

## MEMORANDUM

To: Ray Espinosa, County Administrative Officer; Members of the Board of Supervisors  
From: Joel Ellinwood, Assistant County Counsel; Reed Gallogly, Deputy County Counsel  
Re: Government Authority to Address COVID-19 Pandemic and Local Enforcement  
Date: July 14, 2020

### Question Presented

Questions have been raised about the authority of the Governor of the State of California, the California Department of Public Health Services and the California Public Health Officer to issue orders, directives, advisories and other measures to ascertain the nature of a communicable disease and prevent its spread, that are legally enforceable by local officials.

The question has heightened importance because under Section 11.90 (f) of the California Budget Act of 2020, in order to receive federal funds provided to the State of California under the CARES Act, local governments are required to certify "adherence to federal guidance and the state's stay-at-home requirements and other health requirements as directed in gubernatorial Executive Order N-33-20, subsequent executive orders or statutes, and all State Department of Public Health orders, directives, and guidance issued in response to the COVID-19 public health emergency." Although it is yet to be defined, "adherence" may likely entail reasonable, good faith local efforts to enforce the Governor's executive orders, as well as public health orders, directives, and guidance<sup>1</sup>.

### Short Answer and Recommendations

There is clear legal authority that the COVID-19 emergency orders, directives, and guidance are lawful and enforceable. State law provides the enforcement of these violations is via citation by the sheriff officers and prosecution as a misdemeanor offense. However, absent enforcement by the sheriff and prosecution by the district attorney, local enforcement is constrained by resources and other law enforcement priorities.

The County of San Benito can establish emergency civil enforcement regulations, and empower code enforcement and health officers and their designees to issue administrative citations punishable with fines. A number of other California local governments, including the Counties of Mendocino and Yolo, have already adopted such regulations, either under local emergency powers or by ordinance. A draft of proposed urgency ordinance providing for civil enforcement of COVID-19 Public Health Orders through fines or other civil legal action is attached to this memorandum.

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<sup>1</sup> As of the date of this memo, the Department of Finance certification form only requires local government certify that it will adhere to the COVID-19 orders, etc. and makes no reference to enforcement. However, the Governor's recent press conference has outlined enhanced enforcement focused on 19 counties on the watch list, including issuance of local orders.

### Basis for Governor's Authority

The authority of the Governor is established in the Constitution of the State of California in Article V, Sections 1 and 2, which vests the supreme executive power of the State in the Governor, who shall see that the law is faithfully executed.

Under the California Emergency Services Act (CESA), Government Code section 8550, et. seq., first adopted in 1970, the Governor has the authority pursuant to Section 8625 proclaim a state of emergency and under Section 8567 to

“ . . . make, amend, and rescind orders and regulations necessary to carry out the provisions of [the CESA]. The orders and regulations shall have the force and effect of law. Due consideration shall be given to the plans of the federal government in preparing the orders and regulations. The Governor shall cause widespread publicity and notice to be given to all such orders and regulations, or amendments or rescissions thereof.

(b) Orders and regulations, or amendments or rescissions thereof, issued during a state of war emergency or state of emergency shall be in writing and shall take effect immediately upon their issuance. Whenever the state of war emergency or state of emergency has been terminated, the orders and regulations shall be of no further force or effect.”

Under the CESA, Section 8558 (b), “‘State of emergency’ means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by conditions such as air pollution, fire, flood, storm, *epidemic*, riot, drought, . . . an earthquake, or other conditions, other than conditions resulting from a labor controversy or conditions causing a ‘state of war emergency,’ which, by reason of their magnitude, are or are likely to be beyond the control of the services, personnel, equipment, and facilities of any single county, city and county, or city and require the combined forces of a mutual aid region or regions to combat, . . . .”

It is generally acknowledged that the COVID-19 pandemic qualifies as a state of emergency and was declared so by Governor Newsom on March 4, 2020. Numerous executive orders, public health orders, directives, and guidance documents have been issued by the State of California pursuant to the declared state of emergency. In accordance with the CESA, these orders, directives and guidance take immediate effect and have the force of law.

### Basis for State Public Health Officer Authority

Under the Communicable Disease Prevention and Control Act, Health & Safety Code § 120130 (c) The State Department of Public Health Services may from time to time adopt and enforce regulations requiring strict or modified isolation, or quarantine, for any of the contagious, infectious, or communicable diseases, if in the opinion of the department the action is necessary for the protection of

the public health. Health officers, including local health officers may requires such measures when necessary for protection of the public health. Pursuant to Section 120155, the sheriff of each county is to enforce all orders of the State Department of Public Health issued for the purpose of preventing the spread of any contagious, infectious, or communicable disease.

#### Basis for Local Health Officer Authority

The San Benito County Public Health Officer is authorized to issue orders or guidance by Health & Safety Code section 120175, et seq. Under Health & Safety Code § 101040 the local health officer may take any preventive measure that may be necessary to protect and preserve the public health from any public health hazard during any “state of emergency,” as defined by Section 8558 of the Government Code [the CESA], within his or her jurisdiction (including the Governor’s declared state of emergency regarding COVID-19). “Preventive measure” means abatement, correction, removal or any other protective step that may be taken against any public health hazard that is caused by a disaster and affects the public health.

#### Constitutionality of Public Health Orders Generally

The constitutionality of executive orders to protect the public health during an epidemic was firmly established by the United States Supreme Court 115 years ago in *Jacobson v. Massachusetts* (1905) 197 U. S. 11<sup>2</sup> (compulsory vaccination during epidemic upheld), and reiterated as recently as May 29, 2020 in *S. Bay United Pentecostal Church v. Newsom* (2020) \_\_\_ U.S. \_\_\_; 207 L. Ed. 2d 154, 155 (denying application for injunctive relief regarding order restricting attendance at in-person indoor religious services), in which Chief Justice Roberts wrote in a concurring opinion:

“The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the States “to guard and protect.”

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<sup>2</sup> Mr. Justice Harlan, writing for a unanimous court, stated, “[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that ‘persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned.’ [citations omitted] The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law.”

*Jacobson v. Massachusetts*, 197 U. S. 11, 38, 25 S. Ct. 358, 49 L. Ed. 643 (1905). When those officials “undertake to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad.” *Marshall v. United States*, 414 U. S. 417, 427, 94 S. Ct. 700, 38 L. Ed. 2d 618 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an “unelected federal judiciary,” which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 545, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985).”

#### Enforcement of State Emergency and Public Health Orders, Directives and Guidance

The CESA, Section 8665, provides that violation of any lawful order or regulation is guilty of a misdemeanor, punishable by a fine of up to \$1,000, imprisonment of up to 6 months or both. County Health Officers, per Health & Safety Code § 101030, are obligated to enforce and observe within the unincorporated territory of the county,

- (a) Orders and ordinances of the board of supervisors, pertaining to the public health and sanitary matters.
- (b) Orders, including quarantine and other regulations, prescribed by the department.
- (c) Statutes relating to public health.

Per Health & Safety Code § 101029, the sheriff of each county is to enforce all orders of the local health officer issued for the purpose of preventing the spread of any contagious, infectious, or communicable disease.

The Communicable Disease Prevention and Control Act, Health & Safety Code § 120275 provides that any person who, after notice, violates, or who, upon the demand of any health officer, refuses or neglects to conform to, any rule, order, or regulation prescribed by the department respecting a quarantine or disinfection of persons, animals, things, or places, is guilty of a misdemeanor. Pursuant to Section 120155, the sheriff of each county is to enforce all orders of the State Department of Public Health issued for the purpose of preventing the spread of any contagious, infectious, or communicable disease.

#### Options for Local Enforcement of Public Health Emergency Measures

In addition to enforcement of the state or local health officer orders by the county sheriff, under San Benito County Code § 11.01.006 (A)(6)(a), in the event of the proclamation of a state of emergency by the Governor the County Administrative Officer, in his capacity as the Director of Emergency Services, is empowered to make and issue rules and regulations on matters reasonably related to the protection of life and property as affected by the emergency. Such rules and regulations would only be effective for the duration of the state of emergency. However, these rules and regulations must be confirmed at the earliest practicable time by the Board of Supervisors. Alternatively, as recommended, the Board of Supervisors can adopt an urgency ordinance providing for civil enforcement of state and local public

health orders by authorizing civil fines and other civil legal enforcement through court action by County Counsel or the District Attorney with injunctions and other civil causes of action.

Accordingly, a draft urgency ordinance has been placed on the agenda for the scheduled July 21, 2020 Board meeting. The draft ordinance includes provisions that allow code enforcement officers, health officers, and other local officials to issue administrative citations, punishable by fines, that could be issued separate and independent from sheriff or city police. "Enforcing Officers" are designated in San Benito County Code § 1.03.002 (D), as including a Code Enforcement Officer, Building Official, Building Inspector, Health Officer or designee. Additional officials could be designated by the Board through adoption of a Resolution.

The urgency ordinance would take immediate effect pursuant to Government Code section 25123 (d) for the immediate preservation of the public peace, health, or safety, provided that it contain a declaration of the facts constituting the urgency, and shall be passed by a four-fifths vote of the board of supervisors.

The draft ordinance incorporates by reference the Governor's Emergency Orders, the State Public Health Officer orders, and the directives and guidance issued pursuant to those orders and County Public Health Officer orders for the duration of the COVID-19 public health emergency. The regulations provide that any violation of those orders is a public nuisance, subject to civil action for an injunction, or be subject to civil fines and penalties

For particularly egregious violations, County Counsel could pursue civil abatement and injunctions in civil actions in Superior Court.