IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE FOURTH APPELLATE DISTRICT

DIVISION THREE

PEOPLE FOR THE ETHICAL OPERATION OF PROSECUTORS AND LAW ENFORCEMENT (P.E.O.P.L.E.); BETHANY WEBB; THERESA SMITH; and TINA JACKSON, Plaintiffs and Appellants ANTHONY J. RACKAUCKAS, in his official capacity as Orange County District Attorney; and SANDRA HUTCHENS, in her official capacity as Orange County Sheriff, Defendants and Appellees.	No. G057546 (OCSC 30-2018-00983799-CU-CR-CXC)

RESPONDENTS' BRIEF

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE, HONORABLE GLENDA SANDERS, PRESIDING

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL FOURTH **APPELLATE DISTRICT, DIVISION** THREE	COURT OF APPEAL CASE NUMBER: G057546
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 235128 NAME: ADAM C. CLANTON, DEPUTY FIRM NAME: LEON J. PAGE, COUNTY COUNSEL STREET ADDRESS: 333 W. SANTA ANA BLVD., STE. 407 CITY: SANTA ANA STATE: CA ZIP CODE: 92701 TELEPHONE NO.: (714) 834-3317 FAX NO.: (714) 834-2359 E-MAIL ADDRESS: adam.clanton@coco.ocgov.com ATTORNEY FOR (*name*): Appellees	SUPERIOR COURT CASE NUMBER: 30-2018-00983799-CU-CR-CXC
APPELLANT/ PETITIONER: PEOPLE FOR THE ETHICAL OPERATION OF PROSECUTORS AND LAW ENFORCEMENT, et al. RESPONDENT/ REAL PARTY IN INTEREST: ANTHONY J. RACKAUCKAS, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Appellees, Anthony J. Rackauckas, in his official capacity as Orange Co. Dist. Attorney, and Sandra Hutchens, in her official capacity as Orange Co. Sheriff
2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

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(1)		
(2)		
(3)		
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[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: October 15, 2019

ADAM C. CLANTON, DEPUTY
(TYPE OR PRINT NAME)

/s/
(SIGNATURE OF APPELLANT OR ATTORNEY)

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I.

INTRODUCTION

In *Dix v. Superior Court,* the Supreme Court held that "neither a crime victim nor any other citizen has a legally enforceable interest, public or private, in the commencement, conduct, or outcome of criminal proceedings against another." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 448.)

Following *Dix*, the trial court correctly determined that private litigants, purportedly suing the District Attorney and Sheriff as taxpayers acting on behalf of the general public, may not utilize the Superior Court to collaterally attack the conduct or outcome of criminal proceedings brought against Orange County criminal defendants through an independent civil lawsuit.

Appropriately, the trial court sustained the County's demurrer to the First Amended Complaint ("FAC") filed by Appellants People for the Ethical Operation of Prosecutors and Law Enforcement ("P.E.O.P.L.E."), Bethany Webb, Theresa Smith, and Tina Jackson (collectively "Appellants"), granting Appellants fifteen days to amend. Rather than amend the FAC, Appellants filed this appeal. (Appellant's Appendix ("AA") 194; see also Reporter's Transcript ("RT") 1-30.)

The trial court's order sustaining the County's demurrer should be affirmed. First and foremost, Appellants lack standing to collaterally attack

individual criminal court proceedings through a civil lawsuit. Indeed, Appellants freely admit that they have no personal direct beneficial interest in any identified criminal case. Attempting to circumvent this fatal flaw, Appellants rely upon misplaced theories of "public interest" and "taxpayer" standing. However, the Supreme Court has *already held* that both standing exceptions do *not apply when a member of the public seeks a determination relating to conduct in criminal court proceedings,* as it is the responsibility of the parties to that criminal case to raise any challenges and to decide what matters require litigation. Moreover, the requested relief would improperly require a trial court to review and second-guess the propriety of proceedings in criminal cases. This violates the longstanding rule of exclusive concurrent jurisdiction which provides that, "[o]ne department of the superior court cannot enjoin, restrain or otherwise interfere with the judicial act of another department of the superior court." (*Ford v Superior Court* (1986) 188 Cal.App.3d 737, 742.)

Second, the trial court's order granting the County's demurrer should be affirmed because, through the FAC, Appellants sought equitable relief in on-going criminal proceedings to enforce a penal law. This form of relief is specifically prohibited by longstanding case law, as well as Civil Code section 3369, which provides that, "[n]either specific nor preventative relief can be granted . . . to enforce a penal law[.]"

Third, the trial court's order should be sustained because the FAC failed to plead specific facts demonstrating an ongoing illegal expenditure of public funds, a prerequisite for maintaining a taxpayer action under Code of Civil Procedure section 526a.

Finally, the trial court's order should be affirmed because the FAC, and all causes of action therein, are barred by the statute of limitations. At most, a three-year limitations period applies to the FAC. With an April 4, 2018 filing date, the FAC would need to adequately plead actionable violations on or after April 4, 2015, to state a valid cause of action. It did not do so.

II.

STATEMENT OF THE CASE

A. Nature of the Action

According to the facts alleged in the FAC,[1] Appellants are concerned Orange County residents who believe that misconduct is occurring in criminal court proceedings, though Appellants are not themselves criminal defendants. It is in this capacity that Appellants brought their action premised on "public interest" standing and "taxpayer" standing, asserting

[1] While the County does not concede the facts as stated by Appellants, for purposes of an appeal of the court's ruling on a demurrer, the County refers to Appellants' version of the facts in the FAC. (See AA 64-103.)

the violation of the statutory and constitutional rights of unnamed criminal defendants in their respective criminal cases.

Appellants' Ninth Cause of Action, which sought prospective relief under a theory of taxpayer waste, requested that the trial court make findings of ongoing statutory and constitutional violations in various criminal court proceedings involving various Orange County criminal defendants. Upon making such collateral findings as to the legality of the conduct within the concurrent forum, Appellants requested the trial court to restrain the improper expenditure of public funds relating to such purported violations.

Appellants' alternative theory is "public interest" standing for its Third and Sixth cause of action for writ of mandate, likewise seeking collateral challenges to criminal court proceedings. Under this approach, Appellants, as members of the public, asked the civil court to issue a writ compelling the County to comply with Penal Code sections 4001.1(B) and 1054 et seq. in ongoing criminal cases.

B. Procedural History

On April 4, 2018, Appellants filed their initial complaint against the County in Orange County Superior Court, which was removed to federal court on May 8, 2018, and remanded back to the Superior Court on July 23, 2018. (AA 5, 47, 51.) On October 1, 2018, on remand, Appellants filed their FAC, asserting nine causes of action. (AA 64-103.) Appellants

brought six of those causes of action vicariously on behalf of non-party criminal defendants. (AA 93-98.) The three remaining causes of action included a petition for writ of mandate in which Appellants asserted "public interest" standing relating to Penal Code sections 4001.1 and 1054 et seq., and a claim asserting "taxpayer standing" under Code of Civil Procedure section 526a. (AA 94, 96, 98.) On November 2, 2018, the County demurred to the FAC on numerous grounds. (AA 104-29.)

On February 1, 2019, the trial court heard the County's demurrer and took the matter under submission following a tentative ruling from the bench to sustain the demurrer *without* leave to amend. (RT 6:4-6:25; RT 29:9.) In turn, on February 5, 2019, the trial court issued an order sustaining the Demurrer as to all causes of action, but granting Appellants *fifteen days leave to amend*. (AA 194.) Appellants elected not to amend, notifying the trial court by letter on February 19, 2019 that "Plaintiffs appreciate the Court providing leave" to amend, but that Plaintiffs would "appeal the Court's ruling without filing an amended complaint." (Respondents' Appendix ("RA") 4, 5.)

A judgment of dismissal was entered against Appellants on February 26, 2019, and Appellants subsequently filed their notice of appeal. (AA 196, 201.) The present appeal seeks "review of only their taxpayer claim under Code of Civil Procedure section 526a and their requests for writ of mandate as to violations of Penal Code sections 4001.1, subdivision(b), and

1054 et seq." Appellants do not appeal the decision as to their remaining causes of action. (Appellants' Opening Brief ("AOB"), at p. 24.)

III.

STANDARD OF REVIEW

While an appellate court will review the sustaining of a demurrer de novo, which is the appropriate standard of review relating to Appellants' taxpayer claims, an appellate court nevertheless reviews a trial court's decision to deny "public interest" standing for abuse of discretion. (See *Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 875; *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) Thus, as Appellants concede, the trial court's ruling on their writ of mandate claims should be reviewed for abuse of discretion, while the taxpayer claims should be reviewed de novo. However, " 'A judgment or order of the lower court is *presumed correct*.' " (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.) That is, "Error is never presumed. It is incumbent on the plaintiff to make it affirmatively appear that error was committed by the trial court." (*Id*.) Moreover, an appellate court will affirm the trial court's decision if it was correct on *any* legal basis, irrespective of the trial court's rationale. (See *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32; *Estate of Beard* (1999) 71 Cal.App.4th 753, 776.)

Finally, where, as here, a demurrer is sustained with leave to amend, but *the plaintiff elects not to amend*, a court "resolve[s] all ambiguities and

uncertainties raised by the demurrer *against* the plaintiff." (*Hooper v. Deukmejian* (1981) 122 Cal.App.3d 987, 994 [emphasis added].) Thus, a judgment of dismissal following the failure to amend *must* be affirmed if the unamended complaint is objectionable on *any* ground raised in the demurrer. (*Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 10.)

IV.

LEGAL ARGUMENT

A. The Demurrer Was Properly Sustained as to the Third, Sixth and Ninth Causes of Action as Appellants Lack Standing.

1. Appellants Lack Public Interest Standing to Bring Their Mandamus Actions.

a. Public Interest Standing is Unavailable to Appellants to Challenge Criminal Court Proceedings.

Appellants lack standing to bring their Third and Sixth Causes of Action for Writ of Mandate. Appellants concede that they have no personal direct beneficial interest in any criminal defendants' case. Rather, they claim to bring their action as members of the public. (AOB, at pp. 55-56.) Specifically, they plead that the County violated Penal Code sections 1054 et seq., by not properly disclosing evidence to defendants in those defendants' criminal cases, as well as Penal Code section 4001.1(B) by improperly eliciting incriminating information from criminal defendants. (AA 94-97 [¶¶ 143-47, 156-59].) By necessity, then, if Appellants have

standing, the legal question posed to the trial court would be whether the County violated a penal law in a concurrent criminal matter.

Far from an abuse of discretion, the trial court's determination that Appellants lack standing to assert their writ of mandate[2] actions is wholly consistent with clearly-established law. While standing in a mandamus action ordinarily requires the party to be "'beneficially interested' in the requested relief[,]" a single exception exists "where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty." (*Reynolds, supra*, 223 Cal.App.4th at p. 873.)

Nevertheless, the exception does not swallow the rule, as the public interest exception is *not* automatically available as a substitute where a party is unable to satisfy the beneficial interest test and, further, a trial court's decision to apply the doctrine is purely discretionary. (*Id*. at pp. 873, 874.) More importantly, however, the Supreme Court has *already held* that the "public interest" standing exception *does not apply when a member of the public seeks a determination relating to conduct in criminal court proceedings*. Indeed, in addressing a "public interest" standing challenge to a criminal matter, the Supreme Court in *Dix v. Superior Court*

[2] In a writ of mandate action, "Mandamus lies to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. To authorize a writ the complaint must show an existing duty and a failure to perform the same on demand." (*Meyer v. City & Cnty of San Francisco* (1907) 150 Cal. 131, 134; Code Civ. Proc., § 1085.)

held that "neither a crime victim nor any other citizen has a legally enforceable interest, public or private, in the commencement, conduct, or outcome of criminal proceedings against another." (*Dix v. Superior Court*, *supra,* 53 Cal.3d at p. 448.) Rejecting "public interest" standing to challenge conduct in criminal cases, the Supreme Court held:

> [W]e have made clear that "public interest" standing must yield to paramount considerations of public policy. . . .
>
> [R]ecognition of citizen standing to intervene in criminal prosecutions would have "ominous" implications. It would undermine the People's status as exclusive party plaintiff in criminal actions, interfere with the prosecutor's broad discretion in criminal matters, and disrupt the orderly administration of justice.

(*Id*. at pp. 453-54 [citations omitted].)

The Supreme Court further clarified that "public interest" standing does not apply *even when the citizen's action asserts unlawfulness in the criminal case*. It concluded that in criminal cases, "*challenges must be raised by the parties*, and it is their responsibility, not a stranger's, to decide what matters require litigation." (*Id*. at p. 454 [emphasis added].)

Thus, where the parties in the criminal action do not seek to challenge purported impropriety or irregularities, "[a] non-party may not second-guess" a decision not to challenge. (*Id*.; see also *Nathan H. Schur, Inc. v. City of Santa Monica* (1956) 47 Cal.2d 11, 17 ["the appropriate tribunal for the enforcement of the criminal law is the court in an

appropriate criminal proceeding"]; *Triple A Mach. Shop, Inc. v. State of Cal*. (1989) 213 Cal.App.3d 131, 145 [noting that judicial restraint "is based not only on the fundamental doctrine of separation of powers, but also on the recognition that the law contains adequate remedies for common forms of governmental misconduct in criminal proceedings" such as "prohibitions against use of evidence," "suppression of evidence," and "sanctions"].)

The trial court's decision not to permit public interest standing in this case was not an abuse of its discretion. In articulating the difficulties it had with the FAC, the trial court observed:

> Here, where these rights have allegedly been violated . . . there is an individual criminal court already looking at the question of whether there's been a violation. So I would, in a sense, not only be overseeing the agencies – the D.A.'s office and the Sheriff's Department – I would also be becoming involved in a number of individual cases where judges are making rulings on alleged *Brady* violations, 5th Amendment, 6th Amendment violations.

(RT 27:25-28:4.) The trial court's concern is wholly consistent with the issues raised in *Dix*.

b. <u>The Doctrine of Exclusive Concurrent Jurisdiction Also Prohibits Public Interest Standing as to Appellants' Mandamus Causes of Action</u>.

In addition to the above, the standing issue raised in *Dix, supra,* over

dual-tracked judicial review arises frequently in the context of other judicial doctrines, including the doctrine that "[o]ne department of the superior court cannot enjoin, restrain, or otherwise interfere with the judicial act of another department of the superior court." (*Ford, supra,* 188 Cal.App.3d at p. 742; see also *Curtin v. Koskey* (1991) 231 Cal.App.3d 873, 876 ["one trial court judge may not reconsider and overrule a ruling of another judge"]; see also Code Civ. Proc., § 526(b) [invoked by the trial court at RT 7:5, 8:22].) Not only is this doctrine "designed to ensure the orderly administration of justice, but " 'If the rule were otherwise, it would be only a matter of days until we would have a rule of man rather than a rule of law. . . . [and] would instantly breed lack of confidence in the integrity of the courts.' " (*Anne H. v. Michael B*. (2016) 1 Cal.App.5th 488, 498–99.)

Just as a trial court cannot sit as a court of appeal to reconsider a ruling already made by another trial court, the related "rule of exclusive concurrent jurisdiction" similarly provides that it is improper for a court to even collaterally assess the illegality of conduct *in the first instance*. Under that doctrine, "when two or more courts have subject matter jurisdiction over a dispute, the court that first asserts jurisdiction assumes it to the exclusion of the others. It makes no matter whether the parties to the various actions and the remedies sought are not precisely the same." (*Lofton v. Wells Fargo Home Mortg*. (2014) 230 Cal.App.4th 1050, 1062.) The rationale behind the doctrine is "based upon the public policies of

avoiding conflicts that might arise between courts if they were free to make contradictory decisions . . . ." (*People ex rel. Garamendi v. Am. Autoplan, Inc*. (1993) 20 Cal.App.4th 760, 770; *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1176 [policy seeks to avoid "the real possibility of 'unseemly conflict between courts that might arise if they were free to make contradictory decisions or awards at the same time or relating to the same controversy; . . .' "].)

Far from an abuse of discretion, the trial court's reluctance to wade into criminal court matters is wholly consistent with a long line of law and policy, as well as the doctrine of exclusive concurrent jurisdiction. As outlined above, recognizing Appellants' public interest standing in this case would call upon the trial court to weigh in on and possibly second guess the propriety of proceedings in criminal cases—precisely the policy concern the Supreme Court found conclusive against "public interest" standing in *Dix*, discussed in great detail in other cases, and raised directly by the trial court.[3] The decision should therefore be affirmed.[4]

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[3] To understand the scope of what Plaintiffs are calling on the civil trial court to undertake, one need only turn to their assertions of *Brady* violations. To establish a *Brady* violation, a party "must show a 'reasonable probability of a different result.' " (*In re Sodersten* (2007) 146 Cal.App.4th 1163, 1226.) In turn, "[t]he requisite 'reasonable probability' is a probability sufficient to 'undermine [ ] confidence in the outcome' on the part of the reviewing court." (*Ibid*.) Here, then, for the civil court to reach the conclusion that the County has violated *Brady*, it will be incumbent upon the trial court to effectively relitigate criminal cases to assess whether a different result would have been probable. However, this

2. Appellants Lack Standing to Bring a Taxpayer Action to Challenge Criminal Court Proceedings.

As stated above, the Court must affirm the trial court's judgment of dismissal following Appellants' failure to amend if it finds the FAC objectionable on *any* of the above grounds relating to Appellants' mandamus causes of action. (*Ram, supra*, 234 Cal.App.4th at p. 10.) The Court here should also affirm the trial court's ruling sustaining the demurrer as to Appellants' Ninth Cause of Action ("Taxpayer Action") for similar reasons. Indeed, similar to their causes of action for mandate, Appellants' Taxpayer Action asks a civil superior court to make an affirmative determination that the County has violated the Fifth Amendment, Sixth Amendment, *Brady* rights and state statutory and constitutional rights of criminal defendants *in concurrent proceedings separately overseen by a criminal superior court judge*.

A viable taxpayer suit seeks preventative relief in order to restrain an illegal expenditure, and requires an assertion that the challenged

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determination falls within the purview of the criminal court or the appellate court, not a superior court by way of lateral review.

[4] Despite these clearly expressed concerns, Appellants make an unsupported interest-balancing argument that "neither Defendants nor the Superior Court identified any urgent or competing interests that outweigh the public interest." (AOB, at p. 56.) Indeed, these policy concerns were not only identified by the trial court and the County, but were likewise already described and accepted by the California Supreme Court. (See, e.g., *Dix, supra,* 53 Cal.3d at pp. 453-54.)

government conduct is illegal. (See *Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 714; *Connerly v. State Pers. Bd*. (2001) 92 Cal.App.4th 16, 29; Code Civ. Proc., § 526a.) However, as Appellants acknowledge, there are limits to the availability of taxpayer standing under section 526a. (AOB, at p. 53 (Appellants "acknowledge, that standing, including taxpayer standing, is not unlimited.").)

In the 2017 case of *Weatherford v. City of San Rafael*, for example, the Supreme Court provided instruction on the boundaries of taxpayer standing, turning first for guidance to the analogous discussion in *Dix, supra,* relating to the outer limits of "public interest" standing. (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241,1248.) Describing its prior holdings and caution with regard to "public interest" standing in writ of mandate actions, the Court observed that, "Notwithstanding the arguments for broad 'public interest' standing, though, we have continued to recognize the need for limits in light of the larger statutory and policy context." (*Ibid*.) The *Weatherford* court then took the additional step of clarifying that the approach in *Dix* with regard to "public interest" standing should equally apply to an analysis of "taxpayer" standing under section 526a. Indeed, it elaborated that "[o]ur decision in *Dix* thus illustrates the type of analysis required in determining standing's scope under a statutory right to relief." (*Ibid*.) Turning then to standing

under section 526a, the California Supreme Court continued:

> [T]he text read in isolation can be insufficient to adequately capture the other prudential and separation of powers considerations that have traditionally informed the outer limits of standing. This sensitivity to the larger context of standing is not only a method to better effectuate the Legislature's purpose in providing certain statutory remedies, but also marks a recognition of the sometimes competing interests at issue when considering whether a party may seek a judicial remedy against government officials.

(*Id*. at p. 1249; see also, *Dix, supra*, 53 Cal.3d at pp. 453-54; *Animal Legal Def. Fund v. California Exposition & State Fairs* (2015) 239 Cal.App.4th 1286, 1298 ["[S]ection 526a does not create an absolute right of action in taxpayers to assert *any* claim for governmental waste. To the contrary, courts have recognized numerous situations in which a section 526a claim will not lie."].)

In short, *Weatherford* makes clear that a court not only can, but *should* take into account policy considerations and competing interests when assessing the outer limits of section 526a taxpayer standing, and that the policy concerns expressed in *Dix* also relate to section 526a cases.

Turning then to *Dix* as *Weatherford* instructs, where a member of the public brings an action relating to separate criminal proceedings, "'public interest' standing must yield to paramount considerations of public policy" and "neither a crime victim nor any other citizen has a legally enforceable

interest, public or private, in the commencement, conduct, or outcome of criminal proceedings against another." (*Dix, supra*, 53 Cal.3d at pp. 450, 453.) This is so because "*challenges must be raised by the parties* [in their criminal cases], and it is their responsibility, not a stranger's, to decide what matters require litigation." (*Id*. at p. 454 [emphasis added].) "[A] non-party may not second-guess" a party's decision not to raise a legal challenge in criminal court. (*Ibid*.)

Relying on the Supreme Court's instruction in *Weatherford* that the *Dix* analysis is applicable to section 526a "taxpayer" standing, and that *Dix* itself found that standing exceeds even the liberal limits where the nature of a plaintiff's claim is such that it seeks to challenge conduct in criminal actions, the trial court's decision was not error. Indeed, the findings in *Dix* and the instruction in *Weatherford* are directly applicable to this case. Once again, the trial court expressed its concerns that, based on a taxpayer action that seeks to prove illegal conduct in criminal cases, "*I would, in a sense, not only be overseeing the agencies—the D.A.'s office and the Sheriff's Department—I would also be becoming involved in a number of individual cases where judges are making rulings on alleged Brady violations, 5th Amendment, 6th Amendment violations.*" (RT 27:25-28:4 [emphasis added].)

These concerns are not a deviation from established law but, rather, an emphasis of it, as they restate the analysis in *Weatherford* and *Dix*,

embrace the multiple judicial doctrines that abhor lateral oversight by a concurrent superior court, and regard the criminal tribunal as the appropriate forum to address purported violations.[5] (See *Ford, supra*, 188 Cal.App.3d at p. 742 ["One department of the superior court cannot enjoin, restrain, or otherwise interfere with the judicial act of another department of the superior court."]; Code Civ. Proc., § 526(b); *Lofton, supra*, 230 Cal.App.4th at p. 1062 ["when two or more courts have subject matter jurisdiction over a dispute, the court that first asserts jurisdiction assumes it to the exclusion of the others."]; see also *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 801 ["the California judiciary is ill-equipped to add to its already heavy burden the duty of serving as an ombudsman[.]"].)

Moreover, California Supreme Court support for the trial court's decision does not end with *Weatherford* and *Dix*. The Supreme Court has also recently restricted taxpayer actions on this same principle that a plaintiff cannot, by a taxpayer action, collaterally challenge criminal court proceedings through a court of equity. Indeed, in the same year that *Weatherford* was decided, the Supreme Court also decided the taxpayer

[5] The trial court's reference to Code of Civil Procedure section 526(b) makes sense in the standing analysis, then, for if a trial court is not allowed to interfere with the criminal proceedings of another superior court, injunctive relief cannot be properly granted in the case. (RT 7:4-7:6.) Thus, under *Weatherford*, a court undertaking a section 526a standing analysis would properly consider as a prudential or policy factor whether relief is even available. (See RT 7:8-7:11 ("the propriety of a . . . judicial challenge . . . depends, in part, on the amenability of the issue to judicial redress.").)

case of *Leider v. Lewis* (2017) 2 Cal.5th 1121, which addressed whether a taxpayer action can proceed in a court of equity when the underlying issues are criminal in nature, and can instead be the subject of criminal court proceedings. The Court determined that such matters are properly before a criminal court, and that a taxpayer action is improper. (*Id*. at p. 1137.) In so doing, the Court pointed to Civil Code section 3369 which again states that " 'Neither specific nor preventative relief can be granted . . . to enforce a penal law . . . .' " (*Id*. at p. 1130; Civ. Code, § 3369.)

The Court also noted case law to the same point, such as " 'the fundamental rule that courts of equity are not concerned with criminal matters . . . .' " as well as the proposition of [¶ . . . ¶] "criminal court as the appropriate forum for adjudicating violations of criminal law . . . ." (*Leider, supra,* 2 Cal.5th at pp. 1130, 1133; see also *Perrin v. Mountain View Mausoleum Assn*. (1929) 206 Cal. 669, 671; *Schur, supra*, 47 Cal.2d at p. 17.) The Court, in turn, concluded that "*a taxpayer action will not lie to enforce a Penal Code provision*." (*Leider, supra,* 2 Cal.5th at p. 1137 [emphasis added].) Accordingly, just as *Weatherford* and *Dix* support the determination that the nature of Appellants' case disfavors standing, so too, do the considerations in *Leider* bolster that identical conclusion.[6]

[6] Plaintiffs' argue that the "public interest" standing case of *Dix* is inapposite to the taxpayer standing analysis, because the Supreme Court in *Dix* stated that "nothing we say *here* affects independent citizen-taxpayer actions raising criminal justice issues." (AOB, at p. 49; *Dix, supra,* 53

Finally, Plaintiffs' own FAC and Opening Brief directly reinforce the conclusions in *Dix* and *Leider* that the judicial process available in the criminal court system is a more than sufficient avenue to address the purported violations alleged by Plaintiffs. Indeed, the entreaty by which Plaintiffs seek to undercut *Dix*, *Weatherford*, and *Leider* is that if members of the general public are denied standing to assert the rights of criminal defendants, then such violations will simply languish without judicial review—and, thus in turn, by denying taxpayer and public interest standing the "Superior Court cut of *all* avenues for relief." (AOB, at p. 64 [emphasis in original].) But, the Opening Brief and FAC bely this argument.

For example, all parties concede that this Court has already made sweeping determinations on the very issues that are the subject matter of Appellants' proposed civil action in the *Dekraai* matter. (AOB, at p. 11; AA 67 [¶¶ 8, 35].) However, *Dekraai* only demonstrates that a criminal defendant is fully capable of vigorously challenging any purported violation of statutory and constitutional rights by the County in a judicial forum and, moreover, that this Court is also quite capable of making factual findings and legal proclamations with regard to those issues.[7]

Cal.3d at 454, n.7 [emphasis added].) However, while *Dix* does not itself opine on taxpayer standing, *Weatherford* and *Leider* subsequently filled in those gaps, extending those very principles to taxpayer actions.

[7] Appellants make the related argument that taxpayer standing should not be denied simply on the basis that there exists other prospective plaintiffs with a more direct interest. (AOB, at pp. 38-39.) However, that

Appellants' FAC asks a civil court to make a determination that the County is currently wasting government funds by engaging in purported illegal activity in criminal cases. In order to reach the question of waste, however, the civil court would first be required to assess the question of "illegality," which, by necessity, will involve a court in equity second-guessing, or concurrently reviewing, conduct and legal rights in related criminal court proceedings. *The criminal court is the forum that is adequate, available, and appropriate to address purported violations in criminal cases*. Appellants' proposed action amounts to shadow review by a concurrent superior court—a dual judicial track which itself poses its own issues of judicial economy and waste.[8] Quite simply, Appellants plead an

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is not the issue here, and not the concern triggered by *Dix*, *Weatherford*, and *Leider*. Here, where the real party in interest already has related proceedings in a separate judicial forum, the Supreme Court has made clear that it is proper for a court in equity to decline to undertake its own dual-tracked analysis.

[8] In this regard, in addition to considering the impropriety of wading into the matters of a concurrent jurisdiction, the trial court was also concerned with the sheer scope ("over thirty years" worth) of criminal cases that the FAC puts at issue. (RT 11:26-12:6 ["[it] did make me think about what facts would be necessary outside those in the complaint for you to take this matter further. And would you, indeed, be seeking to open up criminal files going back 30 years?"].) The trial court's holistic consideration of the circumstances of the case is not improper; to the contrary, it is "required." (*Weatherford, supra,* 2 Cal.5th at p. 1249; see also AA 117 (Demurrer, at p. 5) ["From a sheer volume perspective, to the extent the Plaintiffs allege a "thirty year" program, and in turn seek thirty years' worth of production, such discovery would implicate an examination of millions of adjudicated cases, as well as information about cases involving criminal informants. A staggering number of privilege claims

action that reasonably falls outside the bounds of taxpayer standing. The trial court's decision was proper and should be affirmed.

B. The Demurrer Was Properly Sustained as to the Third, Sixth and Ninth Causes of Action for Failing to Allege Sufficient Facts.

1. Appellants' Mandamus Claims Fail as a Writ Cannot Issue to Enforce a Penal Law.

Standing issues aside, the above arguments on the threshold question of standing equally apply to the question of whether the FAC alleges facts sufficient to constitute a cause of action. It does not, and the trial court's decision can be affirmed on this separate and distinct basis.

In ruling on a demurrer, a court looks at the sufficiency of the complaint by assessing whether, based on consideration of all the facts alleged, a plaintiff could be entitled to any relief. (See *Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 446.) Here, based on Appellants' writ of mandate actions, Appellants are not entitled to relief from a civil court. Indeed, the nature of Appellants' mandamus claims is unique—Appellants seek a determination that the County has violated the Penal Code (sections 1054 et seq. and 4001.1(B)) in criminal cases. (AA 94-97 [¶¶ 143-47, 156-

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pursuant to Evidence Code sections 1040-1042 would, in turn, have to be made by OCSD and/or OCDA to protect the identity—and safety—of their wholly appropriate sources of information in the jails, and in turn each of those claims would need to be individually reviewed by this Court. Such diversion from employee safety and enforcement duties favors against a third-party plaintiff action."].)

59].) Pursuant to Civil Code section 3369, however, "neither specific nor preventative relief can be granted . . . to enforce a penal law . . . ."

Moreover, as described above, the California Supreme Court has likewise consistently held that "the appropriate tribunal for the enforcement of the criminal law is the court in an appropriate criminal proceeding." (*Schur, supra*, 47 Cal.2d at p. 17; *Leider, supra,* 2 Cal.5th at p. 1137 [civil courts should not evaluate violations of penal law]; *Dix, supra*, 53 Cal.3d at p. 454 ["A non-party may not second-guess" criminal court proceedings.].)

Consequently, considering all the facts alleged in the FAC, and the inherent call of Appellants' claims, affording any relief would improperly require the civil court to assess whether there have been violations of penal law. Accordingly, just as standing is a hurdle, the Court can apply the same rationale to affirm the trial court's decision on the basis of Appellants' failure to state facts sufficient to constitute a cause of action. (See also RT 7:8-7:11 ["the propriety of a private person's judicial challenge to executive acts depends, in part, on the amenability of the issue to judicial redress"].)

2. Appellants' Taxpayer Action Fails to Allege Sufficient Facts to Support their Claim for Relief.

a. Appellants are not Entitled to Relief.

Once again, as with the writ of mandate actions, the arguments asserted above on the threshold question of standing remain equally relevant and determinative on the separate question of whether the FAC

states sufficient facts to state a taxpayer claim. In ruling on a demurrer, a court must assess whether, based on consideration of all the facts alleged, a plaintiff could be entitled to *any* relief. (See *Zakk, supra*, 33 Cal.App.5th at p. 446.) Here, as plead, the taxpayer action does *not* entitle Appellants to any relief.

In this case, Appellants' broad allegations are that "[f]or over thirty years, the OCSD and OCDA have operated and continue to operate a confidential, illegal jailhouse informant program ("Informant Program") that violates the constitutional and statutory rights of people accused of crimes in numerous ways." (AA 70 [¶ 28].) In turn, under their taxpayer action, Appellants are asking the trial court to conclude that "[d]efendants are illegally expending and wasting public funds by performing their duties in violation of the constitutional and statutory provisions described above." (AA 98 [¶ 170].) As discussed above, the FAC as plead, then, asks a court in equity to make findings that the County has engaged in conduct that "violates the constitutional and statutory rights of people accused of crimes[.]" (AA 70 [¶ 28].)

However, as the California Supreme Court has made clear, "a taxpayer action will not lie to enforce a Penal Code provision." (*Leider, supra*, 2 Cal.5th at p. 1137; Civ. Code, § 3369 ("neither specific nor preventative relief can be granted . . . to enforce a penal law . . . ."). Likewise, "One department of the superior court cannot enjoin, restrain, or

otherwise interfere with the judicial act of another department of the superior court." (*Ford, supra*, 188 Cal.App.3d at p. 742; see also AOB, at p. 28 [Appellants' taxpayer action seeks "to obtain an injunction restraining and preventing the illegal expenditure of public funds."]; Code Civ. Proc., § 526(b).) Because the FAC on its face relies on factual allegations which, by necessity, call upon a trial court to enforce the penal code or wade into the criminal court arena of a concurrent court, the FAC as plead fails to allege facts upon which relief can be granted. (See also, RT 7:8-7:11.)

Ordinarily, the final question would be whether Appellants could amend to state facts entitling them to relief. Here, however, having elected not to amend after being given the opportunity to do so, "it is presumed the complaint states as strong a case as is possible" and that "[a]ll ambiguities and uncertainties must therefore be resolved against Appellants and strict construction is required." (*Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 457; *Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 155–156.) Therefore, based on the FAC and the facts alleged therein, the decision should be affirmed on this additional basis.

b. Appellants fail to State Sufficient Facts Showing a *Current* Informant Program.

In addition to the above, the FAC on its face relies on speculation to support its taxpayer action. For example, as already discussed, the nature

of a taxpayer action is prospective such that it "seeks preventative relief, to restrain an illegal expenditure . . . ." (*Connerly, supra*, 92 Cal.App.4th at p. 29; Code Civ. Proc., § 526a.) Appellants acknowledge this forward-looking nature of a taxpayer claim in their Opening Brief, noting that they are "required to establish a taxpayer action based on *ongoing* waste and illegal expenditures of public funds." (AOB, at pp. 32-33 [emphasis added]; see also *id*. at p. 43.) However, to plead sufficient facts of *ongoing* waste, "General allegations, innuendo, and legal conclusions are not sufficient . . . ." (*Waste Mgmt. of Alameda Cty., Inc. v. Cty. of Alameda* (2000) 79 Cal.App.4th 1223, 1240.) " '[S]pecific facts alleging a waste of public funds must be supported in the record. Otherwise public officials performing their duties would be harassed constantly.' " (*Humane Soc'y of the Unites States v. State Bd. Of Equalization* (2007) 152 Cal.App.4th 349, 356.)

In this case, the FAC *as plead*, fails to assert specific facts of *current* purported misconduct that is being called upon to be restrained. For example, Appellants allege that thirty years ago an informant program existed, and point to several cases from the 1980s which they believe establish the existence of a program then. (AA 70 [¶ 28].) Even assuming arguendo that Appellants had adequately plead facts that such a program existed thirty years ago, the existence of such purported misconduct *in 1988* is not an adequate allegation of fact showing *present* misconduct that must

be restrained. Appellants will no doubt point out that they have alleged conduct more recent than the 1980s, again referencing the *Dekraai* matter in the FAC and allegations relating to the year 2015. (AA 70, 73, 90 [¶¶ 28, 41, 116, 117].)

Once again, however, the call of the question of restraining *ongoing* wasteful spending is not an opportunity to relitigate under a parallel civil track the matter of *People v. Dekraai*. Rather, a trial court in a taxpayer case is tasked with separately assessing whether *after* 2015 and *after Dekraai*, there *presently* exists an illegal "jailhouse informant program." In this case, the necessary allegations of *present* misconduct in the FAC are not premised on fact and rely on general allegations, innuendo, and legal conclusions. The FAC is thus insufficient.

Indeed, in their Ninth Cause of action for taxpayer waste relating to a purported jailhouse informant program, Appellants allege on "information and belief" that waste is "ongoing." (AA 98 [¶ 172].) This assertion is conclusory, and not a sufficient statement of fact to constitute an action. (See *Gomes v. Countrywide Home Loans, Inc*. (2011) 192 Cal. App.4th 1149, 1158–59 ["a pleading made on information and belief is insufficient if it 'merely assert[s] the facts so alleged without alleging such information that 'lead[s] [the plaintiff] to believe that the allegations are true.'"]; *Magnolia Square Homeowners Assn. v. Safeco Ins. Co.* (1990) 221 Cal.App.3d 1049, 1057; *Ankeny v. Lockheed Missiles and Space Co.* (1979)

88 Cal.App.3d 531, 537 ["a pleading must allege facts and not conclusions, and . . . material facts must be alleged directly and not by way of recital"].)

Appellants' similar arguments elsewhere in their Opening Brief do nothing to establish that the FAC pleads specific *facts* of an *ongoing* informant program. Indeed, many of Appellants' arguments in this regard are likewise based only "on information and belief," which constitutes mere recital, and is vague, conclusory and insufficient. (*Gomes, supra,* 192 Cal.App.4th at pp. 1158-59; see AOB at p. 16 (referencing AA 79 [¶64]), 18 (referencing AA 92 [¶¶ 128, 129].) At best, Appellants plead what *their beliefs are* in the FAC, but do not plead facts describing a *current* jailhouse informant program that needs to be restrained.

In addition, Appellants' factual allegations in the FAC likewise do not plead an *ongoing* "illegal jailhouse informant program." (AA 70 [¶ 28].) For example, Appellants refer to paragraph 130 of their FAC relating to Oscar Galeno Garcia, which is silent as to when that case occurred and Appellants elected not to amend to clarify. (AOB, at pp. 18, 67; AA 92 [¶ 130].) Moreover, paragraph 130 of the FAC specifically describes the Garcia case as involving "an out-of-custody informant," and not a "jailhouse" informant. (AA 92 [¶ 130].) To the extent that Appellants now try to point to an adequately plead factual example demonstrating an ongoing "jailhouse informant program," an undated allegation of an informant that was not in jail is insufficient.

Similarly, paragraph 131 of the FAC, also referenced in the Opening Brief, likewise fails to plead facts or a current "jailhouse informant program." (AOB, at p. 67; AA 93 [¶ 131].) Indeed, Appellants state that there are "at least 146 other cases in which *it appears that* the OCDA has failed to turn over such required evidence . . . [T]here *is no indication* in these cases that OCDA disclosed evidence . . . ." (AA 93 [¶ 131] [emphasis added].) At most, these allegations amount to a tenuous deduction that, based on their examination, they do not know one way or another about discovery issues. Moreover, there *are no allegations whatsoever* that there was a purported illegal jailhouse informant used in any of those 146 cases. Thus, Appellants' opinions, deductions, and speculation do not rise to the level of adequate material facts. (See *Linda Vista Vill. San Diego Home-owners Assn., Inc. v. Tecolote Inv'rs, LLC* (2015) 234 Cal.App.4th 166, 180.)

Finally, it once again bears noting that the trial court gave Appellants leave to amend. While Appellants had ample opportunity to bolster their factual allegations to address these deficiencies, they simply elected not to. (See RA, 4-5.) Appellants could have, had they chosen to amend, elaborated upon their "information and belief" allegations by alleging the facts that lead them to believe an informant program is "ongoing." Having rested on their FAC, the FAC as plead does not state facts sufficient to state an action for ongoing taxpayer waste, and

Appellants have abandoned their opportunity to amend. The decision should therefore be affirmed.

C. Appellants' Taxpayer and Writ Actions are Barred by the Statute of Limitations.

Finally, *as plead*, Appellants' writ of mandate and taxpayer actions are also barred by the applicable limitations periods. At most, a three-year limitations period applies to all of Appellants' actions.[9] (See Code Civ. Proc., §§ 312, 338.) In this case, with an April 4, 2018 filing date, the FAC would need to adequately plead actionable violations which occurred on or after April 4, 2016, or possibly on or after April 4, 2015, to state a valid action for mandamus.

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[9] "An action against a sheriff or coroner upon a liability incurred by the doing of an act in an official capacity and in virtue of office, or by the omission of an official duty . . ." must be brought "[w]ithin two years." (Code Civ. Proc., § 339(2).) The applicable limitations period for 526a actions turns on "[t]he gravamen of a complaint and the nature of the right sued upon . . ." (*McLeod v. Vista Unified Sch. Dist.* 2008 158 Cal.App.4th 1156, 1165 (2008). Thus, to the extent a taxpayer action relates to an underlying statutory violation for which there is no limitations period, a three-year limitations period applies. (Code Civ. Proc., § 338). To the extent the taxpayer action relates to a federal or state constitutional violation, a two-year statute of limitations period applies. (See *Colony Cove Properties, LLC v. City of Carson* (9th Cir. 2011) 640 F.3d 948, 956 [California has two year limitations period for 42 U.S.C. § 1983 violations]; *Carlsbad Aquafarm, Inc. v. State Dep't of Health Servs*. (2000) 83 Cal.App.4th 809, 816 [purported violations of state constitution sound in tort]; Code of Civ. Proc., § 335.1 [two-year tort limitations period].) In addition, "[t]he statute of limitations applicable to a writ of mandamus under Code of Civil Procedure section 35 depends upon the nature of the obligation sought to be enforced." (*Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, 926.)

Here, Appellants attempt to avoid the limitations bar or the vagueness of their FAC by relying on "exceptions" that are inapplicable to their circumstances. (AOB, at p. 66.) For example, Appellants first argue that any omissions or vagueness in their FAC can be excused because "[i]n order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows merely that the action may be barred." (AOB, at p. 66 [citing *McMahon v. Republic Van & Storage Co., Inc.* (1963) 59 Cal.2d 871, 874].)

This "exception" is inapplicable for several reasons. First, the defect *does* appear on the face of the complaint, as the FAC appears to make direct reference to the most recent purported instances of a jailhouse informant program as surfacing in February 2015 testimony in the *Dekraai* matter describing actions which occurred *on an earlier date,* and (as described above) otherwise assert contentions, opinions, and speculation as to conduct thereafter. (AA 73, 92-93 [¶¶ 41, 128-31].) Moreover, Appellants' reliance on vagueness aside, they also fail to acknowledge the shifting of burdens that occurs where, as here, a plaintiff elects not to amend despite the opportunity to do so. In such a case, a court must "resolve all ambiguities and uncertainties raised by the demurrer *against the plaintiff*." (*Hooper, supra,* 122 Cal.App.3d at p. 994 [emphasis added].) Thus, under this applicable standard, because Appellants elected not to amend their

FAC to adequately assert purported violations that have occurred within the limitations period, the Court must assume that they do not exist.

Appellants alternative "exceptions" also do not apply. For instance, Appellants contend that they should be able to escape their limitations insufficiencies based on either the "continuing violations" exception or the "continuous accrual" exception. (AOB, at p. 66 [citing *Aryeh v. Canon Bus. Sols., Inc.* (2013) 55 Cal.4th 1185, 1198].) However, neither theory is valid here. For example, under the "continuing violations" exception, an action will be deemed timely if a "pattern of reasonably frequent and similar acts . . . occurred partially outside *and partially inside the limitations period*." (*Ibid.* [emphasis added].) As noted above, however, while Appellants allege the existence of a jailhouse informant program, they do not point to anything in the FAC that pleads the existence of such a program (partially or otherwise) inside the limitations period. (AOB, at p. 66.) This "exception" therefore does not apply.

Moreover, the "continuous accrual" exception addresses "the inequities that would arise if the expiration of the limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct." (*Aryeh, supra,* at p. 1198.) Under this exception, then, if Appellants plead *both* timely and time-barred conduct, the County may be precluded from arguing that the earlier time-barred conduct precludes Plaintiff from pursuing a

claim based on the timely alleged conduct. Nevertheless, this "exception" still requires that some of the conduct plead and put at issue must be timely. Appellants' allegations relating to the existence of an informant program predate the limitations periods. Appellants fail now, and elected not to amend, to shore up allegations of timely conduct. Neither doctrine applies and the decision can therefore be affirmed on this separate basis.

V.

CONCLUSION

By this appeal, Appellants not only seek to create a new rule for standing, but to open the door to require a civil court shadow review of individual criminal proceedings. Indeed, had Appellants successfully filed a second amended complaint that survived demurrer, the outcome would have required, at the request of non-participants in criminal proceedings, the civil court to collaterally review the propriety of conduct in criminal court proceedings. This improper and intrusive review by a lateral court would necessarily result in multiple, duplicative, and potentially inconsistent and/or redundant decisions, which is why California Supreme Court case law overwhelmingly weighs against this outcome.

For the reasons set forth above, in the Demurrer, by the trial court,

and on any other legal basis that may exist irrespective of the trial court's rationale, this Court should affirm.

Dated: October 15, 2019

Respectfully submitted,

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Word Count Certification
(Cal. Rules of Court, rules 37.3(a), 33(b)(1))

The text of this brief consists of 8,007 words as counted by the Microsoft Word processing program used to prepare this brief.

Dated: October 15, 2019

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PROOF OF SERVICE

I declare that I am a citizen of the United States employed in the County of Orange, over 18 years old and that my business address is 333 W. Santa Ana Blvd., Ste. 407, Santa Ana, California, 92701; and, my e-mail address is marzette.lair@coco.ocgov.com. I am not a party to the within action.

On October 15, 2019, I e-filed the foregoing **Respondents' Brief** through Fourth Dist., Div. Three of the Court of Appeal's TrueFiling system that included service on the parties in this action listed below by e-mail transmission by the TrueFiling system.

California Supreme Court via the Court's electronic filing system (TrueFiling);

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California Co. of Orange
Civil Complex Center, Dept. CX-101
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED on October 15, 2019, 2019, in Santa Ana, California.

Marzette L. Lair