

24 Nov 2020

Honorable Vance W. Raye, Presiding Justice,  
and Associate Justices of the Third District Court of Appeal  
914 Capitol Mall, 4th Floor  
Sacramento, CA 95814

Re: Application of amicus curiae to file letter brief and letter brief supporting petitioner  
*Governor Gavin Newsom v. Superior Court of Sutter County*  
**Case No. C093006**  
Superior Court Case No. CVCS200912

To the Honorable Court:

The undersigned amicus curiae California Constitution Center respectfully requests permission to file this letter brief supporting Governor Gavin Newsom’s petition for extraordinary relief, and to urge the Court to order full briefing in this matter. There are no disclosures to make under California Rule of Court 8.200(c)(3).

### Application

California Constitution Center is a nonpartisan academic research center wholly owned and operated by the University of California, Berkeley, School of Law. It is the first and only center at any law school devoted exclusively to studying California’s constitution and high court. Amicus is interested in this case because it raises an important issue of California constitutional law: if the lower court’s injunction persists, it would drastically change existing California separation-of-powers doctrine — and not for the better.

### Authority for Permitting this Amicus Letter

Amicus curiae letters like this are procedurally proper. California Rules of Court Rule 8.487(e)(1) permits the filing of amicus briefs after an appellate court issues an alternative writ or order to show cause. The Advisory Committee comment to Rule 8.487 makes clear that amicus letters are also permissible before a court issues an alternative writ or order to show cause (bold added):

Subdivisions (d) and (e). These provisions do not alter the court’s authority to request or permit the filing of amicus briefs **or amicus letters** in writ proceedings in circumstances not covered by these subdivisions, such as before the court has determined whether to issue an alternative writ or order to show cause or when it notifies the parties that it is considering issuing a peremptory writ in the first instance.

Thus, courts have accepted amicus letters in other appellate matters. *See, e.g., Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 557–58; *Los Angeles*



*County Bd. of Supervisors v. Superior Court of Los Angeles County* (2015) 235 Cal.App.4th 114, 185 Cal.Rptr.3d 842, 847, *rev'd. on another ground*, (2016) 2 Cal.5th 282.

On this basis, amicus curiae respectfully requests that the Court consider this amicus letter in deciding whether to grant Governor Newsom's petition for a writ of mandate or other appropriate relief. If full briefing is ordered, amicus expects to request permission to file a merits amicus brief supporting petitioner.

### Argument

#### **1. The petition raises issues of great concern**

Writ relief is appropriate here because this case involves issues of great public importance that require prompt resolution. *People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 494. The need for emergency executive orders to respond to the coronavirus pandemic grows daily along with the pandemic itself, which is growing exponentially. Just last week, California's rising cases prompted the governor to impose a limited stay-at-home order in most of the state through December 21. Over 1.1 million Californians have contracted the virus — along with Texas, the most of any state — and more than 18,700 Californians have died. Centers for Disease Control and Prevention, CDC COVID Data Tracker, United States COVID-19 Cases and Deaths by State Reported to the CDC since January 21, 2020. An decision that, like the lower court's decision here, broadly restricts the governor's emergency order powers at the height of this pandemic should provoke the gravest concern and inspire swift review.

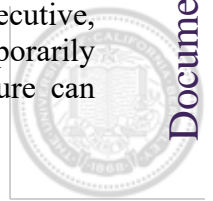
The error below is unlikely to be cured at the trial level because the trial court has issued a permanent injunction in the matter. Review on a later appeal will not provide an adequate remedy because the injunction apparently invalidates many other emergency orders previously issued during the pandemic; bars future emergency orders to curb the pandemic; and restrains emergency executive action to respond to the next crisis, which could strike tomorrow. And the case is unlikely to settle in the interim because the parties seek to achieve opposing binary results.

All these concerns favor extraordinary relief in this exceptional situation.

#### **2. The petition raises issues justifying writ relief**

The Court should grant writ relief for three reasons: the legislature and the Emergency Services Act (ESA) permit the challenged executive action; the challenged executive order did not improperly "amend" any statutes; and the lower court's decision is an impermissible advisory opinion. Even if the decision were correct, the issue is moot because the legislature authorized the governor's action by passing similar bills, and because the election already happened.

In an emergency, the legislature can delegate some of its authority to the executive until the crisis abates. By enacting the ESA, the legislature granted the governor several broad powers: to suspend laws, commandeer private property or personnel, and spend from available funds. Gov. Code §§ 8571–72, 8645. California's legislature can delegate some legislative powers to the executive, especially if the delegation is temporary. And the legislature can retrieve the powers it temporarily ceded during an emergency whenever it wishes, because under the ESA the legislature can terminate an emergency by concurrent resolution. Gov. Code § 8629.



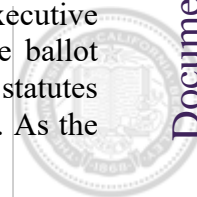
The lower court’s decision failed to recognize that California’s separation of powers doctrine does not deny the government necessary flexibility — especially in this pandemic emergency, when a crisis compels swift action and there is no actual conflict between the branches of government. A governor’s emergency orders have the force and effect of law under Government Code section 8567, and under section 8571 emergency orders “may suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency, . . .”

The governor’s order did exactly that: it suspended the operation of several statutes that regulate how state agencies conduct general elections, a matter under state control. *Field v. Bowen* (2011) 199 Cal.App.4th 346, 356. Elections are conducted by counties, which are state political subdivisions — so an election is state business. The order suspended these statutes conditionally: a county that did not wish to avail itself of the statutory suspensions could just comply with existing law. And the order was superseded — before the election — by Assembly Bill 860 and Senate Bill 423, which required county election officials to mail a ballot to every registered voter for the November general election. This was no separation-of-powers firestorm. Instead, the legislature and the governor were working together at speed to make an all-mail general election happen during a pandemic. *Newsom v. Superior Court of Sutter County* (2020) 51 Cal.App.5th 1093, 1100. Rather than maintaining branch separation, the court’s injunction punishes the branches for working cooperatively.

The trial court acknowledged that the governor is authorized both to suspend statutes and to make orders with the force of effect and law — yet it barred the governor from taking action to fill the resulting void. That was error because the ESA permits the governor to act affirmatively with emergency orders. Government Code section 8567 grants the governor express statutory authority to make “orders and regulations” that “have the force and effect of law.” The ESA permits the governor to suspend the statutes at issue here, then make orders that replicate the parts of those statutes that can still be used and supplement them with affirmative emergency orders.

Furthermore, the decision is an improper advisory opinion because the election already happened. California courts do not issue advisory opinions. *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 798. The ripeness requirement limits judicial opinions to actual controversies. *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170. Courts do sometimes exercise jurisdiction when the issues are of great public importance and must be resolved promptly — as when resolution “is necessary to avoid a disruption of an upcoming election.” *Vandermost v. Bowen* (2012) 53 Cal.4th 421, 453. Because the general election at issue already happened, nothing requires prompt resolution. And any concern is unlikely to recur until the next general election — four years from now, when the pandemic should be a distant memory. At most there could be a special election in 2021, and the legislature has months to address that issue. With no ripe controversy, the decision here is an improper advisory opinion.

The interbranch cooperation and superseding legislative action that ratified the executive order also make this case moot. That an executive order may have controlled some minor aspects of the general election process that were not superseded by later legislation is *de minimis*. An executive order that requires all county election officials to use the Secretary of State’s barcode ballot tracking system is within a governor’s emergency powers to suspend or supplement statutes regulating conduct of state business by state agencies like the Secretary of State’s office. As the



California Supreme Court said in *Ex parte Henion* (1898) 55 P. 326, 326, the business of the courts between bona fide litigants is of too great a magnitude to justify considering moot cases like this.

If this order is upheld, it will neuter the governor's ESA authority to make emergency orders to combat the coronavirus and cripple the state's response to the pandemic. California courts deferred to executive discretion in the state's many past crises, and if anything the need for deference — especially when the legislative and executive branches are actually working together — is at its apex now. Extraordinary relief is appropriate here.

**Conclusion**

Amicus curiae California Constitution Center respectfully requests that this Court accept this letter brief for filing in support of the Governor's petition, and grant the relief requested by the Governor.

Respectfully submitted,



David A. Carrillo, J.S.D.  
State Bar No. 177856  
Executive Director  
California Constitution Center



**PROOF OF SERVICE**

*Gavin Newsom v. Superior Court of Sutter County*  
Third Appellate District Case No. C093006  
Sutter County Superior Court No. CVCS200912

I, Alexander H. Burr, declare:

I am employed in the County of Alameda, State of California. I am over the age of 18 and not a party to the within action. My business address is 325B Law, Berkeley School of Law, Berkeley, CA 94720. My email address is: [ahburr@law.berkeley.edu](mailto:ahburr@law.berkeley.edu). On November 24, 2020, I served the document(s) described as **APPLICATION OF AMICI CURIAE TO FILE LETTER BRIEF AND LETTER BRIEF IN SUPPORT OF PETITIONER** on the interested parties in this action addressed as follows:

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on the service list on November 24, 2020, from the court authorized e-filing service at TrueFiling.com. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

John W. Killeen  
Office of the State Attorney General  
P.O. Box 944255  
1300 I Street, Suite 125  
Sacramento, CA 94244-2550

*Via TrueFiling*

Jay Russell  
Office of the State Attorney General  
P.O. Box 944255  
1300 I Street, Suite 125  
Sacramento, CA 94244-2550

*Via TrueFiling*

James Gallagher  
437 Century Park Drive, Suite C  
Yuba City, CA 95991

*Via TrueFiling*

Benjamin R. Herzberger  
State Capitol, Suite 3021  
Sacramento, California 95814

*Via TrueFiling*

**PROOF OF SERVICE**

*Gavin Newsom v. Superior Court of Sutter County*

Third Appellate District Case No. C093006

Sutter County Superior Court No. CVCS200912

**BY MAIL:** The envelope was mailed with postage thereon fully prepaid. I personally placed it in the mail at the post office. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

Sutter County Superior Court  
1175 Civic Center Blvd.  
Yuba City, CA 95993

*Via U.S. Mail*

Honorable Sarah H. Heckman  
Judge of the Sutter County Superior Court  
1175 Civic Center Blvd.  
Yuba City, CA 95993

*Via U.S. Mail*

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

Executed on November 24, 2020, at El Cerrito, California.

Alexander H. Burr  
Declarant

/s/ Alexander H. Burr  
Signature