EXECUTIVE DEPARTMENT
STATE OF CALIFORNIA

EXECUTIVE ORDER N-43-20

WHEREAS on March 4, 2020, I proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19; and

WHEREAS on March 30, 2020, I issued Executive Order N-39-20 to pave the way for a temporary expansion of the health care workforce ahead of an anticipated surge in the need for medical treatment, and related strain on the health care delivery system, caused by COVID-19; and

WHEREAS clinics, hospitals, and other health care facilities and health care providers must maximize the number of capable health care workers through the use of telehealth services to ensure that Californians impacted by COVID-19 are able to access medical treatment as necessary; and

WHEREAS it is imperative to reduce the spread of COVID-19 and protect health care workers, including through the use of telehealth services, where possible, for any reason (not limited to the diagnosis and treatment of COVID-19 or related conditions); and

WHEREAS health care facilities housing vulnerable populations, such as nursing homes and psychiatric facilities, require special measures to protect those populations from COVID-19 and ensure continuity of care; and

WHEREAS on March 17, 2020, the Office for Civil Rights in the U.S. Department of Health and Human Services issued guidance ("Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency," available at https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html) announcing that the Office, in the exercise of its enforcement discretion, will not impose penalties for noncompliance with regulatory requirements imposed under the HIPAA Rules, as to covered health care providers in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency; and

WHEREAS even in an emergency situation, covered entities must continue to implement reasonable safeguards to protect patient information against intentional or unintentional impermissible uses and disclosures. Further, covered entities and their business associates must apply the administrative, physical, and technical safeguards of the HIPAA Security Rule to electronic protected health information; and

WHEREAS under the provisions of Government Code section 8571, I find that strict compliance with various statutes, regulations, and certain local ordinances specified or referenced herein would prevent, hinder, or delay appropriate actions to prevent and mitigate the effects of the COVID-19 pandemic.

NOW, THEREFORE, I, GAVIN NEWSOM, Governor of the State of California, in accordance with the authority vested in me by the State Constitution and the statutes of the State of California, and in particular, Government Code sections 8567 and 8571, do hereby issue the following Order to become effective immediately:

IT IS HEREBY ORDERED THAT:

1) The requirements specified in Business and Professions Code section 2290.5(b), related to the responsibility of a health care provider to obtain verbal or written consent before the use of telehealth services and to document that consent, as well as any implementing regulations, are suspended.

2) The penalties specified in Civil Code section 56.35, as well as any cause of action arising out of section 56.35 (including, but not limited to, any cause of action arising out of the Unfair Competition Law that is predicated on section 56.35) are suspended as applied to inadvertent, unauthorized access or disclosure of health information during the good faith provision of telehealth services.

3) The administrative fines, civil penalties, and private right of action specified in Civil Code section 56.36, as well as any other cause of action arising out of section 56.36 (including, but not limited to, any cause of action arising out of the Unfair Competition Law that is predicated on section 56.36, as well as the authority to bring a civil action set forth in subdivision (f) of section 56.36) are suspended as applied to inadvertent, unauthorized access or disclosure of health information during the good faith provision of telehealth services.

4) The civil penalties for health care facilities and providers specified in Civil Code sections 1798.29 and 1798.82, related to the timely notification to patients of a breach of the security system, are suspended as applied to any breach resulting from inadvertent, unauthorized access or disclosure during the good faith provision of telehealth services. Any cause of action arising out of section 1798.29 or section 1798.82 (including, but not limited to, any cause of action arising out of the Unfair Competition Law that is predicated on section 1798.29 or section 1798.82) is likewise suspended as applied to inadvertent, unauthorized access or disclosure that occurs during the good faith provision of telehealth services.

5) The deadlines specified in Health and Safety Code section 1280.15, related to notification to the Department of Public Health and to patients of the unauthorized access or disclosure of health information, are extended from a period of 15 days to a period of 60 days when the unauthorized access or disclosure is related to the good faith provision of telehealth services. The administrative penalties specified in Health and Safety Code section 1280.15, related to unauthorized access or disclosure of health information, are suspended when the unauthorized access or disclosure occurs during the good faith provision of telehealth services as a result of the use of technology that does not fully comply with federal or state law. Any cause of action arising out of section 1280.15 (including, but not limited to, any cause of action

arising out of the Unfair Competition Law that is predicated on section 1280.15) is likewise suspended as applied to unauthorized access or disclosure that occurs during the good faith provision of telehealth services as a result of the use of technology that does not fully comply with federal or state law.

6) The administrative penalties for health care providers specified in Health and Safety Code section 1280.17, related to safeguards of health information, are suspended for health care providers as applied to any inadvertent, unauthorized access or disclosure of health information during the good faith provision of telehealth services as a result of the use of technology that does not fully comply with federal or state law. Any cause of action arising out of section 1280.17 (including, but not limited to, any cause of action arising out of the Unfair Competition Law that is predicated on section 1280.17) is likewise suspended as applied to inadvertent, unauthorized access or disclosure that occurs during the good faith provision of telehealth services as a result of the use of technology that does not fully comply with federal or state law.

7) The criminal penalties specified in Welfare and Institutions Code section 14100.2(h), related to persons who knowingly release or possess information about Medi-Cal beneficiaries, are suspended as applied to health care providers, health care facilities, and health care administrators for any inadvertent, unauthorized release of confidential information during the good faith provision of telehealth services. Any cause of action arising out of section 14100.2 (including, but not limited to, any cause of action arising out of the Unfair Competition Law that is predicated on section 14100.2) is likewise suspended as applied to health care providers, health care facilities, and health care administrators for any inadvertent, unauthorized release of confidential information during the good faith provision of telehealth services.

8) To the extent any provision of this Order suspends any penalty or other enforcement mechanism associated with the violation of any statute where such violation arises out of the good faith provision of telehealth services, such violation shall not constitute unprofessional conduct within the meaning of Article 10.5 of the Business and Professions Code or any other applicable law, or otherwise be cause for professional discipline.

9) Where the provision of telehealth services is conducted by a "covered health care provider" subject to the HIPAA Rules and described in the "Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency" ("Notification") issued by the Office for Civil Rights in the U.S. Department of Health and Human Services on March 17, 2020, that covered health care provider shall ensure that its delivery of telehealth services is consistent with that Notification. This paragraph does not impose any mandatory requirements beyond any mandatory requirements imposed by the Notification itself, except that where the Notification encourages particular measures to safeguard patient privacy, but does not require such measures, covered health care

providers shall give due consideration to such measures and shall endeavor to adopt them to the extent possible.

10) For purposes of this Order, "telehealth services" includes the use of telehealth services to engage in the provision of behavioral or mental health services, in addition to the use of telehealth services to engage in the provision of medical, surgical, or other health care services. This paragraph should be construed to ensure that the provisions of this Order apply to the provision of behavioral or mental health services the same extent that those paragraphs apply to other forms of health care.

IT IS FURTHER ORDERED that as soon as hereafter possible, this Order be filed in the Office of the Secretary of State and that widespread publicity and notice be given of this Order.

This Order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the State of California, its agencies, departments, entities, officers, employees, or any other person.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 3rd day of April 2020.

GAVIN NEWSOM
Governor of California

ATTEST:

ALEX PADILLA
Secretary of State