PACIFIC LEGAL FOUNDATION

May 13, 2020

Chief Justice Tani G. Cantil-Sakauye
Judicial Council of California
455 Golden Gate Ave.
San Francisco, CA 94102

VIA U.S. MAIL AND EMAIL TO
judicialcouncil@jud.ca.gov

Re: Judicial Council Emergency Rule 1

Dear Chief Justice Cantil-Sakauye and Members of the Judicial Council:

Pacific Legal Foundation (PLF) writes to urge the Judicial Council to repeal its recently implemented Emergency Rule 1 (ER 1), which violates the fundamental rights of property owners throughout California by indefinitely suspending their right to initiate unlawful detainer actions. The rule is bad policy, because it creates the perverse incentive for all tenants, whether they face financial hardship or not, to refuse to pay their rent during the crisis. But it is also bad law, in that the Judicial Council lacks the authority under the California Constitution to issue the rule and the Governor cannot lawfully delegate his power under the Emergency Services Act (ESA) to suspend statutes contrary to ER 1, as he has purported to do.

Introduction

PLF is the nation's oldest and most prolific public interest law firm dedicated to advancing the principles of individual rights and limited government. PLF's public policy and litigation expertise includes protecting property rights and safeguarding the separation of powers. We have defended the rights of property owners in California and throughout the nation for over four decades.

During the COVID-19 crisis, PLF has heard from many landlords in California and throughout the nation who are concerned about "rent strike" movements and other efforts to encourage tenants to stop paying their rent or to legally bar landlords from collecting rent. Every landlord that we have spoken to understands that the pandemic is an unprecedented crisis. They understand that many people will be unable to pay rent because they have lost jobs due to the shut-down orders. Property owners have every private incentive to help financially struggling tenants stay in their homes during the pandemic. All support in principle Governor Newsom's Executive Order N-37-20, which extends the time period for responding to eviction complaints and suspends enforcement of writs of eviction against those tenants who are unable to pay their rent due to certain COVID-19-related financial hardships and have notified their landlords of this fact in writing.

Emergency Rule 1 Is Bad Policy

Emergency Rule 1 goes much further than the Governor's eviction order, however. By preventing courts from issuing summonses and default judgments in unlawful detainer actions, the rule effectively suspends actions for eviction for all tenants throughout the state, whether they are able to pay their rent or not. Unfortunately, the rule has created a perverse incentive for many tenants.

Faced with no possibility of being evicted, many have simply stopped paying their rent. Landlords we have spoken to have reported a decline in rental receipts by 50% or more since ER 1 was adopted.

Many people have pointed out that in order to comply with "stay at home" orders, individuals must have homes to stay in. This is of course true, but PLF and the many property owners we know ask others to understand an equally important truth: if not for individuals who own and operate rental properties, many of those homes would not exist in the first place.

Owning and operating rental properties is a business like any other. For abundant rental housing to exist, someone must earn and save the money necessary to build or purchase the properties, and to maintain, manage, and operate them. Landlords come in many stripes and sizes. Some are companies who own many rental properties; others are individuals who have invested their personal savings in real estate as a small business or to fund their retirement. Many operate on very thin margins. All, obviously, depend on their rental income for the survival of their businesses.

In order for those suffering hardship during this crisis to be kept in their homes, landlords must be able to remain in business. For that to happen, they must be permitted to collect rent from those who can afford to pay. Emergency Rule 1 thus threatens to have the opposite of its intended effect. By incentivizing many tenants to cease paying rent, the rule makes it more likely that landlords will fail, which will create a housing crisis on top of the pandemic crisis. The rule is also fundamentally unjust, as it places an undue burden on landlords and effectively allows those who can pay their rent to escape that obligation.

But Emergency Rule 1 is not only bad policy, it is also bad law.

Emergency Rule 1 Is Bad Law

Even during a crisis, the principles of constitutional government and the rule of law continue in force. The Judicial Council's rule violates these principles in two fundamental ways. First, the Judicial Council lacks the authority to promulgate Emergency Rule 1 under the California Constitution and basic principles of separation of powers. Second, the Governor's Executive Order N-38-20, which purports to suspend any statutes that impede the Judicial Council's issuance of emergency rules, both violates the Emergency Services Act and constitutes an unlawful delegation of power to the Judicial Council.

The Judicial Council Lacks the Power to Adopt ER 1

The California Constitution gives the Judicial Council relatively narrow powers. The Council is authorized to make recommendations to the courts, the Governor, and the Legislature, to "adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute." Cal. Const. art. VI, § 6(d). All these powers are premised on the Judicial Council's duty

to "improve the administration of justice" and in carrying out its authority, the Judicial Council may not adopt any rules that are "inconsistent with statute." *Id.* As a result, the Council may adopt no "rules governing substantive matters," *People v. Wright*, 30 Cal. 3d 705, 711–12 (1982), except pursuant to the Council's "other functions prescribed by statute," Cal. Const. art. VI, § 6(d). These provisions "limit[] the council's power to act in the absence of legislative authorization." *Wright*, 30 Cal. 3d at 712.

In so defining the Judicial Council's powers, Article VI, section 6(d), reflects the basic principle of separation of powers. That principle is also codified in Article III, section 3, of the California Constitution, which limits the powers of government to legislative, executive, and judicial and provides that "[p]ersons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Cal. Const. art. III, § 3. The purpose of this limitation, of course, is to "prevent the combination in the hands of a single person or group of the basic or fundamental powers of government." *Carmel Valley Fire Prot. Dist. v. State*, 25 Cal. 4th 287, 297 (2001) (cleaned up) (quoting *Davis v. Muni. Ct.*, 46 Cal. 3d 64, 76 (1988)). The doctrine of separation of powers "unquestionably places limits upon the actions of each branch with respect to the other branches." *Sup. Ct. v. Cty. of Mendocino*, 13 Cal. 4th 45, 53 (1996). In particular, the "'core' or 'essential' functions" of a branch "may not be usurped by another branch." *Le Francois v. Goel*, 35 Cal. 4th 1094, 1102–03 (2005) (quoting *People v. Bunn*, 27 Cal. 4th. 1, 14 (2002)). Neither may a branch "practically defeat" or "materially impair" another branch's core powers. *Id.* at 1103 (quoting *County of Mendocino*, 13 Cal. 4th at 54).

In adopting Emergency Rule 1, the Judicial Council usurped the Legislature's prerogative in violation of both Article VI, section 6, and Article III, section 3, of the state Constitution. Foremost amongst the Legislature's core powers is the "power to make the law." *Carmel Valley*, 25 Cal. 4th at 299 (quoting *Loving v. United States*, 517 U.S. 748, 758 (1996)). "This essential function embraces the far-reaching power to weigh competing interests and determine social policy." *Bunn*, 27 Cal. 4th at 14–15 (2002). Thus, only the Legislature may "resol[ve] . . . fundamental policy issues" and "provide . . . direction for the implementation of that policy." *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.*, 3 Cal. 5th 1118, 1146 (2017) (quoting *Carson Mobilehome Park Owners' Ass'n v. City of Carson*, 35 Cal. 3d 184, 190 (1983)). "[A]bsent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function," and "[t]he judiciary . . . may not undertake to evaluate the wisdom of the policies embodied in such legislation." *County of Mendocino*, 13 Cal. 4th at 53.

Emergency Rule 1 directly conflicts with several statutes. First, it abrogates Code of Civil Procedure sections 1166 and 1169, which require the immediate issuance of summons, defaults, and default judgments when statutory conditions are met. Second, by denying landlords the only procedure for vindicating their right of re-entry under the terms of a lease, the rule conflicts with Civil Code sections 791 and 792, which recognize the right to re-entry and express the Legislature's intent that the right be enforced by expedited proceedings. *See In re Abbigail A.*, 1 Cal. 5th 83, 92 (2016) ("In this context, a rule is inconsistent with a statute if it conflicts with either

the statute's express language or its underlying legislative intent." (quoting *In re Alonzo J.*, 58 Cal. 4th 924, 937 (2014))). The rule thus violates Article VI, section 6, of the California Constitution, which makes clear that the Judicial Council may not adopt rules that are "inconsistent with statute."

In adopting the rule, the Judicial Council made a classic policy decision that is properly the Legislature's prerogative, not the Judicial Council's. The Judicial Council adopted the rule for three reasons: (1) unlawful detainer actions "require very fast legal responses (within five days) from defendants who are often self-represented and at a time when court self-help centers and legal aid services are not readily available"; (2) "when involving residential property, they threaten to remove people from the very homes they have been instructed to remain in"; and (3) "the number of such actions for both commercial and residential properties is likely to explode in coming months—as a significant portion of the population faces severe economic losses." *See* Judicial Council of California, Report to the Judicial Council, Item No. 20-141, at 7 (Apr. 4, 2020).

These concerns are all significant. But, as noted above, there are significant countervailing concerns as well. The rule creates a powerful incentive for tenants to refuse to pay their rent. If enough tenants do not pay their rent (which the rule assumes will happen), then their landlords will be forced to cut services, lay off employees, default on their mortgages, and, ultimately, declare bankruptcy. This, in turn, will create more legal disputes and will endanger the very rental market that provides homes during this crisis. In short, the rule makes many tradeoffs of precisely the sort that are the Legislature's to make, not the Judicial Council's. *See County of Mendocino*, 13 Cal. 4th at 53 (stating that "the choice among competing policy considerations in enacting laws is a legislative function," and "[t]he judiciary . . . may not undertake to evaluate the wisdom of the policies embodied in such legislation"); *see also Bunn*, 27 Cal. 4th at 14–15 (stating that the Legislature's essential function is "to weigh competing interests and determine social policy").

Perhaps the most obvious policy decision the Judicial Council made in adopting ER 1 is the decision effectively to change the Governor's own order on evictions, N-37-20. According to the report to the Council concerning the emergency rules, the Governor's order "cannot by itself provide sufficient assistance to tenants and courts to avert this crisis." Report to the Judicial Council, *supra*, at 7. Thus, whereas the Governor's order extends the time to respond to complaints and suspends the enforcement of writs of eviction only for residential tenants suffering from hardship due to COVID-19 and only until May 31, ER 1 effectively prevents even the initiation of an action for unlawful detainer against any residential or commercial tenant for the duration of the state of emergency plus 90 days.[1]

[1] There are other ways of solving the problems the Judicial Council identifies. Report to the Judicial Council, *supra*, at 7. For example, if the concern is that it will not be clear from the face of a complaint whether a tenant is experiencing a COVID-19-related hardship, the simple solution is to require complainants in unlawful detainer actions to file a verified complaint or include an affidavit affirming that the tenant in question does not meet the criteria listed in Executive Order N-37-20. If the concern is that summonses currently direct defendants in such actions to respond within five days, those summonses could be changed or a rider attached to current summonses informing defendants that the time to answer a complaint has been extended. Or complainants in unlawful detainer actions could be required

While one can debate whether the Governor's order or the Judicial Council's rule represents the wiser policy, that judgment is not the Judicial Council's to make. In section 8571 of the Emergency Services Act, the Legislature gave the Governor the authority to, among other things, "suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency." Assuming Executive Order N-37-20 is a proper exercise of this power, the ESA gives the Judicial Council no similar authority. The report to the Judicial Council, however, invokes the authority of another executive order—N-38-20. But, as shown below, that order did not and could not have authorized the Judicial Council to adopt ER 1.

Executive Order N-38-20 Did Not Lawfully Give the Judicial Council the Power to Adopt ER 1

Executive Order N-38-20 does not authorize the adoption of ER 1 for two reasons. First, the order is inconsistent with the ESA. Second, the order constitutes an improper delegation of the Governor's authority under the ESA to the Judicial Council.

The purpose of Executive Order N-38-20 is "to enhance the authority of the Judicial Council and its Chairperson" to issue emergency orders and rules to respond to the COVID-19 emergency. It attempts to accomplish this goal in several ways, but the part that pertains to the Judicial Council's Emergency Rule 1 is contained in paragraph 3,[2] which states:

> In the event that the Judicial Council or its Chairperson, in the exercise of rulemaking authority consistent with Paragraph 2, wishes to consider a rule that would otherwise be inconsistent with any statute concerning civil or criminal practice or procedure, the relevant statute is suspended, subject to the following conditions: a) The statute is suspended only to the extent it is inconsistent with the proposed rule; b) The statute is suspended only if the proposed rule is adopted; and c) The statute is suspended only when the adopted rule becomes effective.

This paragraph was clearly intended to give the Judicial Council the authority to adopt rules that would otherwise be "inconsistent with statute" under Article VI, section 6, of the California Constitution. The problem, however, is that nothing in the ESA permits the Governor to effectively

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to attach such a notice to the front of their complaint. The point is that there are many ways to solve the problems the Judicial Council cited in its report short of suspending all unlawful detainer actions.

[2] The Executive Order also purports to suspend sections 68115 and 68072 of the Government Code "[t]o the extent" those sections "impose[] or impl[y] a limitation" on the authority of the Judicial Council or its Chairperson to issue emergency orders or rules during the crisis. Section 68072 concerns effective dates of newly issued Council rules. Section 68115 authorizes the Chairperson to issue orders during an emergency that allow courts to conduct proceedings anywhere within a county, to transfer civil actions to other courts, and to change and extend certain filing and other deadlines. Because these provisions have nothing to do with unlawful detainer and they do not authorize or restrict unlawful detainer actions in any way, suspending them does not grant the Judicial Council power to issue ER 1, nor does it appear that that was the intent of this portion of Executive Order N-38-20.

transfer his power to suspend certain statutes to the Judicial Council, as this portion of the executive order purports to do.

The ESA authorizes only *the Governor* to suspend certain types of statutes during an emergency. This provision is not a broad grant of power to the Governor to suspend any statute during an emergency, but only statutes in three categories: "regulatory statute[s]"; those that "prescrib[e] the procedure for the conduct of *state business*"; or "orders, rules, or regulations of any state agency." Cal. Gov't Code § 8571 (emphasis added). And in order to invoke this section, the Governor must "determine[] and declare[] that strict compliance with [a] statute . . . would . . . prevent, hinder, or delay the mitigation of the effects of the emergency." *Id*.

As noted above, ER 1 is inconsistent with four different statutes: Code of Civil Procedure sections 1166 and 1169 and Civil Code sections 791 and 792. All of these statutes protect substantive rights.[3] None would appear to fit within any of the categories enumerated in section 8571.

More importantly for present purposes, the Governor did not determine or declare in his executive order that he intended to suspend any of these statutes. Instead, he effectively turned the power to suspend statutes over to the Judicial Council, based on whatever emergency rules the Judicial Council might "wish to consider." This was unlawful. "When the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization." *Bagley v. City of Manhattan*, 18 Cal. 3d 22, 24 (1976) (en banc) (citations omitted), *superseded by statute on other grounds as stated in San Diego Hous. Comm'n v. Pub. Emp't Relations Bd.*, 246 Cal. App. 4th 1 (2016). Such authorization must be "express[]." *City of Los Angeles v. Sup. Ct.*, 56 Cal. 4th 1086, 1094 (2013). Yet no statute permits the Governor to pass on this decision—or any other emergency power—to the Judicial Council. *Compare with* Cal. Gov't Code § 8587 ("[T]he Governor may delegate any of the powers vested in him or her under this chapter to the secretary [of emergency services] except the power to make, amend, and rescind orders and regulations, and the power to proclaim a state of emergency."). In purporting to do so in paragraph 3 of the order, the Governor not only violated the ESA, he also overrode the Legislature's will in violation of the separation of powers. *See County of Mendocino*, 13 Cal. 4th at 53 ("The executive branch . . . may not disregard legislatively prescribed directives . . . .");

[3] "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others." Cal. Civ. Code § 654. As such, the right to exclusion is the defining feature of property. In a tenancy relationship, the right manifests in a landlord's right to re-entry. *See id.* § 791 (recognizing the right to re-entry); *see also id.* §§ 789–90 (regarding tenancies at will); *Jordan v. Talbot*, 55 Cal. 2d 597, 608 (1961) (en banc). The sole procedure for vindicating the right to re-entry is an unlawful detainer action. *Jordan*, 55 Cal. 2d at 604–05. The Legislature "intended [such actions] to be a relatively simple and speedy remedy that obviates any need for self-help by landlords." *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 151 (1976). Accordingly, the Legislature mandated the use of expedited procedures in unlawful detainer actions. *See* Cal. Civ. Proc. Code §§ 1159–79a. These summary procedures include requiring courts to issue summons and enter defaults and default judgments without delay. *See id.* §§ 1166(e), 1169.

Knudsen Creamery Co. of Cal. v. Brock, 37 Cal. 2d 485, 492 (1951) (Executive officers may not "vary or enlarge the terms or conditions" of their statutory power. (quoting *Boone v. Kingsbury*, 206 Cal. 148, 161 (1928))).

Emergency Rule 1 is thus void because it is inconsistent with statutes and Executive Order N-38-20 did not lawfully suspend those statutes, even assuming it could have done so.

Conclusion

While PLF and the landlords it has spoken to understand that these are difficult and unprecedented times and that, as the Judicial Council said, it is operating without a playbook, the government is not operating without any rules or standards at all. Constitutional principles and the rule of law still apply even in an emergency. Those principles are designed to guide governments in their vital role of protecting the rights of *all* Californians, not simply one group of Californians. Emergency Rule 1, however, benefits tenants at the expense of landlords and threatens to undermine the Judicial Council and the Governor's stated goals by threatening the rental housing industry in all of California. Fortunately, there are other, straightforward solutions to the Judicial Council's concerns, as we've identified above. We urge the Judicial Council to revoke ER 1.

Respectfully submitted,

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