Filed 12/4/03

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE NATIONAL TAX-LIMITATION COMMITTEE et al., Plaintiffs and Appellants, v. ARNOLD SCHWARZENEGGER, as Governor, etc., Defendant and Respondent.	C043583 (Super. Ct. No. 02CS01567)

APPEAL from a judgment of the Superior Court of Sacramento County, Gail D. Ohanesian, J. Dismissed.

Gary G. Kreep and Richard D. Ackerman, for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Andrea Lynn Hoch, Chief Assistant Attorney General, Louis R. Mauro, Senior Assistant Attorney General, Catherine M. Van Aken, Supervising Deputy Attorney General, Leslie R. Lopez and Jonathan K. Renner, Deputy Attorneys General, for Defendant and Respondent.

In January 2001, in an exercise of his powers under the California Emergency Services Act (Gov. Code,[1] § 8550 et seq.) (sometimes the Act), former Governor Gray Davis proclaimed a state of emergency in California based on "shortages of electricity" that he found were causing "blackouts affecting millions of Californians." Nearly two years later, plaintiffs The National Tax-Limitation Committee, Lewis K. Uhler, and then-state Senator Ray Haynes commenced this mandamus proceeding to compel the Governor to proclaim an end to the state of emergency because, according to them, "California is no longer in the midst of a 'power crisis.'" The trial court sustained the Governor's demurrer without leave to amend, concluding it was for the Governor or the Legislature, not the courts, to decide whether there was still an energy shortage justifying a state of emergency.

Plaintiffs appealed from the resulting judgment in favor of the Governor. While the appeal was pending, however, former Governor Davis proclaimed an end to the state of emergency. As a result, the parties have filed a stipulation requesting that we dismiss the appeal.

We agree with the parties that because the state of emergency has already been terminated, plaintiffs' petition for a writ of mandate directing the Governor to take that action is moot, and the appeal should be dismissed. Nevertheless, because

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[1] All further statutory references are to the Government Code unless otherwise indicated.

we believe this case presents an issue of continuing public interest, we will exercise our inherent discretion to decide that issue.

On review, we conclude the trial court erred in sustaining the demurrer. Although the Act implicitly gives the Governor discretion to determine when conditions warrant the termination of a state of emergency he has proclaimed under the Act, under well-established California law a writ of mandate will lie to correct an abuse of that discretion.

Neither the separation of powers doctrine nor the political question doctrine precludes the trial court from exercising its power under Code of Civil Procedure section 1085 to correct abuses of discretion by public officers like the Governor. In addition, the Governor is not immune from a properly issued writ of mandate under the immunity provision in the Act (§ 8655).

It may be a rare case in which a plaintiff will be able to *prove* the Governor has unreasonably exercised his discretion in refusing to terminate a state of emergency. Nevertheless, the courthouse door is, and must remain, open to a plaintiff claiming such an abuse of discretion by the Governor. Accordingly, the trial court erred in sustaining the Governor's demurrer. Because this case is now moot, however, we will dismiss the appeal pursuant to the stipulation of the parties.

FACTUAL AND PROCEDURAL BACKGROUND

Under the California Emergency Services Act, the Governor is empowered to proclaim a state of emergency when he finds that certain conditions exist. (§§ 8558, subd. (b), 8625, subds.

(a), (c).) The Act further provides: "The Governor shall proclaim the termination of a state of emergency at the earliest possible date that conditions warrant. All of the powers granted the Governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the Governor or by concurrent resolution of the Legislature declaring it at an end." (§ 8629.)

On January 17, 2001, pursuant to his powers under the Act, former Governor Davis proclaimed a state of emergency to exist based on the following findings:

"[S]hortages of electricity available to California's utilities have today resulted in blackouts affecting millions of Californians; and

"[U]nanticipated and dramatic increases in the price of electricity have threatened the solvency of California's major public utilities, preventing them from continuing to acquire and provide electricity sufficient to meet California's energy needs; and

"[T]he California Public Utilities Commission, the Independent Systems Operator and the Electricity Oversight Board have advised that the electricity presently available from California[']s utilities is insufficient to prevent widespread and prolonged disruption of electric service within California; and

"[T]his energy shortage requires extraordinary measures beyond the authority vested in the California Public Utilities Commission; and

"[T]he imminent threat of widespread and prolonged disruption of electrical power to California's emergency services, law enforcement, schools, hospitals, homes, businesses and agriculture constitutes a condition of extreme peril to the safety of persons and property within the state which, by reason of its magnitude, is likely to be beyond the control of the services, personnel, equipment, and facilities of any single county or city; . . ."

In an exercise of his emergency powers, former Governor Davis then ordered the Department of Water Resources (the Department) to "enter into contracts and arrangements for the purchase and sale of electric power with public and private entities and individuals as may be necessary to assist in mitigating the effects of this emergency." In connection with this order, the Governor suspended "the provisions of the Government Code and the Public Contract Code applicable to state contracts, including but not limited to, advertising and competitive bidding requirements."

On June 13, 2002, Uhler, the president of The National Tax-Limitation Committee, wrote to the Governor and asked that he "proclaim the termination of [his] emergency powers immediately" because "[t]he energy crisis has long since subsided." The Governor refused to do so.

Accordingly, on October 9, 2002, plaintiffs filed a petition for a writ of mandate against the Governor and the Department, alleging that "California is no longer in the midst of a 'power crisis' and [the Governor] is mandated to terminate his emergency powers, relating thereto, as a matter of law." Plaintiffs requested a writ of mandate "requiring [the Governor] to terminate his declaration of an energy emergency and the exercise of all powers flowing therefrom, including, but not limited to, the purchase of electricity or the negotiation of contracts therefore."

The Governor demurred to the petition (see Code Civ. Proc., § 1089), arguing, among other things, that the complaint did not state a cause of action because the Act provides for termination of a state of emergency only by the Governor or the Legislature, and therefore the court was barred by the separation of powers doctrine (Cal. Const., art. III, § 3) from granting the requested relief.[2] The trial court agreed, stating that "this is not the type of case that is appropriate for judicial review. . . . [¶] . . . [I]t is . . . a legislative or a decision of the Governor as to . . . whether or not there is still an emergency situation due to an energy shortage."

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[2] It does not appear from the record that the Department was ever served with a summons or appeared in this matter, and the present appeal deals only with the judgment entered in favor of the Governor.

Accordingly, the trial court sustained the Governor's demurrer without leave to amend and entered judgment in the Governor's favor. This timely appeal followed.

DISCUSSION

I

Mootness

On November 13, 2003, less than two weeks before oral argument in this court, former Governor Davis issued a proclamation declaring an end to the state of emergency he had first declared in January 2001. As a result, the parties have filed a stipulation to dismiss the appeal.

Under rule 20(c)(2) of the California Rules of Court, after the record on appeal has been filed we have discretion whether to dismiss an appeal on the stipulation of the parties. Furthermore, "[i]n a proceeding that may otherwise be deemed moot we have discretion to resolve an issue of continuing public interest that is likely to recur in other cases . . . ." (*Daly v. Superior Court* (1977) 19 Cal.3d 132, 141.)

Whether the California courts have the power to direct the Governor to terminate a state of emergency he has proclaimed under the Act is a quintessential issue of continuing public interest that we believe is likely to recur. Accordingly, while the case before us is moot, and we will dismiss the appeal on that basis, we nonetheless exercise our inherent authority to decide the important issues the case presents before doing so. (See *People v. West Coast Shows, Inc.* (1970) 10 Cal.App.3d 462.)

II

Standard of Review

On review of an order sustaining a demurrer without leave to amend, our initial standard of review is de novo, "i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law" (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790), i.e., whether the petition states sufficient facts to justify relief. (*StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 455, fn. 7.) The question before us is whether plaintiffs have "stated a cause of action under any possible legal theory." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) In analyzing the complaint, we "give[] the complaint a reasonable interpretation, and treat[] the demurrer as admitting all material facts properly pleaded." (*Ibid.*) However, we do not assume the truth of "contentions, deductions or conclusions of law." (*Ibid.*)

III

The California Emergency Services Act

"The California Emergency Services Act recognizes and responds to a fundamental role of government to provide broad state services in the event of emergencies resulting from conditions of disaster or of extreme peril to life, property, and the resources of the state. Its purpose is to protect and preserve health, safety, life, and property. (§ 8550 et seq.) A state of emergency may be proclaimed by the Governor under the

conditions proscribed for any area affected (§ 8625). The act confers broad powers on the Governor to deal with emergencies.

"For example, during a state of emergency, the Governor may suspend any regulatory statute or statute proscribing the procedure for conduct of state business, or suspend the orders, rules or regulations of any state agency, if these would prevent, hinder or delay the mitigation of the effects of the emergency (§ 8571). The Governor may command or utilize private property or personnel deemed by him necessary in carrying out his responsibilities, paying for its reasonable value . . . (§§ 8572, 8652). The state is not liable for any claim based upon discretionary functions (§ 8655). The Governor is empowered to make expenditure from any fund legally available to deal with the conditions of a state of emergency (§ 8645)." (*Martin v. Municipal Court* (1983) 148 Cal.App.3d 693, 696.)

The Governor's power to proclaim a state of emergency emanates from section 8625, which provides: "The Governor is hereby empowered to proclaim a state of emergency in an area affected or likely to be affected thereby when: [¶] (a) He finds that circumstances described in subdivision (b) of Section 8558 exist; and either [¶] (b) He is requested to do so (1) in the case of a city by the mayor or chief executive, (2) in the case of a county by the chairman of the board of supervisors or the county administrative officer; or [¶] (c) He finds that local authority is inadequate to cope with the emergency."

Subdivision (b) of section 8558 provides: "'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 such conditions as air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, the Governor's warning of an earthquake or volcanic prediction, or an earthquake, complications resulting from the Year 2000 Problem, 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, or with respect to regulated energy utilities, a sudden and severe energy shortage requires extraordinary measures beyond the authority vested in the California Public Utilities Commission."

A "sudden and severe energy shortage" is defined as "a rapid, unforeseen shortage of energy, resulting from, but not limited to, events such as an embargo, sabotage, the Year 2000 Problem, or natural disasters." (§ 8557, subd. (h).)

Under the foregoing provisions, the Governor has the power to proclaim a state of emergency when he finds: (1) that a rapid, unforeseen shortage of energy has caused the existence of conditions of disaster or of extreme peril to the safety of persons and property within the state; (2) that the energy shortage requires extraordinary measures beyond the authority vested in the California Public Utilities Commission; and

(3) that local authority is inadequate to cope with the emergency.

In his proclamation of a state of emergency, "[t]he Governor must state the circumstances of the emergency found to exist and that the emergency is found to be beyond local control measures [citation]." (*Martin v. Municipal Court*, *supra*, 148 Cal.App.3d at p. 697.)

The petition in this case does *not* allege the Governor's proclamation of a state of emergency failed to satisfy the foregoing requirements of the Act. Thus, we must presume the Governor acted within his powers under the Act in proclaiming a state of emergency based on the conditions that existed in January 2001. The question here is whether, under the conditions alleged to exist nearly two years later, when the petition was filed, the Governor had a duty that could be enforced by a writ of mandate to terminate the state of emergency pursuant to section 8629. We turn now to that question.

IV

Under the Proper Circumstances, the Governor can be Compelled by a Writ of Mandate to Terminate a State of Emergency Proclaimed Under the Act

We begin with the legal principles governing the issuance of a writ of mandate.

"A writ of mandate may be issued by any court to any . . . person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or

station, . . .” (Code Civ. Proc., § 1085, subd. (a).) It has often been said that “two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the respondent [citations]; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty [citation].” (*Baldwin-Lima-Hamilton Corp. v. Superior Court* (1962) 208 Cal.App.2d 803, 813-814.) However, a writ of mandate will also lie to correct an abuse of discretion by a public officer. (*Fair v. Fountain Valley School Dist.* (1979) 90 Cal.App.3d 180, 186-187.)

“*[M]andamus* or any other appropriate writ may issue against the governor under proper circumstances.” (*O’Brien v. Olson* (1941) 42 Cal.App.2d 449, 455.) As just one example, “[i]t is the duty of the Governor to execute [a land] patent, and a mandamus will issue to compel him to execute it, in case of his refusal, if the statute regulating the sales of such lands has been complied with by the several officers and the purchaser, and the land was subject to sale by the State.” (*Middleton v. Low* (1866) 30 Cal. 596, 604.)

The parties here have focused on the “ministerial duty” aspect of mandamus law. The Governor contends a writ of mandate is unavailable here because “the decision to terminate a declared emergency cannot be viewed as ministerial.” Plaintiffs, on the other hand, contend the Governor has a “mandatory” duty to terminate the state of emergency under section 8629 because there is no power crisis.

"A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists. Discretion, on the other hand, is the power conferred on public functionaries to act officially according to the dictates of their own judgment." (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 501-502.) "Stated otherwise, [a ministerial act] is an act with respect to the performance of which a public officer can exercise no discretion--an act or duty prescribed by some existing law that makes it incumbent on him to perform precisely as laid down by the law. [Citations.] 'In short, where a statute requires an officer to do a prescribed act on a prescribed contingency, his functions are ministerial.'" (*People ex rel. Fund American Companies v. California Ins. Co.* (1974) 43 Cal.App.3d 423, 431-432.)

As noted above, section 8629 requires the Governor to "proclaim the termination of a state of emergency *at the earliest possible date that conditions warrant*." (Italics added.) In their petition, plaintiffs alleged that "[p]resent conditions warrant termination of [the Governor's] emergency powers" because "California is no longer in the midst of a 'power crisis.'" They contend that because "all of the complaint's facts must be taken as true," we must assume for purposes of the demurrer there is no power crisis, and therefore

the Governor has a ministerial duty to proclaim an end to the state of emergency under section 8629.

We agree with plaintiffs that if their allegations were proven true, the Governor could be compelled by a writ of mandate to end the state of emergency, although not exactly for the reasons stated by plaintiffs. As we explain more fully below, if plaintiffs could prove there is no longer a "power crisis," then the only reasonable choice for the Governor to make would be to determine that conditions warrant termination of the state of emergency. Under those circumstances, his refusal to make that choice would be an abuse of discretion that could be corrected by a writ of mandate.

As we have noted, section 8625 gives the Governor the power to proclaim a state of emergency when he finds that certain conditions exist. Undoubtedly, the Governor exercises his discretion in determining whether the requisite conditions exist, e.g., whether there is an energy shortage, whether that shortage has resulted in conditions of disaster or extreme peril to the safety of persons and property within the state, etc. Plaintiffs do not contend otherwise.

It follows, as a matter of parity, that the Governor likewise is entitled to exercise his discretion in later determining whether and when "conditions warrant" termination of the state of emergency under section 8629 -- for example, because one or more of the conditions prerequisite to declaring the state of emergency in the first place has ceased to exist. In other words, the Governor's duty to terminate a proclaimed

state of emergency under section 8629 arises only when *the Governor has determined* that "conditions warrant" termination of the state of emergency. That foundational determination is committed to the sound discretion and judgment of the Governor under the Act.

Arguing that "mandamus cannot lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner," the Governor contends his "authority to declare the . . . end of a state of emergency" cannot be controlled by a writ of mandate because he has the discretion to determine when conditions warrant termination of the state of emergency.

The flaw in that argument is that it ignores a crucial qualification to the legal principle upon which it is based. As our Supreme Court explained more than 100 years ago: "There are innumerable cases in which it has been laid down that *mandamus* cannot issue to control discretion. The rule--which is undoubtedly correct when properly understood--has been expressed in various forms. It has been repeatedly said that the writ cannot perform the functions of a writ of error; that it cannot issue to revise judicial action, but can only compel the performance of ministerial functions; and that it will issue to compel a tribunal to act in some way, but not in any particular way. These formulas undoubtedly express a truth, but they express it in an inaccurate and misleading manner; and by reasoning from them as if literally and in all cases true, courts have sometimes been led into error, and have frequently

been forced to call acts 'ministerial' which are plainly not so. An examination of the authorities will demonstrate the inaccuracy of the above phrases. [¶] Thus it is not accurate to say that the writ will not issue to control discretion; for it is well settled that it may issue to correct an abuse of discretion, if the case is otherwise proper." (*Wood v. Strother* (1888) 76 Cal. 545, 548-549.)

"It is the general rule that the writ of *mandamus* may not be employed to compel a public officer possessing discretionary power to act in a particular way. The court in such a proceeding may compel him to act, but it may not substitute its discretion for the discretion vested in such officer. . . . 'It is a familiar rule governing the issuance of the writ of mandate that an officer in whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. *Mandamus* may not compel the exercise of such discretion in any particular manner; it may only direct that the officer act, and must leave the matter as to what action he will take to his determination.' [Citation.] An important exception to the foregoing general rule is that if the facts as admitted or proved be susceptible of but one construction or conclusion the right to the writ becomes a matter of law and the officer may be compelled to act in accordance with the facts as admitted or established [citations]." (*Bank of Italy v. Johnson* (1926) 200 Cal. 1, 31.)

"Where a statute leaves room for discretion, a challenger must show the official acted arbitrarily, beyond the bounds of reason or in derogation of the applicable legal standards. [Citation.] Where only one choice can be a reasonable exercise of discretion, a court may compel an official to make that choice." (*California Correctional Supervisors Organization, Inc. v. Department of Corrections* (2002) 96 Cal.App.4th 824, 827.)

It follows from the foregoing authorities that while the Governor may have no ministerial duty to terminate a state of emergency under section 8629 until he determines, in the exercise of his discretion, that conditions warrant such an action, mandamus will lie to correct an abuse of discretion by the Governor in making that foundational determination. If, under the facts, the only choice that would be a reasonable exercise of the Governor's discretion would be to determine that conditions warrant termination of the state of emergency, then a writ of mandate can compel him to make that choice. The writ could also compel the Governor to perform his resulting ministerial duty to proclaim the termination of the state of emergency because conditions warrant.

Under the foregoing analysis, the question here is whether, based on the facts plaintiffs alleged in their petition, the only reasonable choice before the Governor was to determine that conditions warrant terminating the state of emergency. We conclude the answer to that question is "yes."

"In passing upon the sufficiency of a pleading, its allegations must be liberally construed with a view to substantial justice between the parties." (*Marin v. Jacuzzi* (1964) 224 Cal.App.2d 549, 552; see also Code Civ. Proc., § 452.) Here, plaintiffs alleged that "California is no longer in the midst of a 'power crisis.'"

Liberally construed, that allegation can be understood to mean there is no longer an energy shortage, and no longer any conditions of disaster or of extreme peril to the safety of persons and property within the state resulting from the previously existing shortage. If that is true -- as we must assume it is for present purposes -- then one of the requisite conditions for declaring the state of emergency in the first place has ceased to exist, and it would be an unreasonable exercise of discretion for the Governor to make any choice other than to determine that conditions now warrant termination of the state of emergency he proclaimed based on the energy shortage. Under these circumstances, a writ of mandate will lie to compel the Governor to make that foundational determination, which would then require him to terminate the state of emergency under section 8629.

In support of his argument that deciding whether to terminate a state of emergency is a "pure policy-based" decision that "cannot be controlled by mandamus," the Governor cites a number of tort cases arising out of actions taken under the authority of the Act. (See *Macias v. State of California* (1995) 10 Cal.4th 844 [suit against malathion manufacturers and

distributors relating to state of emergency based on periodic infestations of Mediterranean fruit fly]; *Soto v. State of California* (1997) 56 Cal.App.4th 196 [suit by public employee injured while participating in a training exercise conducted pursuant to the Act]; *LaBadie v. State of California* (1989) 208 Cal.App.3d 1366 [action for negligent misrepresentation by resident abnormally sensitive to malathion sprayed during state of emergency]; *Farmers Ins. Exchange v. State of California* (1985) 175 Cal.App.3d 494 [suit against state by insurance companies for damage caused to insured automobiles by malathion spraying]; *Susman v. City of Los Angeles* (1969) 269 Cal.App.2d 803 [action for riot damage against a city and state].)

These cases are inapposite because they primarily deal with the unrelated question of immunity from tort liability based on discretionary decisions made in responding to a state of emergency. None of these cases involved the question of whether or when a writ of mandate can issue to correct an abuse of discretion by the Governor under the Act. Moreover, as plaintiffs point out, these cases deal with the "*implementation* of emergency measures, following the declaration of a state of emergency" and do "not address the core issue [here] of whether a governor can continue to exercise emergency powers where no emergency exists at all."

V

The Separation of Powers Doctrine does not Preclude the Court from Compelling the Governor to Terminate a State of Emergency Proclaimed Under the Act

As he did in the trial court, the Governor argues this proceeding is barred by the separation of powers doctrine because it "plainly and fatally intrudes upon the powers of the executive and legislative branches." We disagree.

The separation of powers doctrine is expressed in section 3 of article III of the California Constitution, which provides: "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."

As previously noted, section 8629 expressly provides that a state of emergency may be terminated by a proclamation of the Governor or by a concurrent resolution of the Legislature. The Governor contends this aspect of section 8629 implicates the separation of powers doctrine "because, with respect to terminating a declared state of emergency, the Legislature has specifically provided that only our executive and legislative branches have the power to do so." In other words, according to the Governor, issuance of a writ of mandate in this case would constitute an unconstitutional usurpation of executive and/or legislative authority by the judicial branch.

While it is true section 8629 provides for termination of a state of emergency only by the Governor or the Legislature, it

does not follow that in enacting this statute the Legislature intended to deprive the judicial branch of its traditional and well-established power to issue writs of mandate in appropriate circumstances. As we have noted, it has long been true that the Governor may be the subject of a writ of mandate if the requirements for issuance of the writ are met. (*Middleton v. Low*, *supra*, 30 Cal. at p. 603; *O'Brien v. Olson*, *supra*, 42 Cal.App.2d at p. 455.) "These decisions are based on the fundamental principle that under our system of government no man is above the law. Chief Justice Stephen Field, speaking for the court in the early case of *McCauley v. Brooks* [(1860)] 16 Cal. 11, 54-55, stated that where no discretion exists and a specific legal duty is imposed, ministerial in its character, an officer of the executive department of government, like any other citizen, is subject to judicial process and that, if this were not so, the government would cease to deserve the 'high appellation' of being a government of laws." (*Jenkins v. Knight* (1956) 46 Cal.2d 220, 223.)

Although Chief Justice Field specifically referred in *McCauley* to the "ministerial duty" aspect of mandamus law, the Governor cites no authority, and we have found none ourselves, to suggest the same considerations do not also apply when a writ of mandate is sought to correct an alleged abuse of discretion by the Governor. It has long been the law of California that "[w]here only one choice can be a reasonable exercise of discretion, a court may compel an official to make that choice" by writ of mandate. (*California Correctional Supervisors*

Organization, Inc. v. Department of Corrections, *supra*, 96 Cal.App.4th at p. 827.) There is nothing to indicate the Legislature intended to vitiate this long-established judicial power when it enacted section 8629.

It has also long been the law of California "that mandamus will *not* lie to compel the Legislature to enact any legislation." (*City of Sacramento v. California State Legislature* (1986) 187 Cal.App.3d 393, 397, italics added.) Thus, the Governor is correct when he argues that the courts could not "command the Legislature to adopt a concurrent resolution under section 8629" declaring an end to the state of emergency.

Contrary to the Governor's position, however, it does not follow that because a writ of mandate will not lie to compel the Legislature to terminate a state of emergency, it also will not lie to compel the Governor to do so. As we have shown, the power of the courts, under proper circumstances, to direct the Governor to perform a specific act by writ of mandate is well-established. Accordingly, the Governor's separation of powers argument fails.

VI

The Political Question Doctrine does not Preclude the Court from Compelling the Governor to Terminate a State of Emergency Proclaimed Under the Act

In a variation on his separation of powers argument, the Governor contends this case is not justiciable under the political question doctrine. Again, we disagree.

"[T]he 'political question' rule relates to the appropriate role of the judiciary in a tripartite system of government. Courts perform the judicial function, that is, they resolve cases and controversies before them and, in the process, interpret and apply the laws. [Citation.] In doing so the courts may not usurp the governmental functions of the legislative and executive branches, and usurpation includes unwarranted intrusion into the roles of those branches. Thus it has been said: 'The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the [legislative and executive branches].'" (*Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1213, quoting *Japan Whaling Assn. v. American Cetacean Soc.* (1986) 478 U.S. 221, 230 [92 L.Ed.2d 166, 178].)

"The 'political question' rule has two general applications or effects, one that is broad and commonly applied but rarely articulated as such, and one that is narrow but rarely applicable." (*Schabarum v. California Legislature*, *supra*, 60 Cal.App.4th at p. 1213.) The Governor's argument (which we have rejected already on the facts alleged here) that he cannot be compelled to exercise his discretion in a particular manner invoked one of the broad applications of the political question rule. (See *id.* at pp. 1213-1214 [noting that "the political question concept . . . is the policy behind such frequently identified and applied judicial standards as . . . the refusal

to employ judicial remedies to compel the exercise of discretion in a particular manner"].)

The argument we now confront invokes the narrow application of the rule. "In its narrow sense the political question rule relates to the dismissal of lawsuits without reaching the merits of the dispute. The rule compels dismissal of a lawsuit when complete deference to the role of the legislative or executive branch is required and there is nothing upon which a court can adjudicate without impermissibly intruding upon the authority of another branch of government." (*Schabarum v. California Legislature*, *supra*, 60 Cal.App.4th at p. 1214.)

In *Baker v. Carr* (1962) 369 U.S. 186 [7 L.Ed.2d 663], the United States Supreme Court surveyed a number of its political question cases "in order to expose the attributes of the doctrine--attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness." (*Id.* at p. 210.) In an oft-quoted passage, the Supreme Court summarized the results of its survey as follows: "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding

without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." (*Id.* at p. 217.)

Here, the Governor relies on two of the formulations from *Baker* in arguing this case presents a nonjusticiable political question. He contends "there are no judicial standards for resolving whether 'conditions warrant' the termination of the Emergency Proclamation; and it would be impossible to decide that issue without making several policy determinations -- determinations that require balancing myriad factors."

Not so. There are "judicially discoverable and manageable standards for resolving" whether the Governor has abused his discretion in refusing to find that conditions warrant termination of the state of emergency he first proclaimed in January 2001. Those standards are found in the Act itself -- in particular, in the "circumstances described in subdivision (b) of Section 8558," which, under subdivision (a) of section 8625, the Governor had to find existed before he proclaimed the state of emergency in the first place.

As we have previously explained, the Governor was empowered under the Act to proclaim a state of emergency only upon finding: (1) that a rapid, unforeseen shortage of energy had

caused the existence of conditions of disaster or of extreme peril to the safety of persons and property within the state; (2) that the energy shortage required extraordinary measures beyond the authority vested in the California Public Utilities Commission; and (3) that local authority was inadequate to cope with the emergency. If there is no longer an energy shortage, and no longer any conditions of disaster or of extreme peril to the safety of persons and property within the state resulting from the previously existing shortage, then one of the requisite conditions for declaring the state of emergency in the first place has ceased to exist, and it would be an unreasonable exercise of discretion for the Governor to make any choice other than to terminate the state of emergency.

We see no reason why the foregoing standards, drawn from the statute that empowered the Governor to declare the state of emergency in the first place, are not "judicially . . . manageable." In his proclamation of the state of emergency, the Governor identified various facts supporting his finding of the requisite conditions for proclaiming the state of emergency: "shortages of electricity available to California's utilities ha[d] . . . resulted in blackouts affecting millions of Californians"; "unanticipated and dramatic increases in the price of electricity ha[d] threatened the solvency of California's major public utilities, preventing them from continuing to acquire and provide electricity sufficient to meet California's energy needs"; "electricity [then] available from California[']s utilities [wa]s insufficient to prevent

widespread and prolonged disruption of electric service within California"; and there was an "imminent threat of widespread and prolonged disruption of electrical power to California's emergency services, law enforcement, schools, hospitals, homes, businesses and agriculture." Whether the Governor could *reasonably* conclude these circumstances continue to exist is not a question that involves "policy determinations" unsuited for judicial resolution.

Some guidance on this point is provided by a portion of the Supreme Court's decision in *Baker* in which the court surveyed previous decisions involving the determination of whether hostilities had ended. (*Baker v. Carr*, *supra*, 369 U.S. at pp. 213-214.) As the Supreme Court explained: "Though it has been stated broadly that 'the power which declared the necessity is the power to declare its cessation, and what the cessation requires,' [citation], here too analysis reveals isolable reasons for the presence of political questions, underlying this Court's refusal to review the political departments' determination of when or whether a war has ended. Dominant is the need for finality in the political determination, for emergency's nature demands 'A prompt and unhesitating obedience,' [citation]. Moreover, 'the cessation of hostilities does not necessarily end the war power. It was stated in [a previous case] that the war power includes the power "to remedy the evils which have arisen from its rise and progress" and continues during that emergency. [Citation.]' [Citation.] But deference rests on reason, not habit. The question in a

particular case may not seriously implicate considerations of finality--e.g., a public program of importance (rent control) yet not central to the emergency effort. Further, clearly definable criteria for decision may be available. In such case the political question barrier falls away: '[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . [It can] inquire whether the exigency still existed upon which the continued operation of the law depended.' [Citations.]" (*Id.* at pp. 213-214, fns. omitted.)

Here, we see no reason why plaintiffs should not be allowed to present evidence that there is no longer an energy shortage and that the conditions of disaster or extreme peril which previously existed as a result of the earlier shortage have ceased to exist. The Governor fails to explain why these questions are beyond the power of the courts to resolve. Of course, if reasonable minds could differ, based on the evidence, as to whether there is still a shortage or whether conditions of disaster or extreme peril still exist, the Governor's determination must prevail. (See *Helena F. v. West Contra Costa Unified School Dist.* (1996) 49 Cal.App.4th 1793, 1799.) But if the evidence shows only one reasonable conclusion -- a conclusion contrary to the Governor's determination -- then the court is "not at liberty to shut its eyes to [the Governor's] obvious mistake" and allow him to continue to exercise emergency powers when the basis for the state of emergency has disappeared.

It is important to emphasize that this case specifically involves the Governor's exercise of the powers granted to him by the Legislature under the California Emergency Services Act, which are subject to the specific provisions of the Act, and not the exercise of any inherent but undefined constitutional power the Governor might have in his role as chief executive officer of the state. (See Cal. Const., art. V, § 1.) It is precisely because the Act defines the parameters of the Governor's power to proclaim a state of emergency, and his corresponding duty to proclaim an end to the state of emergency when conditions warrant, that judicial review of the Governor's decision not to terminate a state of emergency can be accomplished without improperly usurping the Governor's executive powers.

Our Supreme Court's recent decision in *In re Rosenkrantz* (2002) 29 Cal.4th 616 supports this conclusion. In *Rosenkrantz*, the Governor argued that his decision under article V, section 8, subdivision (b) of the California Constitution to affirm, modify, or reverse a parole decision of the Board of Prison Terms could not be subject to judicial review without violating the separation of powers doctrine. (*Id.* at p. 663.) In rejecting that argument, the Supreme Court contrasted the Governor's power to review a parole decision with his power to grant a pardon.[3] As the Court explained: "Although article V,

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[3] Subject to specified exceptions, "the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation." (Cal. Const., art. V, § 8, subd. (a).)

section 8(b), confers upon the Governor discretion regarding the manner in which to weigh the constitutionally specified factors, and authorizes the Governor to exercise judgment in reaching a decision, the voters in adopting the constitutional provision placed substantive limitations upon the Governor's exercise of that judgment and discretion. The provision mandates that the Governor consider only the same factors that may be considered by the Board. Having chosen to review a parole decision, the Governor lacks discretion to disregard this requirement, . . ." (*Id.* at pp. 663-664.) "The Governor's pardon authority, however, is not subject to the same type of substantive limitations as is his parole review authority." (*Id.* at p. 663.)

Like the Governor's discretionary power to review parole decisions under the Constitution, the Governor's discretionary power to proclaim the beginning and end of states of emergency under the Act is subject to substantive limitations that the Governor lacks discretion to disregard. It is these substantive limitations, found in the Act itself, that provide the "judicially discoverable and manageable standards for resolving" this case, and that take this case out of the political question doctrine.

We close our discussion of this point by noting the Governor's reliance on *Susman v. City of Los Angeles*, *supra*, is misplaced. *Susman* was not a mandamus proceeding, but a tort action against the city and the state based on property damage sustained in the Watts Riot of 1965. (*Susman v. City of Los*

Angeles, *supra*, 269 Cal.App.2d at p. 808.) In the portion of *Susman* on which the Governor relies, the Court of Appeal concluded the plaintiffs could not show the city was liable for "fail[ing] to provide sufficient police protection service" because "section 845 of the Government Code affords a general immunity for failure to provide sufficient police protection." (*Id.* at p. 821.) The court went on to quote from the Law Revision Commission Comment about section 845, which was "to the effect that the extent to which such police protection should be provided . . . is a political decision which is committed to the policy-making officials of government and that to 'permit review of these decisions by judges and juries would remove the ultimate decision-making authority from those politically responsible for making the decisions.'" (*Ibid.*)

This passage from *Susman* provides no assistance to the Governor's position in this case. The reason for the Legislature's provision of immunity from tort liability for the failure to provide sufficient police protection has no bearing on whether the Governor may be compelled to proclaim the end of a state of emergency based on an energy shortage when there no longer is any such shortage and when the conditions of disaster or extreme peril resulting from the previous shortage have ceased to exist.

For the foregoing reasons, we conclude this case presents a judiciable question that is not barred from review by the political question doctrine.

VII

The Governor is not Immune from

a Writ of Mandate Under Section 8655

The Governor's final argument is that section 8655 -- the immunity provision of the Act -- bars this proceeding. The Governor is mistaken.

Section 8655 provides: "The state or its political subdivisions shall not be liable for any claim based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a state or local agency or any employee of the state or its political subdivisions in carrying out the provisions of this chapter."

This statute provides immunity from *tort liability*; it does not "immunize" the Governor from a writ of mandate properly issued to compel him to correct an abuse of his discretion under the Act. As the Court of Appeal explained with respect to a similar immunity provision (§ 820.2) in *Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 Cal.App.4th 30: "Of course, public employees' discretionary decisions are not 'immune' from all review for abuse of that discretion; an adjudicatory decision entrusted to another branch of government may still be subject to judicial review for abuse of discretion (see Code Civ. Proc., §§ 1085, 1094.5) without affecting the discretionary immunity provision. Rather, the immunity is for *personal tort liability* of the individual public employee for discretionary decisions undertaken as a public employee." (*Id.* at p. 47, fn. 11, italics added.)

Thus, while the Governor could not be sued for damages alleged to have resulted from his discretionary decision not to terminate the state of emergency, it does not follow that his decision cannot be reviewed for abuse of discretion under the court's traditional power to issue writs of mandate. Accordingly, the Governor's immunity argument fails.

VIII

Conclusion

Because plaintiffs' petition, liberally construed, stated facts sufficient to justify the relief they sought, the trial court erred in sustaining the Governor's demurrer. However, because former Governor Davis has already terminated the state of emergency, plaintiffs' petition for a writ directing the Governor to take that action is moot. Accordingly, pursuant to the stipulation of the parties, we will dismiss the appeal.

DISPOSITION

The appeal is dismissed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 27(a).)

ROBIE, J.

We concur:

NICHOLSON, Acting P.J.

RAYE, J.