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November 20, 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 Amici Curiae to File Letter Brief and Letter Brief in Support of Petitioner
Governor Gavin Newsom v. Superior Court of Sutter County
Case No. C093006
Superior Court Case No. CVCS200912

Honorable Presiding Justice and Associate Justices:

Senator Tom Umberg and Assembly Member Marc Berman (“Amici Curiae”) respectfully request permission to file this letter brief in support of Governor Gavin Newsom’s Petition for Extraordinary Writ and Application for Temporary Stay.

Application

Senator Umberg and Assembly Member Berman are the respective Chairpersons of the Senate Committee on Elections and Constitutional Amendments and the Assembly Committee on Elections and Redistricting. They are the authors of AB 860 (Ch. 4, Stats. 2020) and SB 423 (Ch. 31, Stats. 2020), which are the urgency measures that superseded Governor Newsom’s Executive Orders Nos. N-64-20 and N-67-20. Amici Curiae worked closely with the Governor to introduce and enact that legislation in order to ensure a safe and fair statewide election on November 3, 2020. Accordingly, they are interested in the outcome of this writ proceeding. They write to assist the Court’s understanding of how SB 423 superseded Executive Order N-67-20 and why this matter is moot.¹

Letter Brief

AB 860 and SB 423

Amici Curiae agree with the Governor’s summary of the effect of AB 860 and SB 423, and the collaboration between the Legislature and the Governor that preceded their enactment. Of particular importance, Amici Curiae note that they sent a formal letter to the Governor in May

¹ There are no disclosures to make under California Rule of Court 8.200(c)(3).

2020, advising that they were preparing a legislative package to ensure that Californians could vote by mail for the November 3, 2020 election, and requesting that the Governor issue an executive order directing that all voters be mailed a ballot. The legislative package that was enacted – AB 860 on June 18, 2020 and SB 423 on August 6, 2020 – mirrored Executive Orders N-64-20 and N-67-20 in all substantive respects.

Relevant to this matter, SB 423 replaced the provisions of Executive Order N-67-20 with respect to the number, timing, and placement of polling places, ballot drop-off locations, and voting centers. (Cal. Elec. Code, § 1602.) SB 423 imposed additional requirements concerning voter outreach and a process for the Secretary of State to consider requests from counties to adjust or partially waive both the new requirements imposed by SB 423 and the existing requirements of the Voter’s Choice Act. (*Id.*, §§ 1603, 1604.)

It is important to highlight the monumental effort required of state and local agencies to alter procedures for a statewide election, a point expressed in the uncodified section of SB 423: “When California conducts the November 3, 2020, statewide general election, it is unknown to what degree the COVID-19 pandemic will still pose a threat to public health. The state and its counties need to begin taking action now to procure supplies and equipment, secure voting locations, enlist volunteers, and draw up plans, among other steps, to ensure that the November 3, 2020, statewide general election is held in a manner that is accessible, secure, and safe.” (SB 423, § 1(a)(2).) Accordingly, it was necessary that the Legislature collaborate with the Governor as a precursor to enacting AB 860 and SB 423.

In its Statement of Decision, the Sutter County Superior Court stated that two provisions in Executive Order N-67-20 remained in effect despite subsequent legislation. First, the court noted that the executive order requires all counties to use the Secretary of State’s barcode tracking system for mail ballots, which SB 423 did not address. However, AB 860 had already imposed a superseding and distinct requirement: All counties must use the barcode tracking system unless the county made available a system that met or exceeded the Secretary of State’s level of service. (Cal. Elec. Code, § 3019.7(d).)

Second, the court noted that Executive Order N-67-20 altered the Voter’s Choice Act by precluding counties from providing in-person public meetings or workshops in connection with the preparation of plans for the administration of the November 3, 2020 election, as long as a draft plan was already posted on the county elections official’s website and public comment was still accepted. However, the pertinent provisions of that act – Cal. Elec. Code, § 4005(a)(10) – provide for a relatively complex process of public hearings, comments, revisions, and the submission of the plan to the Secretary of State. As the Governor’s petition observes, it is unlikely that the counties to which these requirements would apply were still developing election administration plans at the time SB 423 was enacted.

The Governor declared Executive Orders N-64-20 and N-67-20 to be of no force and effect and superseded as of the effective dates of AB 860 and SB 423. However, this was hardly necessary because, by providing requirements for the conduct of the November 3, 2020 election, AB 860 and SB 423 had clearly superseded the executive orders.

Mootness

For the above reasons, Amici Curiae agree with the Governor that Real Parties in Interest’s complaint is moot. At the time of the November 3, 2020 election, SB 423 had already superseded Executive Order N-67-20. Even if the executive order had remained in effect, the election has already occurred and, accordingly, there is no live controversy to decide. “An issue becomes moot when some event has occurred which deprives the controversy of its life. The policy behind a mootness dismissal is that courts decide justiciable controversies and will normally not render advisory opinions.” (*Center for Local Government Accountability v. City of San Diego* (2016) 247 Cal.App.4th 1146, 1157 [internal alterations].)

The superior court held that this matter was not moot because there remain material questions for the court’s determination, and because the matter presents issues of broad public importance that are likely to recur. However, the facts do not support this ruling.

First, Real Parties in Interest have not shown that a material question remains for the superior court’s determination. Executive Order N-67-20 was superseded by legislation, and the November 3, 2020 statewide election has occurred. Real Parties in Interest cannot demonstrate that the Governor’s Executive Order has any further force or effect such that declaratory or injunctive relief is required. (*See Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 205 [“material question exists when the judgment, if left unreversed, would preclude a party from litigating its liability on an issue still in controversy”].)

Second, this case involves a fact-specific situation involving a pandemic and a presidential election, which are not issues of broad public importance that are likely to recur. In the context of this extraordinary public health crisis, Amici Curiae advised the Governor that they would be introducing legislation to secure a safe November 3, 2020 election, and requested assistance from the Governor in the form of an executive order. Procedures for the election were ultimately governed by legislation. Thus, the “likely to recur” exception to the mootness doctrine does not apply. (*See Giles v. Horn* (2002) 100 Cal.App.4th 206, 228 [“[b]ecause plaintiffs’ claim is a particularly factual determination that must be resolved on a case-by-case basis, dependent upon the specific facts of a given situation, it is not one on which we would exercise our discretion to address on the merits, despite the fact that it is moot”].)

The superior court suggests that the matter is likely to recur because a special election could occur in early 2021. However, as the Governor’s petition highlights, no special election is currently slated to occur. The parameters for such an election – including the offices or measures to be voted on, when it will occur, whether the Legislature opts to enact urgency measures to implement special procedures, and the status of the pandemic – are undefined. An action for declaratory relief “must be based on an actual controversy with known parameters. If the parameters are as yet unknown, the controversy is not yet ripe for declaratory relief.” (*Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 541.)

Lastly, the superior court justifies its order by citing *Kirkwood v. Cal. State Auto Assn.* (2011) 193 Cal.App.4th 49, 59 for the proposition that the correct interpretation of a statute is a matter particularly suitable for judicial declaration. The distinction in that case is that a live

controversy – a homeowner’s claim that his insurer had miscalculated the depreciation of personal property – depended upon a court’s determination of the meaning of a relatively recent amendment to the Insurance Code. (*Id.* at pp. 55-57.) Here, no live controversy exists that requires interpretation of the Emergency Services Act, AB 860 or SB 423, or any other statute. A determination of Real Parties in Interest’s claims will “have no practical impact or provide the parties effectual relief.” (*Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888.)

For the foregoing reasons, Amici Curiae agree with the Governor that this matter is moot.

Conclusion

Amici Curiae urge this Court to accept this letter brief for filing in support of the Governor’s petition, and to grant the relief requested by the Governor.

Dated: November 20, 2020

Respectfully submitted,

Aaron D. Silva
Chief Deputy Legislative Counsel

By: /s/ Benjamin R. Herzberger
BENJAMIN R. HERZBERGER
Deputy Legislative Counsel

Attorneys for Amici Curiae Senator Tom Umberg
and Assembly Member Marc Berman

PROOF OF SERVICE

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

I, Benjamin R. Herzberger, declare:

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action. My business address is 925 L Street, Suite 900, Sacramento, CA 95814. My email address is: Benjamin.Herzberger@lc.ca.gov. On November 20, 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 20, 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
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Via TrueFiling

James Gallagher
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Via TrueFiling

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

Executed on November 20, 2020, at Sacramento, California.

Benjamin R. Herzberger
Declarant

/s/ Benjamin R. Herzberger
Signature

Document received by the CA 3rd District Court of Appeal.

PROOF OF SERVICE

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

I, Christina Witt, declare:

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action. My business address is 925 L Street, Suite 900, Sacramento, CA 95814. My email address is: Christina.Witt@lc.ca.gov. On November 20, 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 MAIL: The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Sacramento, California, in the ordinary course of business. 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 20, 2020, at Sacramento, California.

Christina Witt
Declarant

/s/ Christina Witt
Signature

Document received by the CA 3rd District Court of Appeal.