One Court Decision Could Scuttle California's Pandemic Response

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Sutter County Superior Court Judge Sarah Heckman ruled earlier this month that Gov. Gavin Newsom exceeded his authority by issuing an executive order requiring vote-by-mail ballots to be sent to all registered California voters before the November 2020 general election. The decision, which the Court of Appeal has stayed pending its own review, states in part that the executive order "is void as an unconstitutional exercise of legislative power and shall be of no further force or effect" because the governor overreached his authority by changing state law.

The decision should be overturned on appeal for three reasons: the legislature and the Emergency Services Act (ESA) permit this executive action; the challenged executive order did not improperly "amend" any statutes; and the 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. Any student of the California constitution knows that the 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.

The decision here 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. That scenario hardly calls for a judicial fire truck.

The decision 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.

Because the election already happened, the decision is an advisory opinion, which California courts do not issue. 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, and the law disregards such trifles. 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 broad 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, 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. The Court of Appeal should reverse.

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