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MikeSigns v. Superior Court - Why Rule 1 Broke the Law

Steven J. Andre

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT**

MICHAEL HORSLEY, dba Mikesigns,
Plaintiff / Petitioner,
v.

SUPERIOR COURT OF
CALIFORNIA, COUNTY OF
MONTEREY,

Defendant / Respondent.

DOUG SCOTT, dba American
Biotech Testing,

Real Party In Interest

Case No.
Trial Court Case: 20CV00997
Appellate Div: 20AP000012/
20CV001300

PETITION FOR WRIT DIRECTING
TRIAL COURT TO ENTER
DEFAULT OF DEFENDANT AND
ISSUE CLERK'S JUDGMENT FOR
RESTITUTION FORTHWITH

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PETITION :

Petitioner, Michael Horsley dba MikeSigns, hereby challenges the order from the Respondent lower court (APPENDIX 6, (A-81)) and hereby seeks issuance of a writ pursuant to Code of Civil Procedure §1085 from this honorable Court, directing the trial court to carry out its mandatory, ministerial duty to issue a default and issue a clerk's judgment thereon pursuant to Code of Civil Procedure §1169.

I. INTRODUCTION AND STATEMENT OF THE CASE

Petitioner, Michael Horsely, is a commercial landlord who brought an unlawful detainer action based upon a January 2020 3-Day Notice demanding unpaid rent which had no relationship to any COVID-19 emergency conditions. (APPENDIX 1, p. A-7)

Petitioner's Complaint was filed on March 10, 2020, (APPENDIX 1,p. A-4) and served the same day. (APPENDIX 1, p .A-12) Petitioner's Request for Entry of Default and a proposed clerk's judgment for restitution of the premises were submitted for issuance by the clerk on March 27, 2020. (APPENDIX 2, p. A-15-17) On April 6, 2020, the Judicial Council issued emergency rules, including Rule 1 which claims to prohibit courts from issuing either a Summons or a default or setting trial within 20 days absent a showing by the plaintiff that is not imposed by the unlawful detainer statute (Code Civ. Proc. §1161) and is not related to court administration relative to the COVID-19 emergency.

(APPENDIX 5, p.A-71-72)

On April 8, 2020, the Monterey County Superior Court trial court rejected Petitioner's default and judgment requests based upon Rule 1. (APPENDIX 4, p. A-19-23)

On April 10, 2020, Petitioner submitted an Ex Parte Request for an order directing issuance of the default and judgment. (APPENDIX 5, p.A-25- 79) Petitioner argued *inter alia* in his ex parte motion that the Judicial Council's adoption of a requirement that an unlawful detainer plaintiff seeking a non-paying defendant tenant's default has the burden of demonstrating to the court that health and safety considerations are implicated if a landlord is prevented from evicting that delinquent tenant is **1)** not authorized by any legislation or lawful gubernatorial emergency grant of power; **2)** contrary to orders by the Governor and local legislation which place the burden upon a tenant seeking relief from eviction proceedings to demonstrate that a rent payment arrearage is due to the COVID-19 emergency; **3)** adding a new burden of proof for a landlord to demonstrate health and safety concerns exceeds the constitutional authority of the Judicial Council to deal with court rules and operations; **4)** is so fundamentally legislative in nature as to be beyond the constitutional power of an administrative government agency such as the Judicial Council such that if any delegation of law-making authority had occurred, it would be unconstitutional and any such enactment would be invalid, and; **5)** prospective in effect so as not to have application to a March 27, 2020, request for a default judgment.

The trial court by the Honorable Thomas Wills, summarily denied Petitioner's ex parte request on April 14, 2020, without addressing any of the points raised as to why Rule 1 should not prohibit issuance of Petitioner's requested default and clerk's judgment for possession of the premises. (APPENDIX 6, p. A-81) Petitioner then served and submitted for filing a Petition for a writ in the Appellate Division of the Monterey County Superior Court on April 21, 2020. (APPENDIX 7, p. A-116) The court clerk did not file the Petition until May 18, 2020. (APPENDIX 7, p. A-84). The Appellate Division summarily denied the Petition on June 16, 2020. (APPENDIX 8) For some unknown reason the case picked up two case numberings during the writ process (20AP000012 and 20CV001300). (APPENDIX A-84 and A-119)

II. ARGUMENT

A. A LANDLORD'S STATUTORY RIGHT TO SUMMARY PROCEDURES AND THE CONSTITUTIONAL REQUIREMENT THAT THE JUDICIAL COUNCIL NOT ENACT RULES CONTRARY TO THOSE STATUTES

1. LANDLORDS ARE GUARANTEED THE RIGHT TO SUMMARY PROCEDURES OF A 5-DAY SUMMONS, ENTRY OF DEFAULT, A DEFAULT JUDGMENT, AND SPEEDY TRIAL SETTING

At common law a "might makes right" view of real property rights prevailed and it was not uncommon for violence to be used to take possession of land away from another. Nogues, J.P., *Defects in the Current Forcible Entry and Detainer Laws of the United States and England* (1978) 25 UCLA L.Rev. 1067, 1068. By the thirteenth century, England

had enacted statutes restricting self help in the retaking of a landlord's real property to situations where violence was not involved. Id. at 1068-70.

After the rowdy gold rush days of claim-jumping and land-grabbing, California saw creation of a new state government which acted to temper such violent enforcement of land rights. Prior to 1872 self help was still authorized by statute. California allowed for a landlord to reenter and retake possession of property from a tenant who violated the terms of a lease so long as the landlord's action was without use of force. *Dickinson v. Maguire* (1858) 9 Cal. 46. In 1872 California adopted unlawful detainer and forcible entry and detainer laws. The objective was to prevent the bloodshed, violence and breaches of the peace resulting from exercise of the common law right to use force to regain possession of property. See, *Jordan v. Talbot* (1961) 55 Cal.2d 597, 607.

The enactment almost 150 years ago of Code of Civil Procedure §1161, the unlawful detainer statute, and related forcible entry and detainer statutes (Code of Civil Procedure §1159 and §1160) involved taking away the landlord's common law right to utilize self-help and exchanging it for a new statutory right to a summary proceeding to regain possession of rental premises. "Section 1161 of the Code of Civil Procedure was enacted to obviate the need for self-help by landlords and thereby avoid breaches of the peace." *Kassan v. Stout* (1973) 9 Cal.3d 39, fn.8. A tenant who failed to pay unpaid rent after receiving a 3 day notice was thereafter deemed "guilty of unlawful detainer." (Code Civ. Proc. §1161(2)) The statutorily created summary procedure afforded a landlord "an

expeditious and adequate remedy for obtaining possession of premises wrongfully withheld by tenants". *Childs v. Etinge* (1973) 29 Cal.App.3d 843, 853. "The rights and remedies afforded a landlord by the statutory provisions are given in lieu of his common law rights and remedies which included the right to enter and expel the tenant by force. [citations omitted]." Id.

The California Legislature's substitution of the new statutory right to summary court proceedings and legal process allows a landlord to regain possession of the subject premises in an expedited manner without utilizing force and involves several pertinent enactments allowing: 1) a landlord the right to a Summons requiring a response from the tenant on the landlord's premises within 5 days; 2) a procedure to regain possession of the premises via a clerk's judgment entered upon the tenant default in failing to respond to process within the five day period; 3) the right to have a speedy adjudication where the tenant answers before default is entered, and 4) the right to a proceeding limiting the issues cognizable by the court.

California Code of Civil Procedure §1167(a) provides as part of the landlord's right to summary proceedings that the tenant accused of a failure to comply with lease terms after written notice and service with process has five days to respond. In other words, the court is required by law to issue a 5-Day Summons. As with any court case, the served defendant tenant has the option of not responding within the five day period. Where a tenant fails to timely respond, the landlord has the right to request entry of the

tenant's default and obtain a prompt judgment for possession based upon that default.

Code of Civil Procedure §1169 spells out this right to an expeditious judgment for possession upon a tenant's default:

1169. If, at the time appointed, any defendant served with a summons does not appear and defend, the clerk, upon written application of the plaintiff and proof of the service of summons and complaint, shall enter the default of any defendant so served, and, if requested by the plaintiff, immediately shall enter judgment for restitution of the premises and shall issue a writ of execution thereon. . . .

On the other hand, where the tenant appears and answers, the landlord has the right to a speedy trial and preference on the court's calendar over other civil proceedings. This is set forth at Code of Civil Procedure §1170.5, which states in pertinent part :

1170.5. (a) If the defendant appears pursuant to Section 1170, trial of the proceeding shall be held not later than the 20th day following the date that the request to set the time of the trial is made. Judgment shall be entered thereon and, if the plaintiff prevails, a writ of execution shall be issued immediately by the court upon the request of the plaintiff.

(b) The court may extend the period for trial upon the agreement of all of the parties. No other extension of the time for trial of an action under this chapter may be granted unless the court, upon its own motion or on motion of any party, holds a hearing and renders a decision thereon as specified in subdivision (c).

(c) If trial is not held within the time specified in this section, the court, upon finding that there is a reasonable probability that the plaintiff will prevail in the action, shall determine the amount of damages, if any, to be suffered by the plaintiff by reason of the extension, and shall issue an order requiring the defendant to pay that amount into court as the rent would have otherwise become due and payable or into an escrow designated by the court for so long as the defendant remains in possession pending the termination of the action.

. . .

2. THE JUDICIAL COUNCIL IS FORBIDDEN FROM ACTING CONTRARY TO THE UNLAWFUL DETAINER STATUTES

The foregoing background relating to the codified right of a landlord to summary procedures for regaining possession of real property from a delinquent tenant is salient in terms of a very emphatic limitation imposed upon the Judicial Council by the State's Constitution and reemphasized by the Governor's Order on March 27, 2020 (APPENDIX 5, p.A-63-65), authorizing emergency rules by the Council. Both specifically constrain the Judicial Council in its actions from enacting any rule that is contrary to statute.

The California Constitution unequivocally requires that rules adopted by the Council "shall not be inconsistent with statute." (Cal. Const. Art. VI, sec. 6) The Governor's emergency Order N-38-20 reiterates the Constitution's limitation. The Order, issued March 27, 2020, authorizes the Judicial Council to issue emergency orders "to amend or adopt rules for court administration, practice and procedure; and to take other action to respond to the emergency caused by COVID-19 by affording the Council "flexibility to adopt any rules concerning civil or criminal practice or procedure they may deem necessary to respond to the COVID-19 pandemic, while ensuring that the rules adopted 'shall not be inconsistent with statute,' as provided in Article VI, section 6 of the California Constitution." (APPENDIX 5, pp. A-63-65).

Contrary to these requirements that the Council not create any rule contrary to statute, the Council with Rule 1 does precisely what has been forbidden. Rule 1

contravenes both the letter and the spirit of express unlawful detainer statutes guaranteeing a landlord speedy means of regaining possession of real property from tenants who have forfeited their lease rights. Specifically, those summary procedures are via a five day Summons issued pursuant to Code of Civil Procedure §1167, a clerk's judgment for possession after default issued pursuant to Code of Civil Procedure §1169, or an expedited trial provided for pursuant to Code of Civil Procedure §1170.5.

By imposing a blanket ban on issuance of any unlawful detainer summons or default (except where the landlord shows health and safety ramifications if the landlord cannot proceed with eviction) without regard to any correlation between the emergency and the tenant's situation or the alleviation of impacted court procedures or providing safe access to justice for litigants, the emergency measure is not just in excess of the Council's authority by being directly contrary to the foregoing specific statutes, it also exceeds the Governor's authority under the Emergency Service Act (ESA) . As will be explained infra, Rule 1 also exceeds the Council's legal authority to address court procedures because it entails measures involving improperly rendering a social policy determination unrelated to court processes regarding the respective social needs of renters versus landlords. Rendering such a fundamentally legislative determination by an administrative agency into law vastly exceeds the Council's lawful authority as conferred by the Constitution (Art. VI, sec. 6) and is not the product of any statutory authority or emergency executive order.

3. THE GOVERNOR HAS NO EMERGENCY POWER TO SUSPEND UNLAWFUL DETAINER LAWS AND, THEREFORE, WOULD HAVE NO POWER TO DELEGATE ANY SUCH AUTHORITY TO THE JUDICIAL COUNCIL

The Governor relied upon the Emergency Services Act (“ESA”) (Government Code §8550, et seq.) to promulgate his executive orders responding to the pandemic. While the ESA gives the Governor broad authority over the executive branch during a state of emergency (See, §8567(a) (allowing the Governor to “make and rescind orders and regulations); §8571 (allowing the Governor to suspend any agency regulation if it hinders the Governor’s ability to address the emergency)), the same authority does not exist with regard to legislative acts. The Governor is not empowered to make, modify or rescind statutes during a state of emergency. Such authority remains the province of the Legislature.

In terms of suspending statutes during the emergency, the Governor’s power is not plenary. The Legislature confined such authority to two specific categories, neither of which applies in this case. Section 8571 allows suspensions only for statutes regarding procedures for the conduct of state business and regulatory statutes.

The latter category - regulatory statutes - relates to laws whereby the Legislature delegates authority to an executive branch agency to promulgate regulations to carry out and enforce statutes. A distinction is drawn by the courts between self-implementing statutes and regulatory statutes. A regulatory statute involves “an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” *New*

York State Elec. & Gas Corp. v. Saranac Power (2000) 117 F.Supp.2d 211, 231. In other words, a regulatory statute is where the Legislature specifies in the statutory scheme that a specified agency is to implement that scheme by regulation. *Alvarado v. Selma Convalescent Hospital* (2007) 153 Cal.App.4th 1292, 1304 (“Section 1276.5, subdivision (a) is a regulatory statute, which the Legislature intended the DHCS to enforce.”); *San Diego Trust & Savings Bank v. County of San Diego* (1940) 16 Cal.2d 142, 147 (concerning a statute authorizing local taxation agencies to assess and tax banks as to certain personal property and recognizing: “The Bank Act, under consideration here is not a tax statute but a regulatory statute intended to regulate the business of banking.”).

California’s unlawful detainer statutes are not regulatory in nature and do not relate to state business. Consequently, the Governor has no authority to suspend those statutes. Since the Governor has no authority to suspend those statutes, the Governor lacks any ability to delegate such a power even if the ESA allowed such power to be delegated, which it does not. What power the Governor does have to suspend statutes is non-delegable. Section 8571 requires that it is the Governor who is to determine what statutes hamper addressing the state of emergency and merit suspension. See, *Bagley v. City of Manhattan* (1976) 18 Cal.2d 22, 24 (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.”) . In any case, an action suspending an unlawful

detainer statute by the Judicial Council under ESA authority delegated by the Governor is contrary to statute, specifically §8571, and forbidden by Article VI, section 6 of the California Constitution.

4. IT IS CONTRARY TO THE UNLAWFUL DETAINER STATUTES AND, THEREFORE UNLAWFUL FOR THE JUDICIAL COUNCIL TO IMPOSE A NEW BURDEN OF PROOF UPON LANDLORDS SEEKING TO REGAIN POSSESSION OF PROPERTY FROM A DELINQUENT TENANT

It is one thing to limit or delay certain court proceedings in order to curtail the spread of infectious disease during such public proceedings. It is quite another matter for the Judicial Council to act to change the legal burden of proof imposed by statute upon parties regarding a legislatively prescribed remedy. The latter action is unlawful. This is especially so where the administrative agency acts based upon perceived social inequities unrelated to proper concerns over maintaining safe court proceedings and equal access to justice.

In light of the aforementioned Constitutional limitations and the limitations of the Governor's emergency order upon the Judicial Council's actions, another relevant aspect of the summary nature of the landlord's right to address a tenant default is the limited scope of an unlawful detainer proceeding. California's courts have repeatedly rejected efforts to expand the issues and burden of proof for a landlord beyond certain basic issues essential to the question of the landlord's right to possession. As the California

Supreme Court, addressing the limited issue preclusion effect of an unlawful detainer judgment recognized in *Vella v. Hudgins* (1977) 20 Cal.3d 25:

[T]he proceeding is summary in character; [] ordinarily, only claims bearing directly upon the right of immediate possession are cognizable (Green [v. Superior Court (1974) 10 Cal.3d 616], at pp. 632-634; Knowles v. Robinson (1963) 60 Cal.2d 620, 625; Cheney v. Trauzettel (1937) 9 Cal.2d 158, 159; see Cruce v. Stein (1956) 146 Cal.App.2d 688); and [] cross-complaints and affirmative defenses, legal or equitable, are permissible only insofar as they would, if successful, "preclude removal of the tenant from the premises." (Green supra at p. 634, fn. 19; Union Oil Co., supra, at p. 725.)

Id. at 255.

Counterclaims and offsets are not available to the defendant in an unlawful detainer proceeding. *Arnold v. Krigbaum* (1915) 169 Cal. 143, 145-47. Damages, where not authorized by statute, cannot be sought by the landlord or the tenant. *Roberts v. Redlich* (1952) 111 Cal. App. 2d 566; *Balassy v. Superior Court* (1986) 181 Cal. App. 3d 1148, 1151-52; *Chase v. Peters* (1918) 37 Cal.App. 358, 360-61; *Vasey v. California Dance Co.* (1977) 70 Cal. App. 3d 742, 748; *Saberi v. Bakhtiari* (1985) 169 Cal. App. 3d 509, 515; *Castle Park No. 5 v. Katherine* (1979) 91 Cal. App. 3d Supp. 6, 10-12; *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal. App. 3d 1032, 1073.

This clear understanding of §1161 as requiring only that a landlord establish an unlawful detainer to prevail as to the issue of possession has resulted in consistent judicial recognition enforcing that understanding by precluding extraneous issues from that process. The burden for unlawful detainer for a tenant's persistent non-payment

of rent for months – the basis for eviction here - is plain. Code of Civil Procedure §1161(2) sets forth the prima face showing for a landlord to prevail: “A tenant of real property . . . is guilty of unlawful detainer: When he or she continues in possession . . . without the permission of his or her landlord. . . after default in the payment of rent . . . and three days’ notice . . . requiring its payment, stating the amount which is due, the name, telephone number, and address of the person to whom the rent payment shall be made . . .”)

Rule 1’s attempt to impose an additional burden of proof on a landlord to show the landlord’s “action is necessary to protect public health and safety”, should properly be rejected by this Court. Health and safety concerns related to displacement may properly be the subject of post-judgment judicial consideration for a hardship stay of execution (Code Civ. Proc. §918), but are not properly added to the legislatively adopted burden set by §1161 for access to the summary procedures established by the Legislature for a landlord to regain possession of real property from a delinquent tenant.

B. RULE 1’S SHIFTING OF THE BURDEN TO LANDLORDS TO SHOW HEALTH AND SAFETY PROBLEMS WILL RESULT IF THEY CANNOT EVICT A TENANT IS NOT AUTHORIZED BY LEGISLATION OR LAWFUL GUBERNATORIAL DECREE AND IS CONTRARY TO THE GOVERNOR’S ORDERS AND LOCAL ENACTMENTS RELATING TO EVICTIONS DURING THE EMERGENCY

Governor Newsom’s emergency order issued on March 27, 2020 (APPENDIX 5, pp.A-63-65 - (EXHIBIT 6 (b))), authorized the Judicial Council to adopt emergency rules to handle COVID-19’s impact upon the courts. The Governor’s order was circumspect in

adhering to the State Constitution's limitation that the Judicial Council's rule-making and other functions were to relate to court administration and procedures. It was not a mandate for the Judicial Council to legislate and address public welfare, the seriousness of rent or other tenant deficiencies and other social policy matters outside its administrative sphere.

Nowhere in the Governor's March 27th Order is there any grant of authority to the Judicial Council to limit evictions to only cases where health and safety concerns are threatened. The latter evaluation would be a proper task for the State Legislature. The Governor did not make that evaluation. On the other hand, the question of relief for tenants economically impacted by the emergency was regarded by the Governor's decree as appropriately handled by local legislative bodies. That is precisely why Governor Newsom, eschewing other eviction limitations in his order on March 16, 2020 and his other order on March 27, 2020 (APPENDIX 5, pp. A-50-53 and A-60-62 - (EXHIBITS 4 and 6(a))), left the job of imposing limits on evictions for hardships resulting from the emergency to local governments to address.

Reconfiguring the burden of proof required to evict a tenant who has not paid the tenant's rental obligation is a legislative task. So is establishing the process for obtaining a default and judgment thereon. It is not within the parameters delegated to the Judicial Council by the Governor's March 27, 2020, Order calling for the Council to address court procedures in light of the COVID-19 emergency.

Plainly Governor Newsom, acting on his proper authority to address an emergency, was asking the Judicial Council to come up with rule changes and procedures for courts that would allow access to justice while minimizing risks to health and safety to court personnel, judges, lawyers and persons using the court process. This request for action by the Council did not include letting that administrative agency make fundamental policy decisions and to re-write unlawful detainer laws to halt issuance of summons and defaults and setting of trial proceedings in all eviction cases where a landlord cannot demonstrate a danger to health and safety is presented.

A default request, based upon a 3 Day Notice for unpaid rent (dating back to October 2019) served on January 23, 2020, presented no issue under the Governor's orders extending relief to tenants impacted by the COVID-19 emergency (APPENDIX 5, pp. pp. A-50-53 and A-60-62 EXHIBIT 4 and EXHIBIT6 (a)) . The March 27, 2020 order (APPENDIX 5, pp. A-60-62 - EXHIBIT 6 (a)) recognizes the potential for economic hardship to rent-paying tenants caused by the emergency and it protects them by allowing local enactments giving tenants time before they may be evicted, allowing them an opportunity to catch up, obtain relief and so on.

Significantly, the Governor's order also recognizes that not all tenants facing eviction are facing that situation because of the emergency. It provides that landlords should not be deprived of access to justice and should be allowed to evict tenants whose dereliction of their lease obligations has no correlation to the emergency. For this

reason, the Order specifies it is *incumbent upon the tenant* to notify the landlord and document that emergency-related hardship. (APPENDIX 5, pp.A-51 and A-61- see, Par. 1-3)

The Judicial Council ignores the Governor's plain intent. Instead of making the tenant show the tenant's situation would be imperiled by an eviction, Rule 1 makes the landlord responsible for showing a threat to health and safety if the tenant is not evicted. In other words, unless the tenant is a public menace or engaging in some form of nuisance on the premises, a landlord cannot evict that delinquent tenant even for a default that has absolutely nothing to do with the emergency. The decision to impose this obstacle to proper unlawful detainer proceedings has no correlation to regulating court access during the emergency. It is simply unauthorized legislation.

Reinforcing the lack of delegated authority for the Judicial Council to revise statutory eviction procedures, the Governor's Orders gave specific emergency authorization to the relevant local entity, City of Salinas, to provide relief to any tenants impacted by the emergency. In response, the Salinas City Council enacted a law allowing tenants who could document an emergency-related hardship to avoid eviction. (APPENDIX 5, p. 53-58- (EXHIBIT 5)) In accordance with the guidance afforded by the Governor's Order, Salinas allowed relief to affected tenants, but allowed evictions to proceed against tenants unaffected by the emergency situation. Rule 1 seeks to upend the authorized local legislation which has arrived at a satisfactory accommodation

between the need to afford affected tenants relief and the need to allow landlords access to justice to protect their property rights.

The provisions of emergency Rule 1, calling for a landlord seeking to evict a commercial tenant for unpaid rent dating back to October 2019, to show that health and safety is at stake if eviction cannot proceed, are not authorized by the Governor's Order or any law. In addition Rule 1's provisions are beyond the pale of the allowable role of the Council set forth by our State's Constitution.

C. RULE 1's REQUIREMENTS EXCEED THE JUDICIAL COUNCIL'S CONSTITUTIONAL AUTHORITY TO DEAL WITH COURT RULES AND OPERATIONS

Article III, §3 of the California State Constitution sets forth two constitutional imperatives of significance with regard to emergency Rule 1. That section states: "The powers of state government are legislative, executive, and judicial. Persons 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 first imperative is that there are separate branches of our state government exercising different governmental functions and each with exclusive authority to operate in its own constitutional sphere. The second imperative is that each branch of the government is forbidden from exercising the powers of the others or from delegating its powers to another branch.

The Judicial Council is established by the Constitution as a part of the executive branch serving administrative needs of both the legislative and judicial branches. Article

VI, section 6 establishes the Judicial Council as an agency existing to deal with court operations and to set procedures for the operation of California's courts. Accordingly, the Council is forbidden both by the express language in Article VI, section 6 from making Rules contrary to laws enacted by the Legislative branch, but also by Article II, §3 from lawmaking. In other words, while the Council can make rules to enable statutes, it cannot make rules that disable statutes (See, Article III, §3.5 : "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: . . . (c) To declare a statute unenforceable") change statutes or itself make policy decisions of a legislative nature.

The limits of the Judicial Council's constitutional authority were directly addressed by the California Supreme Court in *People v. Wright* (1982) 30 Cal.3d. 576. The issue in that case had to do with the Council setting criteria for sentencing purposes at the express behest of the Legislature. The defendant appealed his sentence arguing the Legislature had improperly delegated legislative authority. The Court in *Wright* recognized separation of powers principles meant there could not be a complete delegation of lawmaking authority to the Council. The Legislature had to provide guidance for the administrative agency to work out the details: "The Legislature must make the fundamental policy determinations, but after declaring the legislative goals and establishing a yardstick guiding the administrator, it may authorize the administrator to adopt rules and regulations to promote the purposes of the legislation and to carry it

into effect.” Id. at 713. The Court found that under the circumstances the Legislature had made the requisite policy evaluations and had adequately provided standards for the Council to establish sentencing guidelines by directing that it arrive at criteria to promote uniformity in sentencing. Id.

The difference between the situation in *Wright*, where the Legislature specifically asked the Judicial Council to make its legislative objective happen and provided guidance for that process, and the situation here, is plain. With Rule 1, The Council has received no legislative policy determination regarding health and safety. Additionally, there is no specified objective or guidance leading to preventing landlords from evicting non-paying tenants without making a showing that health and safety would be imperiled if a landlord cannot evict. This was not lost on the Court in *Wright*. It recognized the significance of this distinction in rendering such an act by the Council unconstitutional:

An unconstitutional delegation of legislative power occurs when the Legislature confers upon an administrative agency unrestricted authority to make fundamental policy decisions. [Citations] "This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions." (*Kugler v. Yokum*, *supra*, 69 Cal.2d at pp. 376-377.)

Id. at 712.

Any proper emergency authority exercised by the Governor and conferred by his orders upon the Judicial Council did not include letting the Council make fundamental policy decisions or having it hold in abeyance or otherwise deny enforcement of unlawful

detainer statutes by halting issuance of summons and defaults and trials in all eviction cases where a landlord cannot demonstrate a danger to health and safety is presented.¹ The provisions of emergency Rule 1, calling for a landlord seeking to evict a commercial tenant for unpaid rent dating back to October 2019, to demonstrate that health and safety is at stake if eviction cannot proceed, are contrary to the allowable role of the Council set forth by the State Constitution at both Articles III and VI.² This Court is now called upon to recognize that overstep.

Whether such substantive legal changes are needed is up to the elected representatives of the People or to the Governor acting under emergency powers in the Constitution. *Wright*, explains that the Council does not get to meddle in making

1 The Governor's March 27, 2020 Order (APPENDIX p. 63) does not presume to authorize anything exceeding the Judicial Council's constitutional purview. That order sought to have the Council set up emergency procedures and rules to maintain access to justice under emergency conditions. The Order granted no authority to the Council to make policy evaluations regarding how to dispense relief to tenants at the expense of landlords including where there is no emergency basis to afford a tenant default. The Governor had already established a balanced means for local legislation to provide relief for tenants and prevent economic hardships caused by the emergency, to avoid unnecessary displacement and homelessness, while affording landlords the ability to protect their rights when tenant failures to abide by lease terms are unrelated to COVID-19.

2 The Council's power is constitutionally limited to "rules for court administration, practice and procedure, not inconsistent with statute" (Cal. Const., Art. VI, § 6.) Substantive law- making, inconsistent with the burdens set by §1161 (2), the requirements for issuance of a default in §1169, the requirements for issuance of a Summon in §1167 and the time within which a trial must be set in § 1170.5, is beyond the constitutional mandate of the Council.

substantive law, such as changing the burden imposed upon a party seeking a remedy established by the legislature. This is so whether there is an emergency or not. Such power cannot and should not be usurped by the Council acting by fiat on its own view of what it believes needs to be done to protect tenants even tenants who may opt not to contest a landlord's claims or not to use the courts (especially in the default situation presented here).

D. EVEN IF THE GOVERNOR *HAD* AUTHORIZED THE COUNCIL TO ADOPT THE BURDEN SHIFTING IN RULE 1, THIS WOULD FAIL NOT ONLY UNDER THE ESA, BUT ALSO UNDER THE NON - DELEGATION DOCTRINE

The Governor's March 27, 2020, Order (APPENDIX 5, pp. A- 63-65) specifically holds the Judicial Council to the Constitution's requirement to create no rule contrary to statute. It hews to the understanding that an effort to vest such legislative power in the Council would be unconstitutional. Even if that Order had attempted to confer such authority, such a delegation would fail as a matter of constitutional law. At the federal level, the Non-delegation doctrine derives from Article 1 of the United States Constitution which prescribes that "legislative power" "shall be vested in a Congress" (*Touby v. U.S.* (1991) 500 U.S. 160, 165 ("Congress may not constitutionally delegate its legislative power to another branch of Government.") and emanates from the very structure of our constitutional form of government which divides governmental power flowing from the People and disperses it to the executive, legislative and judicial branches.

The plain corollary of this balancing of delegated power is that one branch of our government may not engage in activity reserved as the exclusive province of another branch. *Mistretta v. United States* (1989) 488 U.S. 361, 371–72 (“The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that ‘[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,’ U.S. Const., Art. I, § 1, and we long have insisted that ‘the integrity and maintenance of the system of government ordained by the Constitution’ mandate that Congress generally cannot delegate its legislative power to another Branch.”)

At the state level, separation of power principles are specifically stated in California’s Constitution as precluding the delegation of the powers of one branch of government to another. (Cal.Const. Art III, §3); *Kugler v Yocum* (1968) 69 Cal.2d 371, 375; *Marine Forests Society v. Cal. Coastal Com.* (2005) 36 Cal.4th 1, 24-25. California law-making regarding protecting property rights and the remedies, burdens of proof, evidentiary rules and defenses has, since the gold rush been the realm of the sovereign People via referendum or via their elected representatives in the Legislature. These societal determinations, because they are by their nature a collective expression by the social body, are not the proper province of an administrative agency. They are properly the province of the legislative branch of government.

Our state Supreme Court observed the critical overstep involved in delegating the power to enact emergency Rule 1 to the Judicial Council here in *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287. *Carmel Valley FPD* was a case considering whether legislative enactments had encroached upon the power of the executive branch. The Court described the pertinent difference between delegating law making power (which is unconstitutional) versus the conferring of discretion to carry out the law (which is a proper product and function of law making):

The legislative branch of government, although it is charged with the formulation of policy, properly may delegate some quasi-legislative or rulemaking authority to administrative agencies. (*Bixby v. Pierno* (1971) 4 Cal. 3d 130, 142. For the most part, delegation of quasi-legislative authority to an administrative agency is not considered an unconstitutional abdication of legislative power. (*Davis v. Municipal Court*, supra, 46 Cal.3d at p. 76; *Bixby v. Pierno*, supra, 4 Cal.3d at p. 142.) " ' **The true distinction ... is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.** " ' " (*Loving v. United States*, supra, 517 U.S. at pp. 758-759; see also 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 130, p. 186.)

Id. at 297-298 (emphasis added).

The difference between a situation where the Legislature sets a lawmaking objective and defers to an administrative agency with guidance for filling in the details (as in *People v. Wright*, supra) and the situation here - where there is no set objective or guidance for the agency - is critical. The problem with the latter scenario is we have an administrative agency deciding what the law ought to be. It is not carrying out the

Legislature's agenda, it is marching to its own drumbeat in making up the law as it, not the People or the People's elected representatives, sees fit.

While most any governing body takes advantage of administrative delegations to ensure efficient administration of the law, such delegations also require adequate checks to ensure that fundamental policy decisions are made by those most accountable to the electorate. "The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct...." *Yakus v. United States* (1944) 321 U.S. 414, 424. The delegation of the core sovereign function of deciding what burden is imposed upon one seeking to regain possession of real property or to obtain a Summons or the default of a defendant who fails to answer a complaint or secure a trial date is fundamentally inconsistent with representative government.

E. ANY LEGAL ENACTMENT BY THE JUDICIAL COUNCIL IMPOSING A NEW BURDEN TO DEMONSTRATE HEALTH AND SAFETY ISSUES MUST BE GIVEN PROSPECTIVE, NOT RETROACTIVE EFFECT

The tenant here was served with process on March 10, 2020. Petitioner's default request was submitted March 27, 2020. The tenant's failure to file any responsive pleading within five days placed him in default. At that point, the landlord was entitled to entry of the tenant's default and a default judgment (Code Civ. Proc. §1169) and was required to submit a request for entry of default. (Cal. Rules of Court, Rule 3.110(f))

The default request, based upon a 3 Day Notice for unpaid rent (dating back to October 2019) and served on January 23, 2020, presented no issue under the Governor's orders extending relief to tenants impacted by the COVID-19 emergency (APPENDIX 5, pp. A-5-53, 60-62 - (EXHIBIT 4 and EXHIBIT6 (a))) or the applicable local ordinance adopted by the City of Salinas implementing the governor's Orders. (APPENDIX 5, p. A-55- (EXHIBIT 5)) The clerk sat on and did not act on Petitioner's request until April 8, 2020 – just days after the Judicial Council adopted its emergency Rule 1 on April 6, 2020. (APPENDIX 5, p. A19) Until the plaintiff submits and the clerk enters a defendant's default the defendant is able to file an Answer. *Fiorintino v. City of Fresno* (2007) 150 Cal.App.4th 596, 605. The tenant here had notice of Petitioner's intention to seek his default and despite ample opportunity to file a responsive pleading, declined to do so.

Laws are presumed to operate prospectively and not retroactively. *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587; *Quarry v. Doe I* (2012) 53 Cal.4th 945, 955. This is so unless the Legislature plainly has directed otherwise by means of the express language of retroactivity or other sources that provide a clear and unavoidable implication that it intended retroactive application. *Id.* Likewise, administrative provisions, since they carry out or fill in the details of legislative enactments, are prospective in nature. Hutchinson, *Rule Making Function of California Administrative Agencies* 15 Hastings L. Journal (1964) 272, 273 ("In short, administrative rules apply generally and prospectively to all transactions within their scope, as does legislation")

This is also so with regard to a document submitted for filing, such as a request for entry of a default. *Rojas v. Cutsforth* (1998) 67 Cal.App. 4th 774 (“But a paper is deemed filed when it is deposited with the clerk with directions to file the paper. (*Dillon v. Superior Court*, *supra*, 24 Cal. App. 760, 765.) Because here the clerk had no proper basis for rejecting Rojas's complaint, it must be deemed filed when it was presented on November 7, 1996.” *Id.* at 778). In other words, the request for entry of the default of defendant/Real Party here should be considered to have been filed as of the date of its submission which was prior to implementation of Rule 1’s requirements.

The consequence of applying this presumption against retroactivity to the April 6 adoption of Rule 1 is plain. Emergency Rule 1 has no application to a request for entry of default that was submitted for processing by the court before that temporary rule went into effect. Since a paper is deemed filed when it is deposited with the clerk with directions to file the paper (*Dillon v. Superior Court* (1914) 24 Cal. App. 760, 765), the trial court below should properly have directed the clerk to process Petitioner’s request for entry of default *nunc pro tunc* and to enter a clerk’s judgment for possession. This Court should direct that filing now.

III. CONCLUSION

The old adage that “hard cases make bad law” is aptly illustrated by the tendency of the judiciary during times of emergency to blink when governmental actions deprive

American citizens of their rights. *Korematsu v. United States* (1944) 323 [U.S.](#) 214; *Schenck v. United States* (1919) 249 U.S. 47. This tendency is one to be resisted precisely because rights are most in need of protection during hard times. Here, the rights of landlords – undoubtedly a historically maligned classification in our society – have been eviscerated by a rule adopted by an administrative agency, the Judicial Council, under the pretext of an emergency. That Rule is without constitutional or other lawful authority. The existence of an emergency does not serve to compensate for this lack of lawful authority.

An order should issue directing the trial court below to 1) enter the default of Doug Scott, dba American Biotech Testing, who declined to answer Petitioner's Complaint, and 2) to issue a clerk's judgment for possession forthwith.

Dated: August __3__, 2020

A handwritten signature in black ink, appearing to read "Steven J. Andre". The signature is stylized with a large, looped "S" and a prominent "A".

Steven J. Andre, Attorney for Petitioner, Michael
Horsley dba Mikesigns

VERIFICATION

I am the attorney for Petitioner, Michael Horsley, dba Mikesigns, in this case. I have read the foregoing Petition and know its contents. The facts alleged in the Petition are within my own knowledge and I know these facts to be true. I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on this __3rd__ day of August, 2020 at Carmel, California.



Steven J. Andre

CERTIFICATE OF WORD COUNT

I certify that this brief contains _6,901_ words as counted by the word-processing program used to generate this brief.



Dated: August __3__, 2020.

Steven J. Andre, Attorney for
Petitioner, Michael Horsley,
dba Mikesigns

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF MONTEREY

I am employed in the county aforesaid, I am over the age of 18 years and not a party to the within action. My business address is 26080 Carmel Rancho Blvd., Carmel, CA 93923.

The papers listed below were served this date by mailing them by first class mail addressed as follows:

Clerk of the Superior Court
County of Monterey for delivery to the Hon. Thomas Wills
1200 Aguajito Road
Monterey, CA 93940

Doug Scott, individually
and dba, American Biotech Testing
566 Brunken Avenue
Salinas, CA 93901

PETITION FOR WRIT; APPENDIX

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

Dated : August __3__, 2020



Steven Andre