

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

CASE NO. C093006

GAVIN NEWSOM, as Governor of the State of California,
Petitioner,

v.

THE SUPERIOR COURT OF SUTTER COUNTY,
Respondent,

JAMES GALLAGHER and KEVIN KILEY,
Real Parties in Interest

Petition for Writ of Extraordinary Mandate, Prohibition, or Certiorari from Sutter County
Superior Court,

Case No. CVCS20-0912, Hon. Sarah Heckman.

**APPLICATION OF JAMES V. LACY AND UNITED STATES JUSTICE
FOUNDATION FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN
SUPPORT OF REAL PARTIES IN INTEREST JAMES GALLAGHER AND
KEVIN KILEY**

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Attorney for Amicus Curiae JAMES V. LACY AND UNITED STATES JUSTICE
FOUNDATION

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rule 8.208 and Rule 8.488 of the California Rules of Court, Amicus Curiae James V. Lacy and United States Justice Foundation herein certifies, through its undersigned counsel, it knows of no entity or person that must be listed under Rule 8.208 or Rule 8.488 of the California Rules of Court.

Dated: December 18, 2020

Respectfully submitted,

/s/ Alexander Tomescu

Alexander Tomescu

United States Justice Foundation

Attorney for Amicus Curiae JAMES V. LACY and UNITED STATES JUSTICE
FOUNDATION

APPLICATION OF JAMES V. LACY AND UNITED STATES JUSTICE FOUNDATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF ON SUPPORT OF REAL PARTIES IN INTEREST JAMES GALLAGHER, ET AL.

Pursuant to rule 8.487, subdivision (e), of the California Rules of Court, James V. Lacy and the United States Justice Foundation respectfully requests permission to file an amicus curiae brief in this proceeding in support of Real Parties in Interest James Gallagher et al. This application is timely made within 14 days after the filing date of the real parties in interest's return.

The decision rendered by the Court of Appeals in this case will affect not only the Real Parties in Interest, but will undoubtedly bear consequences for all citizens of the state of California. The lower court's ruling that Governor Newsom exceeded his authority under the California Emergency Services Act ("CESA") should have served as a stern repudiation to the Governor. Instead, he is determined to rely on "all police powers of the State" to place unconstitutional restrictions on California residents and small businesses. The United States Justice Foundation is a California nonprofit public interest, legal action organization dedicated to the principle that government officials cannot exceed their constitutional mandate, and this principle is especially applicable in emergency situations like the current pandemic-mandated shutdowns spearheaded by Governor Newsom. James V. Lacy is a citizen of California, the President and Chairman of the United States Justice Foundation and the publisher of news and opinion on California public policy, at California Political Review (www.capoliticalreview.com). Furthermore, the Governor has indicated (and shown in the past year) that he fully intends to continue utilizing the police powers of the State, in reliance on Government

Code § 8627, to indefinitely extend his arbitrary color-coded restrictions, at least until he, and he alone, sees fit to end them. The United States Justice Foundation finds the Superior Court's ruling in this case to be constitutionally sound, and our brief is in support of the arguments propounded by the real parties in interest to this case, that the case is not moot, and that the Governor does not have unfettered power under CESA.

James V. Lacy and the United States Justice Foundation respectfully asks that this Court grant this application for permission to file the accompanying amicus curiae brief.

Dated: December 18, 2020

Respectfully submitted,

/s/ Alexander Tomescu

Alexander Tomescu

United States Justice Foundation

Attorney for Amicus Curiae JAMES V. LACY and UNITED STATES JUSTICE FOUNDATION

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**PROPOSED AMICUS CURIAE BRIEF OF JAMES V. LACY AND UNITED
STATES JUSTICE FOUNDATION IN SUPPORT OF REAL PARTIES IN
INTEREST JAMES GALLAGHER AND KEVIN KILEY**

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AMICUS CURIAE BRIEF

I. INTRODUCTION

The citizens of the state of California have endured, like all Americans across this country, the ravages that the global coronavirus pandemic have wrought. However, residents of California have also dealt with the Governor's numerous executive orders that have crippled the livelihoods of millions and contributed greatly to the sense of despair this year. The Governor has claimed that he is imbued with the power to issue particular executive orders and to creatively interpret certain statutes during states of emergency. Specifically, the Governor has claimed that California Government Code § 8267 and the California Emergency Services Act (Gov. Code §§ 8550-8669.7) ("CESA") grants him the authority to arbitrarily extend emergency stay-at-home orders, to impose a color-coded restriction system on businesses, and to generally utilize all the police powers of the State. The lower court's ruling clearly articulated that the California Constitution gives law-making power to the legislative branch, and that the Governor is limited in his authority to rely on certain statutes to unilaterally determine the state's policies during this, or any, emergency. Due to the fact that the Governor has made clear his belief that he is free to continue his unconstitutional impositions on residents of this state, this case is not moot.

II. ARGUMENT

A. Mootness

The lower court ruled that this case was not moot. This preliminary ruling is correct, as it is clear that the Governor feels that his previous Executive Orders, including Executive Order N-67-20, were legally sound under the California Constitution and CESA. Contrarily, the legality of these executive orders are certainly under dispute since it must still be determined that the Governor can circumvent the legislature in using CESA to impose such widespread orders that impact almost every aspect of daily life in the state. To believe, as Petitioner does, that no live controversy exists requiring close interpretation of CESA is literally unbelievable, as the Governor has continuously extended his arbitrary color-coded restrictions in the past, and there is no certainty at this time that the pandemic will end soon. The law may be blind, but it is not stupid.

B. The California Constitution Requires the Separation of Powers.

The lower court ruled that the California Constitution's requirement of the separation of powers must be recognized and enforced. Under Article III, Section 3, the California Constitution states that "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise the either of the others except as permitted by the Constitution." Because the Governor is vested with executive power (Cal. Const. art. IV), he cannot exercise the rulemaking authority that is vested in the California legislature. The fact that this state is suffering through the effects of a global pandemic does not render the California Constitution

powerless. While the Governor's reliance on California Government Code § 8627, providing him with "all police powers vested in the state", the Legislature has not, and indeed cannot, delegate such power to the Governor's office wholesale. It is true that in the past it has been found that the Legislature "properly may delegate some quasi-legislative or rulemaking authority to the executive branch" (*Carmel Valley Fire Prot. Distr. v. State of California* (2001) 25 Cal. 4th 287, 297.), this is by no means a permanent grant of such authority by the Legislature to the Governor, nor that it is solely the decision of the Governor to utilize such authority for as long as he feels.

That the Governor insists that his continued exercise of police powers entitles him to the power to make laws governing the people and the business community in the state is a clear sign that these abuses will continue unchecked should the lower court's ruling not be upheld. The Governor has already announced yet another stay-at-home order on December 3rd, after the lower court's ruling. It is vital that the proper legislative power is restored to the branch of state government constitutionally empowered to make or amend statutes, and that it is restricted when there is a temporary and limited delegation of such authority to the executive branch of the state government.

C. The Governor is Granted Limited Authority under CESA

The Governor has interpreted CESA to grant him authority to decide what businesses can be open, the maximum capacity of those open businesses, what businesses can be closed, where people are allowed to go, whether they can worship or otherwise congregate – he has conveniently found this authority unfettered and not open to

challenge. However, while the Governor has “complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state” (CA. Govt. Code § 8627), he cannot make the law.

There is a clear delineation between assuming and exercising authority over agencies of the state government and usurping the powers vested in the California Legislature by the California Constitution. Should this distinction be continuously ignored by the Governor, it invites greater constitutional problems. The Governor could then, at any time, declare an emergency to address any policy issue, and exercise his authority under CESA to “make” law and direct state agencies to enforce such law-making by fiat. The constitutional authority of the Legislature to pass laws regarding any such issue would be superseded. The lower court’s ruling was correct in finding that the Governor’s broad interpretation of his authority under CESA would have consequences beyond the current circumstances. While the Legislature does have the power to terminate an emergency declaration, there is no mechanism that prevents the Governor from issuing a new emergency declaration and again re-assuming authority in a manner that violates the separation of powers.

CONCLUSION

For the above reasons, this Court should uphold the lower court’s ruling, deny the Governor’s petition for extraordinary writ, and hold that CESA does not grant the Governor the authority to override the California Constitution.

Dated: December 18, 2020

/s/ Alexander Tomescu

Alexander Tomescu

Attorney for Amicus Curiae JAMES V. LACY AND UNITED STATES JUSTICE
FOUNDATION

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204 of the California Rules of Court, I hereby certify that the foregoing Amicus Curiae brief uses a Times New Roman typeface of 13-point font. I further certify that the foregoing brief contains 2,019 words.

Dated: December 18, 2020

/s/ Alexander Tomescu

Alexander Tomescu

DECLARATION OF SERVICE

I, Alexander Tomescu, declare as follows: I am a resident of the State of California, residing or employed in Laguna Niguel, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 30011 Ivy Glenn Drive, Suite 223, Laguna Niguel, California 92677.

On December 18, 2020, a true copy of BRIEF AMICUS CURIAE OF JAMES V. LACY AND UNITED STATES JUSTICE FOUNDATION was electronically filed with the Court through truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efilings system.

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Real Party in Interest

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 18th day of December, 2020, at Laguna Niguel, California.

Executed on December 18, 2020 at Laguna Niguel, California.

/S/ Alexander Tomescu

Alexander Tomescu