or, indeed, any—understanding of the term police power, much less why the Legislature would have thought such a limited grant sufficient to respond to enemy invasions and atomic bombs.

## B. Standards for Exercising the Emergency Police Power

While *Gallagher* correctly recognized the nature of the emergency police power that the ESA confers, it mistakenly concluded that "section 8627 does not set forth express standards" of the emergency police power.<sup>110</sup> In fact, the ESA expressly imposes two requirements: (1) a nexus requirement similar to the implied requirement recog-

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103. California War Powers Act, CAL. MIL. & VET. CODE § 1581 (Deering 1943) (granting "the right to exercise within the protective regions designated all police power vested in the State by the Constitution and the laws of the State of California").

104. See *supra* text accompanying notes 9–19, 29–35.

105. See California Disaster Act, CAL. MIL. & VET. CODE § 1505.5 (Deering 1954) (providing that a state of extreme emergency exists immediately "whenever this State is attacked by an enemy of the United States by the use of atomic weapons").

106. *Newsom v. Cal. Superior Court (Gallagher)*, 278 Cal. Rptr. 3d 397, 404–05 (Ct. App. 2021).

107. *Id.* (citing, among other cases, *People v. Gutierrez*, 324 P.3d 245 (Cal. 2014)); see also *People v. Leiva*, 297 P.3d 870, 875 (Cal. 2013) (holding that the canon of constitutional doubt applies only where a court is "faced with an ambiguous statute that raises serious constitutional questions").

108. Gov'T § 8627; see *Gallagher*, 278 Cal. Rptr. 3d at 405–06.

109. *Gallagher*, 278 Cal. Rptr. 3d 397.

110. *Id.* at 407.

nized by *Gallagher*, and (2) a practicability requirement, which *Gallagher* failed to recognize. Moreover, as the history of the Governor's emergency police power shows, the Legislature added these requirements to constrain the Governor's emergency police power.<sup>111</sup> Thus, the restrictions imposed on the Governor's emergency police power are in some respects broader and in some respects narrower than the court found.

### 1. The Nexus Requirement

In *Gallagher*, the court implied a nexus requirement into the emergency police power granted by section 8627.<sup>112</sup> The section, however, contains an express nexus requirement.<sup>113</sup> From its inception in the War Powers Act, the Governor's authority to exercise the police power has been subject to the nexus requirement; specifically that it be exercised "in order to effectuate the purposes of this chapter."<sup>114</sup> This same nexus requirement is included in the ESA: During both civilian and military emergencies, the statute grants the Governor the right to exercise the police power of the State "to effectuate the purposes of this chapter."<sup>115</sup>

In addition, the ESA imposes an additional requirement in civil emergencies. Section 8627 requires that the Governor exercise the State's police power "to the extent he deems necessary" to effectuate the ESA's purposes.<sup>116</sup> As the history of this provision shows, this necessity requirement was added to the nexus requirement in section 8627 to constrain the Governor's exercise of the emergency police power during civilian emergencies.<sup>117</sup> While both the War Powers Act and the California Disaster Act required that the Governor consider any rules, regulations, or orders promulgated necessary for the protection of life and liberty, there was no additional requirement that he deem any exercise of the police power necessary to effectuate the purposes of those statutes.<sup>118</sup> Nor is there any such restriction on the exercise of the police power in section 8620, which grants the Governor

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111. See *supra* text accompanying notes 39–42, 50–51, 61–72.

112. *Gallagher*, 278 Cal. Rptr. 3d at 407–08.

113. Gov'T § 8627.

114. California War Powers Act, CAL. MIL. & VET. CODE § 1581.

115. Gov'T §§ 8620, 8627.

116. *Id.* § 8627; see also *id.* § 8551 ("This chapter may be cited as the 'California Emergency Services Act.'").

117. See *supra* text accompanying notes 67–69.

118. See *supra* text accompanying notes 14, 20, 38–42.

that police power during state of war emergencies.<sup>119</sup> The necessity requirement applies only in civil emergencies, and under well-established principles of statutory interpretation, the Legislature's addition of this requirement must be given effect.<sup>120</sup>

However, it is not clear exactly how great a constraint this requirement imposes. By requiring that the Governor deem an order necessary to effectuate the ESA's purposes, section 8627 indicates that courts should afford some level of deference to the Governor's determination. In addition, "necessary" can describe a range of connections.<sup>121</sup> While necessary can be interpreted to mean "essential," it also can be interpreted to mean something that is "important or strongly desired."<sup>122</sup> Consequently, the necessity requirement should be interpreted, at least, to bar the Governor from using the emergency police power to pursue goals unrelated to the ESA's purposes, or to issue orders that only tangentially or insubstantially further those purposes.

## 2. The Practicability Requirement

*Gallagher* also failed to recognize a second express restriction on the Governor's power because it mistakenly concluded that section 8567 of the ESA imposes only procedural requirements on the Governor's emergency police power.<sup>123</sup> Section 8567 certainly contains procedural provisions requiring, for example, that emergency orders be in writing and widely publicized.<sup>124</sup> However, the section also contains substantive requirements. For example, it states that emergency orders "shall have the force and effect of law," "shall take effect immediately," and "shall be of no . . . force or effect" on termination of an emergency.<sup>125</sup> In addition, section 8567 states that orders "shall, whenever practicable, be prepared in advance of a state of war emergency or state of emergency."<sup>126</sup> As the Governor is required to exer-

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119. Gov'T § 8620.

120. *See, e.g.*, *Wells v. One2One Learning Found.*, 141 P.3d 225, 248 (Cal. 2006) (noting "the principle of statutory construction that interpretations which render any part of a statute superfluous are to be avoided").

121. *Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018).

122. *Id.*

123. *Newsom v. Cal. Superior Court (Gallagher)*, 278 Cal. Rptr. 3d 397, 406 (Ct. App. 2021).

124. Gov'T § 8567(a) (requiring "widespread publicity and notice" of emergency orders); *id.* § 8567(b) (requiring orders "be in writing"); *id.* § 8567(d) (filing).

125. Gov'T § 8567(a)–8567(b).

126. *Id.* § 8567(c). While the ESA does not contain the provision that orders issued in advance of an emergency shall not become operative until an emergency is proclaimed,

cise the emergency police power granted by the ESA in accordance with section 8567,<sup>127</sup> this means that the Governor may issue orders exercising the emergency police power only where it was not practicable to issue the orders in advance of the emergency.<sup>128</sup>

Here again, it is not clear exactly how great a constraint this requirement imposes. The requirement of practicability logically demands some form of foreseeability. Consequently, if the need for some action during an emergency is clearly foreseeable, section 8567 requires the Governor to take or order that action in advance of the emergency.<sup>129</sup> Thus, presumably, this bars the Governor from taking that same action during an emergency. However, the requirement that the action be “practicable” rather than just foreseeable appears designed to give the Governor substantial leeway for issuing orders tailored to the specifics of an emergency. For example, it is foreseeable that earthquake victims may need additional time to file their taxes and comply with other statutory deadlines, but the amount of time needed will depend on the severity of the earthquake. Thus, it remains to be seen how much a constraint the practicability requirement imposes on the emergency police power.

### C. Purposes of the Emergency Services Act

*Gallagher* also made another mistake in construing the Governor’s emergency police power. Pointing to the second paragraph of section 8550, the court asserted that the ESA’s sole purpose is to promote effective coordination of emergency relief efforts among different jurisdictions.<sup>130</sup> That is only partly right. Efficient coordination is *one* of the ESA’s purposes: As *Gallagher* noted, section 8550 “further declared to be the purpose” of the Act effective coordination of emergency services functions among the state, local jurisdictions, the federal government, and private agencies.<sup>131</sup> However, that is not the ESA’s *only* purpose.

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unlike its predecessor, the California Disaster Act, *see supra* text accompanying note 51 (quoting California Disaster Act, CAL. MIL. & VET. CODE § 1581 (Deering 1954)), there is no indication in the legislative history that this omission was intended to make a substantive change.

127. *Id.* § 8627 (“In exercise thereof, [the Governor] shall promulgate, issue and enforce such orders, as he deems necessary, in accordance with section 8567.”) (emphasis added).

128. *See id.*

129. *Id.* § 8567.

130. *Newsom v. Cal. Superior Court (Gallagher)*, 278 Cal. Rptr. 3d 397, 408 (Ct. App. 2021).

131. Gov’t § 8550.

Indeed, the ESA expressly states that it has multiple purposes. For example, section 8627 requires the Governor to exercise the State's emergency police power "to effectuate the purposes"—not the purpose—of the ESA.<sup>132</sup> The parallel grant of emergency police power during military emergencies likewise refers to the ESA's "purposes."<sup>133</sup> And section 8550 itself refers to providing mutual aid "in carrying out the purposes"—again, not the one purpose—of this chapter.<sup>134</sup>

The California Supreme Court also has recognized that the ESA has multiple "primary purposes."<sup>135</sup> Moreover, contrary to the *Gallagher* court's assertion that the ESA's sole purpose is to "promote effective coordination," courts repeatedly have recognized that a purpose of the ESA is "to protect and preserve health, safety, life, and property."<sup>136</sup>

Section 8550 supports this interpretation. Before *further* declaring effective coordination a purpose of the ESA, that section recognizes the State's responsibility "to mitigate the effects of natural, manmade, or war-caused emergencies" and "to protect the health and safety and preserve the lives and property of the people of the state."<sup>137</sup> In addition, section 8550 declares it necessary to grant the Governor and others emergency powers "[t]o ensure that preparations within the state will be adequate to deal with such emergencies."<sup>138</sup> Thus, one of the ESA's purposes is plainly to fulfill the State's responsibility during emergencies to protect health, safety, life, and property.

The history of the Governor's emergency police power also supports this interpretation. Both the War Powers Act and the California Disaster Act required the Governor to exercise the emergency police power "to effectuate the purposes of this chapter."<sup>139</sup> Neither statute, however, contained any suggestion that its sole purpose was to facilitate effective coordination. Indeed, the statement in section 8550, upon which the Court of Appeal for the Third District relied, appears to have been derived from the declaration at the beginning of the

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132. *Id.* § 8627 (emphasis added).

133. *Id.* § 8620.

134. *Id.* § 8550(d).

135. *Macias v. California*, 897 P.2d 530, 536 (Cal. 1995) (quotation omitted).

136. *Id.* (quoting *Martin v. Cal. Municipal Court*, 196 Cal. Rptr. 218, 220 (Ct. App. 1983)); *accord Cal. Corr. Peace Officers' Ass'n v. Schwarzenegger*, 77 Cal. Rptr. 3d 844, 850 (Ct. App. 2008); *Adkins v. State*, 59 Cal. Rptr. 2d 59, 64 (Ct. App. 1996).

137. Gov'T § 8550.

138. *Id.*

139. California Disaster Act, CAL. MIL. & VET. CODE § 1581 (Deering 1954); California War Powers Act, CAL. MIL. & VET. CODE § 1581 (Deering 1943).

Civil Defense Act of 1950,<sup>140</sup> which was *not* added to the California Disaster Act, the ESA's predecessor.<sup>141</sup> Nothing in the ESA's legislative history, however, suggests that the Legislature meant to eliminate its previously recognized purposes, much less amend it to have the sole purpose of effective coordination, thereby constricting the scope of the Governor's emergency police powers. To the contrary, the ESA's legislative history expressly states that the changes made by the statute were "primarily technical in nature."<sup>142</sup>

### III. Constitutionality of the Governor's Emergency Police Power

Although the court of appeal misconstrued the restrictions on the ESA's emergency police power, these mistakes to a certain extent balance each other out and, in any event, do not undermine its conclusion that this power is constitutional and does not violate California's non-delegation doctrine.<sup>143</sup>

California law recognizes that, as the most representative organ of government, the Legislature "should settle insofar as possible controverted issues of policy" and "must determine crucial issues whenever it has the time, information and competence to deal with them."<sup>144</sup> Nevertheless, it is well-settled that "the legislative branch of government . . . properly may delegate some quasi-legislative or rulemaking authority . . ."<sup>145</sup> An unconstitutional delegation of legis-

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140. *Newsom v. Cal. Superior Court (Gallagher)*, 278 Cal. Rptr. 3d 397, 408 (Ct. App. 2021); Civil Defense Act of 1950, 1950 Cal. Stat., ch. 3, § 2(b) ("It is further declared to be the purpose of this act and the policy of the State that all civil defense functions of this State be coordinated as far as possible with the comparable functions of the Federal Government including its various departments and agencies, of other states and localities, and of private agencies of every type, to the end that the most effective preparation and use may be made of the Nation's manpower, resources, and facilities for dealing with any disaster that may occur.").

141. Civil Defense Act, 1950 Cal. Stat., ch. 3, § 2(b); *see* California Disaster Act, CAL. MIL. & VET. CODE §§ 1500–1602 (Deering 1954); *see also* CAL. MIL. & VET. §§ 1500–1502, 1504–1505, 1507 (Deering 1954) (adding other provisions to the California Disaster Act).

142. CAL. DEP'T OF FINANCE, BILL ANALYSIS OF A.B. 560, 1970 Reg. Sess. Cal. State Leg. (1970).

143. State rather than federal constitutional law governs separation of powers in states and the applicable non-delegation of the doctrine. *See, e.g., Stop the Beach Nourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 719 (2010); *Marine Forests Soc'y v. Cal. Coastal Comm'n*, 113 P.3d 1062, 1075–77 (Cal. 2005).

144. *Clean Air Constituency v. Cal. State Air Res. Bd.*, 114 Cal. Rptr. 577, 587 (Ct. App. 1974).

145. *Carmel Valley Fire Prot. Dist. v. California*, 20 P.3d 533, 539 (Cal. 2001); *see also Parker v. Riley*, 113 P.2d 873, 877 (Cal. 1941) ("[A]lthough it is normally the duty of the legislature to make the determinations of fact upon the basis of which legislation is to

lative power occurs only if there is a “total abdication of that power”<sup>146</sup> and the Legislature confers “unrestricted authority to make fundamental policy decisions.”<sup>147</sup> Consequently, an unconstitutional delegation occurs only where the Legislature “(1) leaves the resolution of fundamental policy issues to others, or (2) fails to provide adequate direction for the implementation of that policy.”<sup>148</sup> The emergency police power granted by the ESA satisfies this test.

The Legislature resolved the fundamental policy regarding the exercise of the Governor’s emergency police power. As noted above,<sup>149</sup> the ESA expressly recognizes that California has a “responsibility to mitigate the effects of natural, manmade or war-caused emergencies,”<sup>150</sup> and that to ensure preparation for such emergencies the State needed to “confer upon the Governor . . . the emergency powers provided” by the ESA when a “state of emergency” under the statute exists and is proclaimed.<sup>151</sup> Thus, the Legislature determined that the State should alleviate the harms caused by emergencies and that the Governor should lead this effort.

This is exactly the type of fundamental policy determination that the non-delegation doctrine requires. Fundamental policy determinations are, by their nature, broad. They involve matters such as whether agricultural workers should have the right to collective bargaining and to self-organization,<sup>152</sup> whether criminal sentences should be indeter-

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become effective, that duty may properly be devolved upon members of the executive branch of the government.”) (citations omitted).

146. *Kugler v. Yocum*, 445 P.2d 303, 311 (Cal. 1968) (“Only in the event of a total abdication of that power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an ‘unlawful delegation . . . .’”); *see also id.* at 306 (the Legislature “must itself effectively resolve the truly fundamental issues” and “establish an effective mechanism to assure the proper implementation of its policy decisions”); *see also* *Am. Coatings Ass’n, Inc. v. State Air Res. Bd.*, 277 Cal. Rptr. 3d 284, 300 (Ct. App. 2021) (“We invalidate a legislative enactment as an unlawful delegation of legislative power only in the event of a total abdication of that power, through failure either to render basic policy decisions or to assure that they are implemented as made.”).

147. *People v. Wright*, 639 P.2d 267, 271 (Cal. 1982) (“An unconstitutional delegation of legislative power occurs when the Legislature confers upon an administrative agency unrestricted authority to make fundamental policy decisions.”).

148. *Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd.*, 405 P.3d 1087, 1100–01 (Cal. 2017) (quoting *Carson Mobilehome Park Owners’ Ass’n v. City of Carson*, 672 P.2d 1297, 1299 (Cal. 1983)).

149. *See supra* text accompanying note 135.

150. Gov’t § 8550.

151. *Id.* § 8550(a).

152. *Agric. Lab. Rels. Bd. v. Cal. Superior Court*, 546 P.2d 687, 705 (Cal. 1976).

minate,<sup>153</sup> or whether urgent action on air pollution is needed.<sup>154</sup> The determination that the State should mitigate the harms caused by emergencies and that the Governor should lead that effort fits squarely within this precedent.

In addition, the standards imposed by the ESA on the Governor's exercise of the emergency police power provide adequate direction for implementing the Legislature's fundamental policy determination. The ESA grants the Governor emergency police power only "[d]uring a state of emergency" duly proclaimed by the Governor.<sup>155</sup> In addition, the statute requires any exercise of that power to satisfy both the nexus and practicability requirements.<sup>156</sup> While, as noted above, it is unclear how stringent these requirements are, the nexus requirement permits the Governor to exercise the emergency police power only where "necessary . . . in order to effectuate the purposes" of the ESA.<sup>157</sup> Even though those purposes are broader than *Gallagher* posited, this requirement forces the Governor to follow the fundamental policy determination made by the Legislature and thus satisfies the non-delegation doctrine.

California courts have found far less direction adequate. For example, the California Supreme Court held that the requirement of "public convenience and necessity" provides adequate direction to the Public Utilities Commission in ratemaking.<sup>158</sup> The court likewise found adequate direction in statutes requiring agencies to follow broad goals such as promoting uniformity in sentencing with use of aggravating and mitigating circumstances,<sup>159</sup> treating addicts while protecting them and the public,<sup>160</sup> and taking urgent action on air pollution.<sup>161</sup> Indeed, lower courts have long held that a mere requirement of promoting the "general welfare" is "a sufficient guideline to enable an agency to act constitutionally."<sup>162</sup> The standards imposed

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153. *People v. Wright*, 639 P.2d 267, 271 (Cal. 1982).

154. *Clean Air Constituency v. Cal. State Air Res. Bd.*, 523 P.2d 617, 627 (Cal. 1974).

155. Gov'T § 8627; *see also* Gov'T § 8625 (authorizing the Governor to proclaim a state of emergency).

156. *Id.* §§ 8567(b)–8567(c), 8627.

157. *Id.* § 8627.

158. *S. Pac. Transp. Co. v. Pub. Util. Comm'n*, 556 P.2d 289, 292 (Cal. 1976).

159. *People v. Wright*, 639 P.2d 267, 271 (Cal. 1982).

160. *In re Marks*, 453 P.2d 441, 455 (Cal. 1969).

161. *Clean Air Constituency v. Cal. State Air Res. Bd.*, 523 P.2d 617, 627 (Cal. 1974).

162. *Sacramentans for Fair Plan. v. City of Sacramento*, 250 Cal. Rptr. 3d 261, 275 (Ct. App. 2019) (quoting *Rodriguez v. Solis*, 2 Cal. Rptr. 2d 50, 59 (Ct. App. 1991)); *see also Rodriguez*, 2 Cal. Rptr. 2d at 59 (citing cases holding a general welfare standard sufficient); *Groch v. City of Berkeley*, 173 Cal. Rptr. 534, 537 (Ct. App. 1981) (citing additional cases).



on the Governor's emergency police power provide much greater direction and thus even more clearly satisfy California's non-delegation doctrine.<sup>163</sup>

Even if the standards for exercising the emergency police power were not sufficient by themselves, the non-delegation doctrine would be satisfied by the safeguards against abuse of that power. Under California law, standards "possess no sacrosanct quality," and safeguards may "obviate the need for standards" to establish the constitutionality of a delegation.<sup>164</sup> The California Supreme Court has indicated that safeguards may be more important than standards in satisfying the non-delegation doctrine.<sup>165</sup>

The ESA has multiple safeguards. As the Court of Appeal for the Third District recognized,<sup>166</sup> the Governor's emergency police power may be exercised only during "a state of emergency,"<sup>167</sup> which is defined as "conditions of disaster or of extreme peril" beyond the capability of local governments and regions to combat,<sup>168</sup> proclaimed by the Governor.<sup>169</sup> The Governor is also required to terminate a proclamation of emergency "at the earliest possible date that conditions warrant."<sup>170</sup> In addition, the Legislature has the authority to terminate a

163. Section 8627 even satisfies the more stringent requirements of the federal non-delegation doctrine. For example, the U.S. Supreme Court upheld that a statute empowering the U.S. Attorney General to temporarily include a substance on the schedule of banned controlled substances where "necessary to avoid an imminent hazard to the public safety." *Touby v. United States*, 500 U.S. 160, 166 (1991). It also has upheld a statute authorizing standards "requisite to protect the public health." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475–76 (2001) (considering 42 U.S. § 7409(b)(1)). The ESA's requirement that the Governor's exercise of the emergency police power only as deemed "necessary . . . to effectuate the purposes" of the Act, CAL. GOV'T CODE § 8627, provides at least as intelligible a standard.

164. *Kugler v. Yocum*, 445 P.2d 303, 309 (Cal. 1968) ("The requirement for 'standards' is but one method for the effective implementation of the legislative policy decision." ". . . safeguards inherent in a statute which protect against its arbitrary exploitation obviate the need for standards."); *see also* *Birkenfeld v. City of Berkeley*, 550 P.2d 1001, 1029 (Cal. 1983) ("The need is usually not for standards but for safeguards.") (citation omitted).

165. *Kugler*, 445 P.2d at 309 ("[T]he most perceptive courts are motivated much more by the degree of protection against arbitrariness than by the doctrine about standards . . .") (quotation omitted); *Samples v. Brown*, 53 Cal. Rptr. 3d 216, 228 (Ct. App. 2007) ("[The] most perceptive courts are motivated much more by the degree of protection against arbitrariness than by the doctrine about standards . . .").

166. *Newsom v. Cal. Superior Court (Gallagher)*, 278 Cal. Rptr. 3d 397, 408–09 (Ct. App. 2021).

167. Gov'T § 8627.

168. *Id.* § 8558(b).

169. *Id.* § 8625.

170. *Id.* § 8629; *see also id.* § 8567(b) (providing that orders and regulations issued during an emergency have "no further force or effect" once an emergency is terminated).

state of emergency and render any emergency actions taken by the Governor ineffective, by passing a concurrent resolution.<sup>171</sup> Moreover, even where the Legislature does not wish to terminate a state of emergency, it retains the authority to enact legislation overruling specific executive orders, which provides a powerful safeguard against abuse.<sup>172</sup> Finally, the Governor's exercise of the emergency police power under the ESA is subject to judicial review,<sup>173</sup> which would provide yet another powerful safeguard against abuse.<sup>174</sup>

Thus, even when the scope of the Governor's emergency police power is properly interpreted, the standards and safeguards imposed by the ESA are more than enough to satisfy California's non-delegation doctrine and establish the constitutionality of that power.<sup>175</sup>

## Conclusion

Since 1943, the Governor has had the authority to exercise the State's police power during emergencies, but the Governor rarely exercised this authority, and no court considered the scope and constitutionality of that authority until the court of appeal's *Gallagher*

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171. *Id.* § 8629; *see also* Gov't § 8567(b) (emergency orders have no force or effect after the emergency has been terminated).

172. *See, e.g.,* *Golightly v. Molina*, 178 Cal. Rptr. 3d 168, 181 (Ct. App. 2014) (holding where county board "retained its authority to modify or rescind its delegation" that "there has been no 'total abdication' by the Board of its legislative power") (citing *Kugler v. Yocum*, 445 P.2d 303, 311 (Cal. 1968)).

173. *Cal. Corr. Peace Officers' Ass'n v. Schwarzenegger*, 77 Cal. Rptr. 3d 844, 851–57 (Ct. App. 2008) (reviewing whether emergency properly proclaimed); *see also supra* text accompanying notes 70–72 (noting that continuation of emergency may be subject to judicial review).

174. *See Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd.*, 405 P.3d 1087, 1104 (Cal. 2017).

175. Most courts considering grants of emergency power have reached a similar conclusion. *See Beshear v. Acree*, 615 S.W.3d 780, 809–912 (Ky. 2021) (rejecting unconstitutional delegation challenge based on necessity requirement and Legislature's ability to terminate emergency); *Desrosiers v. Governor*, 158 N.E.3d 827, 841 (Mass. 2020) (rejecting non-delegation challenge based on Legislature's authority to override emergency orders and remove the Governor's emergency power); *Casey v. Lamont*, 258 A.3d 647, 654–56 (Conn. 2021) (rejecting challenge based on necessity requirement, Legislative authority to override, and availability of judicial review). *But see* *Midwest Inst. of Health, PLLC v. Governor of Michigan*, 958 N.W.2d 1, 36–39 (Mich. 2020) (closely divided court ruling delegation of emergency power unconstitutional). Indeed, the Kentucky Supreme Court held in the alternative that the Governor's exercise of emergency power did not raise any non-delegation problem because the Governor had inherent authority to respond to emergencies. *See Beshear*, 615 S.W.3d at 806–09; *see also* *United Auburn Indian Cmty. of Auburn Rancheria v. Newsom*, 472 P.3d 1064, 1080 n.9 (Cal. 2020) (holding that the Legislature has broad authority to assign the Governor responsibility for matters falling in a "zone of twilight between the powers of the Governor and the Legislature").

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decision last year. Although that decision correctly found that the Governor's emergency police power is both broad and constitutional, it failed to recognize the nexus and practicability requirements imposed on the exercise of this power, in part because it was unaware of the power's historical origin and development. This Article has recounted that history in the hope that future courts will be better positioned to construe and develop those requirements.