

1 LAW OFFICE OF CHAD D. MORGAN
2 **Chad D. Morgan, Esq. SBN 291282**
3 P.O. Box 1989 PMB 342
4 40729 Village Drive #8
5 Big Bear Lake, CA 92315
6 Tel: (951) 667-1927
7 Fax: (866) 495-9985
8 chad@chadmorgan.com

9 **Alexander E. Tomescu, Esq. SBN 283840**
10 30011 Ivy Glenn Drive, Ste. 223
11 Laguna Niguel, CA 92677
12 Tel: (949) 495-3314

13 Attorneys for Plaintiff, James V. Lacy

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 FOR THE COUNTY OF SACRAMENTO

16 **James V. Lacy,**

17 Plaintiff;

18 vs.

19 **Gavin Newsom**, in his official capacity as
20 Governor of California;

21 **Kathleen Allison**, in her official capacity
22 as Secretary of California Department of
23 Corrections & Rehabilitation; and
24 DOES 1 through 25, inclusive,
25 Defendants.

Case No.:

**Verified Complaint for Declaratory &
Injunctive Relief**

[Cal. Const., art. III, § 3; Pen. Code § 3604]

1 Plaintiff alleges as follows:

2 1. It is the policy of both the Legislature and the people of California to allow a punishment
3 of death for the state's most dangerous criminals. This policy is as old as the state.

4 2. Governor Gavin Newsom is an ardent opponent of the death penalty. Shortly after he
5 assumed office in January of 2019, he issued an Executive Order that effectively repealed
6 California's death penalty, in violation of the state Constitution's separation of powers doctrine
7 and in violation of the Governor's constitutional mandate to faithfully execute the law.

8 3. The order had the effect of repealing the death penalty because it granted reprieves in
9 excess of the Governor's constitutional power and ignored statutory mandates to (A) provide
10 standards for administration of lethal injections, and (B) maintain at all times the ability to
11 execute a judgment of death.

12 4. In this action, Plaintiff seeks a declaratory judgment that the Governor's executive order
13 is unconstitutional and the injunctive relief necessary to restore California's death penalty as the
14 Legislature provided.
15

16 **PARTIES**

17 5. Plaintiff **James V. Lacy** is a resident, voter, and taxpayer in the City of Dana Point,
18 County of Orange, State of California. Mr. Lacy is President of the United States Justice
19 Foundation, nonprofit public interest, legal action organization, created to instruct, inform and
20 educate the public on, and to litigate, significant legal issues confronting America. In the
21 November 8, 2016 general election, Mr. Lacy voted to uphold the death penalty in California by
22 voting yes on and campaigning for Proposition 66 to "Mend, Not End, the Death Penalty." Mr.
23 Lacy also voted no on and campaigned against Proposition 62, which would have repealed the
24 death penalty. Over the years, Mr. Lacy has repeatedly voted for initiative measures that would
25 continue capital punishment in the state and against measures that would reduce or eliminate it.
26 He is interested in seeing the state's death penalty statutes enforced for himself, his family, his
27 community, and the state as a whole.

28 6. Defendant **Gavin Newsom** is the Governor of the State of California and is sued in his

1 official capacity.

2 7. Defendant **Kathleen Allison** is Secretary of California Department of Corrections and
3 Rehabilitation (CDCR) and is sued in her official capacity. Governor Newsom appointed her to
4 this position on October 1, 2020. In this capacity, Defendant Allison is the executive branch
5 official charged with oversight and management of CDCR and is responsible for its day-to-day
6 operations and maintaining its compliance with state law.

7 8. The true names of Defendant DOES 1 through 25, inclusive, are unknown to Plaintiff,
8 who therefore brings this action against DOES 1 through 25, inclusive, by such fictitious names
9 and will seek leave of this Complaint to show their true names, identities, and capacities when
10 they have been ascertained.

11 9. Except as otherwise alleged, Plaintiff is informed and believes that all Defendants and/or
12 their employees and agents were each other's agents and were, at all relevant times, acting in the
13 course of their agency relationship.
14

15 JURISDICTION AND VENUE

16 10. The Sacramento County Superior Court is the proper venue because the acts complained
17 of which are the subject of this Complaint, have all occurred or will all occur in the County of
18 Sacramento, State of California.

19 11. Defendant Gavin Newsom and Defendant Allison are sued in their official capacities as
20 agents of the state which has its capitol in Sacramento County, which is Defendant's principal
21 place of business.

22 12. The relief sought is within the jurisdiction of this Court.

23 FACTS COMMON TO ALL CAUSES OF ACTION

24 13. Capital punishment in California goes back to the state's earliest days and was provided
25 for in the state's original Constitution, adopted in 1849.

26 14. However, it has also been the subject of impassioned debate and has evolved over the
27 years. Death penalty opponents have been relentless in their challenges, but voters have also been
28

1 steadfast in their desire to retain capital punishment as an option to punish the state’s most
2 violent and dangerous criminals.

3 15. The California Supreme Court’s 1972 ruling that the death penalty was unconstitutional
4 exemplifies the ongoing debate. In response to that ruling, California voters amended the state’s
5 Constitution to provide that the death penalty statutes the Supreme Court considered were
6 constitutional. Then they voted against retention and removed from office several Supreme
7 Court justices who struck down the death penalty.

8 16. The current death penalty statutes go back to a 1941 large-scale revision of the Penal
9 Code, which added Part 3, “Of Imprisonment and Death Penalty” to the Code.¹ (Stats. 1941,
10 ch. 106.) The 1941 version of section 3604 provided simply that “[t]he punishment of death shall
11 be inflicted by the administration of lethal gas.” (Stats. 1941, ch. 106, p. 1117, § 15.) In 1992, the
12 Legislature amended section 3604 to give inmates the option for execution by lethal injection but
13 kept lethal gas as the default. (Stats. 1992, ch. 558, § 2 [AB 2405].) A 1996 amendment changed
14 the default option to lethal injection. (Stats. 1996, ch. 84, § 1 [AB 2082].) These changes were
15 generally responsive to legal challenges brought by death penalty opponents and demonstrate the
16 Legislature’s ongoing intent to preserve capital punishment in the state.

17 17. Among the Legislature’s 1992 amendments to Penal Code section 3604 was a
18 requirement that CDCR establish standards for the infliction of “intravenous injection of a
19 substance or substances in a lethal quantity sufficient to cause death.” (Stats. 1992, ch. 558, § 2.)
20 This provision exists in the substantially the same form today. (Pen. Code § 3604; see also
21 Prop. 66, § 10 (adopted Nov. 8, 2016) [changing “California Department of Corrections” to
22 “California Department of Corrections and Rehabilitation”].)

23 18. From approximately 2006 through the passage of Proposition 66 on November 8, 2016,
24 part of the impassioned death penalty debate was whether CDCR’s standards, established under
25 section 3604, satisfied procedural requirements of the Administrative Procedures Act (APA).
26 These debates tied up implementation of the death penalty for the better part of a decade.
27

28 ¹ Unless context suggests otherwise, all undesignated code citations are to the Penal Code.

1 Through Proposition 66, voters reinforced their support for capital punishment by creating an
2 APA exemption for CDCR’s lethal injection protocol. (Pen. Code § 3604.1 [added by Prop. 66,
3 § 11 (adopted Nov. 8, 2016)].)

4 19. A California Supreme Court decision confirming that Proposition 66 was a constitutional
5 exercise of the people’s initiative power (*Briggs v. Brown* (2017) 3 Cal.5th 808) ended debate
6 about the regulations’ APA compliance. On January 29, 2018, CDCR published its lethal
7 injection protocol, section 3349 *et seq.* of Title 15 of the California Code of Regulations.

8 20. On November 6, 2018, Gavin Newsom was elected Governor of California. During his
9 campaign, Newsom expressed his opposition to the death penalty.

10 21. After taking office, Newsom stepped-up his rhetoric and demonstrated his animus
11 towards the State’s long-established policy of providing punishment of death as an option to
12 punish those who commit the most heinous of crimes.

13 22. On March 13, 2019, Newsom issued Executive Order Number N-09-19. A true and
14 correct copy of this order, obtained from the Governor’s website, is attached as **Exhibit A**. In this
15 order, the Governor ordered the following: (1) “An executive moratorium on the death penalty
16 ... in the form of a reprieve for all people sentenced to death in California”; (2) that “California’s
17 lethal injection protocol shall be repealed”; and (3) that “[t]he Death Chamber at San Quentin
18 shall be immediately closed.”

19 23. On March 18, 2019, in response to the Governor’s order, CDCR repealed regulations
20 setting forth its lethal injection protocol, removing section 3349 *et seq.* from Title 15 of the
21 California Code of Regulations. As discussed in the Second Cause of Action, this violates
22 subdivision (a) of section 3604, which requires that CDCR establish standards to inflict “an
23 intravenous injection of a substance or substances in a lethal quantity sufficient to cause death.”
24

25 24. As an additional response to this order, CDCR dismantled the so-called “Death
26 Chamber” at San Quentin. As discussed in the Third Cause of Action, this violates subdivision
27 (e) of Penal Code section 3604 (added by § 11 of Prop. 66 on Nov. 8, 2016), which requires that
28

1 CDCR “maintain at all times the ability to execute such judgments.” By dismantling the San
2 Quentin execution chamber, CDCR has not maintained the ability to execute judgments of death.

3 25. This has also led to confusion and uncertainty among county District Attorneys as to
4 whether they should seek the death penalty when trying certain criminal defendants.

5 26. With a stroke of his pen, Governor Newsom eliminated nearly fifty years of established
6 Legislative policy that provides for a punishment of death. As an ardent opponent of the death
7 penalty, Newsom delved into the business of policy making with an intent to undermine the law
8 and has purportedly changed legislative policy by executive fiat.²

9 **FIRST CAUSE OF ACTION**

10 (Violation of Constitutional Separation of Powers against Newsom)

11 27. Petitioner realleges and incorporates paragraphs 1 through 26 as if fully set forth herein.

12 28. “The powers of state government are legislative, executive, and judicial. Persons charged
13 with the exercise of one power may not exercise either of the others except as permitted by this
14 Constitution.” (Cal. Const., art. III, § 3.)

15 29. “The legislative power of this State is vested in the California Legislature which consists
16 of the Senate and Assembly, but the people reserve to themselves the powers of initiative and
17 referendum.” (Cal. Const., art. IV, § 1; see also Cal. Const. art. II, §§ 1, 8, 10 [relating to the
18 initiative power].)

19 30. The Governor’s power is set forth in section 1 of Article V of the California Constitution.
20 He has “[t]he supreme executive power of this State” and is required to “see that the law is
21 faithfully executed.”
22
23
24
25

26 _____
27 ² In an October 26, 2020 press release regarding an amicus brief Governor Newsom filed in a death penalty case, the
28 brief was described as “[b]uild[ing] on [the] Governor’s actions to end the death penalty in California ...” Rather
than eliminate the death penalty by executive decree, the proper approach would be to propose and qualify a ballot
initiative then convince a majority of voters to change a policy they have continuously reaffirmed for half-a-century.
This was the failed effort of Proposition 62 (November 8, 2016) and 34 (November 6, 2012).

1 31. Penal Code section 3604 represents the Legislature’s formulation of policy that the state
2 must provide for the possibility of criminal punishment by death. This policy can be changed only
3 by a legislative act.

4 32. To fulfill this policy, the Legislature has directed CDCR to, among other things, (A)
5 establish standards for the administration of “intravenous injection of a substance or substances
6 in a lethal quantity sufficient to cause death” to inflict the punishment of death and (B) maintain
7 at all times the ability to execute” judgments of death. (§ 3604, subs. (a), (e).) These are
8 mandatory legal duties.

9 33. It is the executive branch’s duty to faithfully execute these laws. While the executive
10 branch has some discretion, its discretion is limited.

11 34. With respect to the standards provided for in subdivision (a) of section 3604, the
12 executive must establish standards that inflict “an intravenous injection of a substance or
13 substances in a lethal quantity sufficient to cause death.” This is a fundamental requirement of
14 whatever standards CDCR establishes.

15 35. With respect to subdivision (e) of section 3604, which requires that CDCR “maintain at
16 all times the ability to execute” judgments of death, there are several issues. First, the
17 dismantling of the execution chamber at San Quentin means that CDCR has not maintained this
18 ability. (See § 3603 [requiring all executions at San Quentin].) Second, without the standards
19 described in subdivision (a), CDCR would not have the ability to carry-out an execution because
20 it does not have a protocol to follow. Finally, preserving CDCR’s ability to execute judgments of
21 death requires both (A) adoption of standards that comply with state and federal court opinions
22 setting forth the parameters by which a punishment of death may be administered, and (B)
23 ongoing modification of those standards to remain in compliance with evolving state and federal
24 case law.

25 36. This does not mean that the Governor is devoid of all executive power relating to the
26 death penalty. Penal Code section 3700 generally provides that no one other than the Governor
27 “can suspend the execution of a judgment of death.” This relates to one of the Governor’s
28

1 enumerated Constitutional powers, where he may “[s]ubject to application procedures provided
2 by statute ... on conditions [he] deems proper ... grant a reprieve, pardon, and commutation after
3 sentence ...” (Cal. Const., art. V, § 8.)

4 37. Superficially, this suggests a broad power to grant reprieves because the Governor may
5 grant a reprieve “on conditions [he] deems proper.” But the Constitution still provides limits and
6 imposes on the Governor a related duty.

7 38. As a limit, section 8 of Article V allows a reprieve only subject to the application
8 procedures the Legislature provides. He may not grant a reprieve by Executive Order. This
9 means that Governor cannot unilaterally grant a reprieve to all condemned inmates without
10 considering each inmate’s separate application.

11 39. The Governor’s Constitutional duty is to “report to the Legislature each reprieve,
12 pardon, and commutation granted, stating the pertinent facts and the reasons for granting it.”
13 (Cal. Const., art. V, § 8.)
14

15 40. These Constitutional prerequisites show that the Governor does not have the broad
16 powers necessary to support his Executive Order. His seizure of this authority violates
17 constitutional separation of powers because he has taken for himself powers the California
18 Constitution delegated exclusively to the Legislature and the people.

19 41. There is an actual controversy between the parties as to the scope of Governor Newsom’s
20 right to eliminate the death penalty. Plaintiff contends that Governor Newsom’s Executive Order
21 N-09-19 violates separation of powers, as set forth above. He is informed and believes that
22 Governor Newsom contends otherwise.

23 42. Plaintiff desires a declaration of his right and the public’s right to be free from the
24 Governor’s unconstitutional order, and declaratory relief is necessary to resolve this controversy.
25 Therefore, he is entitled to a declaratory judgment as to the scope of the Governor’s power as
26 presented in this case and requests a declaratory judgment that Executive Order N-09-19 is void
27 in whole or in part. (See Code Civ. Proc. § 1060; Civ. Code § 3367.)
28

SECOND CAUSE OF ACTION

(Failure to Establish Standards Under Penal Code § 3604(a) against Allison/CDCR)

43. Petitioner realleges and incorporates paragraphs 1 through 42 as if fully set forth herein.

44. On or about March 18, 2019, in response to Governor Newsom’s unlawful executive order (No. N-09-19), CDCR repealed regulations setting forth its lethal injection protocol. These regulations were necessary to fulfill the requirements of subdivision (a) of Penal Codes section 3604, requiring standards that inflict “an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death” (the state’s lethal injection standards).

45. There is a public right for Defendant to act in conformity with state law for the benefit of everyone in the state. By repealing the state’s lethal injection standards, Defendant (who is in a position of public trust) has violated the right of everyone in the state because everyone in the state has a statutory right for CDCR to maintain lethal injection standards, as required by subdivision (a) of Penal Code section 3604.

46. There is no pecuniary relief adequate to compensate for CDCR’s failure to maintain lethal injection standards. Plaintiff does not have an adequate remedy in the ordinary course of law.

47. Plaintiff seeks a mandatory injunction directing Defendant to restore or enact regulations setting forth its lethal injection standards.

48. Because the state’s lethal injection standards are exempt from APA procedural requirements, any administrative remedies that might exist in APA do not apply. (See, *e.g.*, Gov. Code § 11340.6.) Further, Government Code section 11340.6 describes a “right to petition” for adoption, repeal, or amendment of a regulation. Here, Plaintiff’s primary request for relief is reinstatement of a regulation that was improperly repealed, which is not among the petitioning options provided for in section 11340.6. Thus, Government Code section 11340.6 does not apply. Moreover, because Defendant acted in response to an Executive Order issued by the Governor, any administrative remedy would be futile and should be excused.

THIRD CAUSE OF ACTION

(Failure to Maintain Ability to Execute Judgments of Death § 3604(e) against Allison/CDCR)

49. Petitioner realleges and incorporates paragraphs 1 through 42 as if fully set forth herein.

50. Defendant Allison has a mandatory legal duty under subdivision (e) of section 3604 of the Penal Code, on behalf of CDCR, to “maintain at all times the ability to execute judgments” of death.

51. In or about March of 2019, CDCR, in response to the Governor’s unlawful Executive Order (No. N-09-19), began dismantling its execution chamber at San Quentin. Because San Quentin is the only place where CDCR may carry-out executions (see Pen. Code § 3603), dismantling San Quentin’s execution chamber means that CDCR has not “maintain[ed] ... the ability to execute judgments” of death.

52. Plaintiff seeks (1) a prohibitory injunction to prevent further dismantling of the San Quentin execution chamber, and (2) a mandatory injunction to restore the San Quentin execution chamber to an operable condition.

53. Actions to dismantle the San Quentin execution chamber have caused great waste and injury to the funds and property of the State because taxpayers will be forced to bear the cost of restoring the San Quentin execution chamber to an operable condition, as required by subdivision (e) of Penal Code section 3604, enacted by voters when they passed Proposition 66, and declared Constitutional by the Supreme Court in *Briggs v. Brown, supra*, 3 Cal.5th 808.

54. Actions to dismantle the San Quentin execution chamber have caused and continue to cause great waste and irreparable harm and injury to every person in the state because every person in the state has a statutory right for CDCR to maintain its ability to carry-out judgments of death. There is an important public interest in ensuring that Defendant fulfills this statutory duty.

55. Plaintiff has asserted a public right for Defendant to act in conformity with state law for the benefit of everyone in the state. By dismantling the San Quentin execution chamber, Defendant (who is in a position of public trust) has violated this right.

1 56. There is no pecuniary relief adequate to compensate for CDCR's failure to maintain its
2 ability to carry-out judgments of death as required by statute.

3 57. Plaintiff does not have any administrative remedy to exhaust.

4 **PRAYER FOR RELIEF**

5 Wherefore, Plaintiff prays that the Court enter judgment in his favor with orders for the
6 following:

7 **On the first cause of action:**

8 1. Declaratory judgment that Governor Gavin Newsom's March 13, 2019 Executive Order,
9 Number N-09-19, is, all or in part, void;

10 **On the second cause of action:**

11 2. Injunctive relief ordering Defendant Kathleen Allison, as CDCR Secretary, to rescind its
12 repeal of CDCR's lethal injection protocol or otherwise enact the regulations subdivision (a) of
13 Penal Code section 3604 requires;

14 **On the third cause of action:**

15 3. Temporary, preliminary, and/or permanent injunctive relief prohibiting further
16 dismantling of San Quentin's execution chamber;

17 4. Injunctive relief ordering establishment of an operable execution chamber at San Quentin;

18 **On all causes of action:**

19 5. Plaintiff's costs of suit and reasonable attorneys' fees; and

20 6. Such other and further relief as the Court deems proper.

21 DATE: January 27, 2021

22 Respectfully Submitted,
23 LAW OFFICE OF CHAD D. MORGAN

24 By: 

25 Chad D. Morgan Esq.
26 Attorney for Plaintiff, James V. Lacy

VERIFICATION

1
2 I, James V. Lacy declare that I am the Plaintiff in the above-entitled action. I have read the
3 foregoing **Verified Complaint for Declaratory & Injunctive Relief** and know the contents
4 thereof to be true to my own knowledge, except as to those statements made upon information
5 and belief, and as to them, I believe them to be true.

6
7 I declare under penalty of perjury under the laws of the State of California that the
8 foregoing is true and correct.

9 Jan 27, 2021

10 Executed on _____.

11 James V. Lacy
James V. Lacy (Jan 27, 2021 12:26 PST)

12 _____
James V. Lacy