NO. G057546

IN THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION 3

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,

v.

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.

Appeal From An Order of Dismissal
Orange County Superior Court Case No. 30-2018-00983799-CU-CR-CXC
Hon. Glenda Sanders

OPENING BRIEF

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CERTIFICATE OF INTERESTED PARTIES OR PERSONS

Pursuant to California Rules of Court, rule 8.208, Plaintiffs know of no entity or person that must be listed under Rule 8.208, subdivision (e)(1) or (2). No entity owns 10 percent or more of Plaintiff People For The Ethical Operation Of Prosecutors And Law Enforcement (P.E.O.P.L.E.).

Dated: July 1, 2019

Respectfully submitted,

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INTRODUCTION

In its 2016 ruling affirming the recusal of the entire Orange County District Attorney's office ("OCDA") from the prosecution of mass murderer Scott Dekraai, this Court noted that it could not "overlook[]" the "magnitude of the systemic problems" infecting the illegal and unconstitutional informant program operated by the OCDA and the Orange County Sheriff's Department ("OCSD"; collectively with OCDA, "Defendants"). Even after that ruling, Defendants continue to deny the existence of the informant program, including in public statements and in their demurrer in this case. And, as Plaintiffs have alleged, Defendants continue to operate the illegal and unconstitutional informant program with impunity. Yet when Plaintiffs brought this suit to stop Defendants' continuing illegal and unconstitutional activity, the Orange County Superior Court invoked flatly incorrect legal theories to hold that Plaintiffs lacked standing as taxpayers or in the public interest to seek any redress whatsoever. In doing so, the Superior Court ensured that Defendants' misconduct would, in fact, be overlooked.

Plaintiffs' First Amended Complaint ("FAC") contains sufficient allegations to sustain their taxpayer and mandate claims, which are the only ones Plaintiffs are pursuing on appeal. For the taxpayer claim, the FAC alleges that Plaintiffs pay sales and property taxes, and that Defendants are government officials engaged in illegal and unconstitutional acts in the

course of official duties that constitute waste and illegal expenditures of public funds.

Every concern the Superior Court raised during the demurrer hearing is an improper basis for sustaining a demurrer or denying taxpayer standing. More broadly, the Superior Court's apparent determination that taxpayers lack standing to challenge illegal law enforcement actions is wrong. It is belied by decades of taxpayer suits successfully restraining law enforcement, the plain text of Code of Civil Procedure section 526a, the Legislature's intent in enacting section 526a, and the California Supreme Court's longstanding liberal interpretation of taxpayer standing.

The Superior Court also incorrectly denied Plaintiffs public interest standing to seek a writ of mandate to challenge Defendants' violations of Penal Code sections 4001.1, subdivision (b), and 1054 et seq. Public interest standing is a doctrine, wholly distinct from taxpayer standing, that permits citizens to petition the courts to ensure that the government abides by its statutory duties even where those citizens might otherwise lack standing to bring such a claim. The public interest in enforcement of these statutes is significant, and neither Defendants nor the Superior Court identified any serious countervailing interests.

In holding that Plaintiffs lacked standing as taxpayers and in the public interest, the Superior Court told Orange County residents that they are entirely unable to challenge Defendants' unconstitutional and illegal

actions. That decision is contrary to the law, California public policy, this Court's own findings regarding the informant program, and the basic concept of a responsive and representative government of the people. This Court should reverse.

STATEMENT OF THE CASE

A. Statement of Facts

Orange County residents were shocked by revelations in the high-profile murder prosecutions of Scott Dekraai and Daniel Wozniak that the OCSD and the OCDA were systematically violating the constitutional and statutory rights of criminal defendants through a clandestine jailhouse informant program ("Informant Program"). (Appellants' Appendix ("AA") 70 [¶ 28].) Notwithstanding Defendants' efforts to hide the Informant Program, including the OCDA's repeated and vehement opposition to discovery despite its constitutional and statutory obligations to disclose, the truth about Defendants' misconduct eventually came out. (AA 80 [¶¶ 70-74].) Defendants gave jailhouse informants generous jail perks, cash payments, and time off their sentences in exchange for information coerced from represented criminal defendants, then used that information in court without disclosing their sources. (AA 66-67 [¶¶ 1-11].) This unconstitutional and illegal conduct was not limited to the Dekraai and Wozniak prosecutions. As this Court has already found, Defendants'

misconduct was part of a systematic Informant Program used in numerous prosecutions.[1] (AA 67, 70, 93 [¶¶ 9, 28, 132].)

Despite this Court's prior findings, and despite the voluminous additional examples of misconduct alleged in the FAC, Defendants have continually denied the existence of the Informant Program, including in their demurrer. (AA 91-92 [¶¶ 123-132], 113-114.) The now-former District Attorney denied this Court's conclusions about his office's *Brady* violations, saying on the news program 60 Minutes that the OCDA "did not withhold evidence; we have not withheld any evidence." (AA 92 [¶ 126].) The now-former Sheriff labeled this Court's concerns "semantics" and stated that "there is no program, per se." (AA 91 [¶ 124].) Plaintiffs allege that Defendants continue to engage in these illegal and unconstitutional acts today. (AA 92-93 [¶¶ 128-132].)

1. Defendants' Informant Program Is Unconstitutional and Illegal

The Informant Program generally operates as follows. First, OCSD deputies place targeted criminal defendants in close proximity to cultivated and compensated confidential informants, with the purpose of eliciting information from these targeted defendants in violation of their constitutional right to counsel and the Legislature's explicit statutory ban on such conduct. (AA 70-72 [¶¶ 28-35].) Second, the informants extract

[1] *People v. Dekraai* (2016) 5 Cal.App.5th 1110, 1148-1149 (*Dekraai*).

this information, including through threats of violence or promises of protection from violence, with the OCSD's and the OCDA's knowledge. (AA 82-86 [¶¶ 84-97].) Third, the OCDA uses the extracted information and confessions against the defendants in their criminal cases while failing to provide the required discovery about the circumstances of the confessions or background information on the informant. (AA 86, 89 [¶¶ 98, 110-111].) These three steps correspond to three broad categories of constitutional and statutory violations.

First, Defendants violate criminal defendants' rights to counsel under the Sixth Amendment to the U.S. Constitution,[2] as well as corresponding state constitutional and statutory rights, through their use of informants to elicit information from criminal defendants after the defendants' right to counsel has attached. (AA 79 [¶ 64].) The FAC identifies examples of this misconduct, such as the cases of Leonel Vega and Henry Rodriguez, who were both questioned by confidential jailhouse informants while represented by counsel. (AA 79-80, 81-82 [¶¶ 65-69, 76-79 (Leonel Vega); ¶¶ 80-82 (Henry Rodriguez)].) In Vega's case, the OCSD's "Special Handling Unit" ("SHU") deputies employed a "dis-iso" scheme to move both Vega and a confidential informant to the same disciplinary isolation cellblock with adjoining cells to facilitate information

[2] See *Massiah v. United States* (1964) 377 U.S. 201.

extraction. (AA 81-82 [¶¶ 75-79].) In Rodriguez's case, the OCSD improperly used an informant who elicited information when Rodriguez was represented by counsel; although the OCDA had suspected the Sixth Amendment was implicated, it did not investigate because it wanted to portray the informant as acting purely altruistically and not as part of the larger Informant Program. (AA 82 [¶¶ 80-82].) These cases exemplify the ongoing violations involved in the Informant Program; Plaintiffs allege that there are "countless more." (AA 79 [¶ 64].)

Second, Defendants violate criminal defendants' constitutional rights under the Fifth Amendment[3] and article I, section 7 of the California Constitution by facilitating illegal informant tactics such as "greenlighting," whereby informants coerce confessions from criminal defendants by threatening them with gang violence or even murder unless they confess. (AA 82-83 [¶¶ 84-86].) The FAC identifies multiple examples of confidential informants who used such techniques, including Raymond Cuevas and Jose Paredes in the Nuzzio Begaren/Rudy Duran and Anthony Calabrese cases; Brian Ruorock in Jose Derosas's case; and Lance Wulff and Jeremy Bowls in Derek Adams's case. (AA 83-86 [¶¶ 87-93 (Cuevas/Paredes); ¶¶ 94-95 (Ruorock); ¶¶ 96-97 (Wulff/Bowles)].) For instance, during one 18-month period, law enforcement paid Cuevas and

[3] See *Arizona v. Fulminante* (1991) 499 U.S. 279.

Paredes approximately $150,000 for informant work, and Defendants knew that Cuevas and Paredes used the threat of being green-lit by the Mexican Mafia to coerce defendants to confess. (AA 83-84 [¶¶ 87-93].) Cuevas was recorded making threats to Duran, but Defendants never turned over the recordings to Duran's defense attorneys. (AA 84 [¶¶ 92-93].) Again, these cases are just a sample of the systematic use of this and other illegal tactics by Defendants and their cultivated informants. (AA 83-84 [¶¶ 86, 89].)

Third, Defendants violate criminal defendants' due process rights under the Fifth Amendment,[4] as well as under California's Constitution and Penal Code sections 1054 et seq., by withholding information about the Informant Program from those defendants. (AA 86, 89 [¶¶ 98, 110-111].) One example is the Luis Vega case, in which Defendants kept an innocent juvenile in jail on a murder charge even after their jailhouse informants reported that someone else had confessed to the crime and exculpated Vega, because Defendants believed that disclosing that information would disclose the existence of the entire Informant Program. (AA 88-89 [¶¶ 108-109].) The FAC identifies many other cases that illustrate Defendants' *Brady* and discovery violations relating to the Informant Program, including the cases of Scott Dekraai, Henry Rodriguez, Leonel Vega,

[4] See *Brady v. Maryland* (1963) 373 U.S. 83.

Nuzzio Begaren, Rudy Duran, Joseph Govey, Shirley Williams, and Eric Ortiz. (AA 74-75, 79-82, 84, 86-89 [¶¶ 98-103 (Dekraai); ¶¶ 50-52, 80-82 (Rodriguez); ¶¶ 65-69, 76-79 (Vega); ¶¶ 92-93, 104-105 (Begaren/Duran); ¶ 106 (Govey/Williams); ¶ 107 (Ortiz); ¶ 110].)

All of the constitutional and statutory violations involved in the Informant Program constitute waste and illegal expenditures of taxpayer funds. (See, e.g., AA 68, 98 [¶¶ 15, 18, 169-172].) The informants are compensated for their participation in the Program with cash, perks, and time off their sentences. Cultivating confidential informants and employing special government personnel in the SHU to maintain the Informant Program requires public funds. (E.g., AA 70-74, 76, 80-84 [¶¶ 29, 36-37, 39, 42, 47-48, 55, 72-73, 76, 81, 89].)

Plaintiffs allege that the Informant Program and its constitutional and statutory violations are ongoing. (AA 91-93 [¶¶ 122, 128-132].) The FAC identifies the recent case of Oscar Galeno Garcia as evidence of continued misconduct post-*Dekraai*, including Defendants' failure to disclose evidence of SHU deputies' involvement in the Informant Program and prior inconsistent testimony in the *Dekraai* and *Rodriguez* cases. (AA 92-93 [¶ 130].) The public defender's motion in *Garcia* also pointed to at least 146 other cases since June 2016 in which the OCDA did not disclose relevant impeachment evidence related to OCSD deputies' illegal

involvement in the Informant Program. (AA 93 [¶ 131].) In other words, Defendants' actions do not indicate a change in conduct post-*Dekraai*.

2. Plaintiffs Have Brought Suit as Taxpayers and in the Public Interest to End this Unconstitutional and Illegal Informant Program

Four plaintiffs—three individuals and an association—brought this suit to halt the unconstitutional and illegal Informant Program. Plaintiff People for the Ethical Operation of Prosecutors and Law Enforcement ("P.E.O.P.L.E.") is an association of Orange County residents and taxpayers working to reform the Orange County criminal justice system, including through a court watch program to identify cases with *Brady* violations. (AA 68 [¶ 14].) Plaintiff Bethany Webb is an Orange County resident and taxpayer whose sister was tragically murdered and mother critically injured by Scott Dekraai. (AA 68 [¶ 17].) Defendants denied Ms. Webb and the many other members of the community touched by the *Dekraai* case the speedy and dignified justice to which they were entitled; instead, they suffered through the multi-year delay and ensuing revelations of misconduct related to the Informant Program and subsequent cover up. (*Ibid.*) Plaintiff Theresa Smith is an Orange County resident and taxpayer who founded a criminal justice organization called the Law Enforcement Accountability Network ("LEAN") after Anaheim police killed her son in a shooting that Ms. Smith believes was unjustified. (AA 69 [¶ 20].) Plaintiff Tina Jackson is an Orange County resident and taxpayer who founded

Angels for Justice, which connects prisoners and their families with a wide array of services. (AA 69 [¶ 23].) Plaintiffs brought this case in their capacities as taxpayers as well as by seeking writs of mandate in the public interest. (AA 67-69 [¶¶ 12, 14-25].)

Plaintiffs filed this suit against Orange County's District Attorney and Sheriff in their official capacities. (AA 70 [¶¶ 26-27].) Anthony J. Rackauckas was named as the District Attorney in the FAC; Todd Spitzer has since succeeded him. (See AA 70 [¶ 26].) Sandra Hutchens was named as the Sheriff in the FAC; Don Barnes has since succeeded her. (See AA 70 [¶ 27].) Because the FAC is stated against the DA and the Sheriff in their official capacities, the change in the names of the officeholders does not change the substance of Plaintiffs' claims.

The FAC alleges nine causes of action. The first eight center on the three categories of constitutional and statutory violations described above: (1) a title 42 United States Code section 1983 claim for the violation of criminal defendants' rights to counsel under the Sixth Amendment; (2) a corresponding claim under the California Constitution; (3) a petition for a writ of mandate enforcing Penal Code section 4001.1, subdivision (b)[5]; (4) a section 1983 claim for the violation of criminal defendants' due

[5] Plaintiffs' mandate claims rest on Code of Civil Procedure section 1085, which empowers the public to compel compliance with the law. (AA 68-69, 94-97 [¶¶ 14-25, 143-147, 156-159].)

process rights to be free from coercive interrogation under the Fifth Amendment; (5) a corresponding claim under the California Constitution; (6) a section 1983 claim for the violation of criminal defendants' due process rights to discovery under the Fifth Amendment; (7) a corresponding claim under the California Constitution; and (8) a petition for a writ of mandate enforcing Penal Code section 1054 et seq. (AA 93-98 [¶¶ 133-167].) The ninth cause of action is a standalone taxpayer claim under Code of Civil Procedure section 526a encompassing all of the illegal and unconstitutional conduct described in the FAC, which constitute illegal expenditures and wastes of public funds. (AA 68-69, 98 [¶¶ 15, 18, 169-172].)

The FAC seeks declaratory and injunctive relief, as well as writs of mandate ordering Defendants to comply with their statutory duties under Penal Code sections 4001.1, subdivision (b), and 1054 et seq. (AA 98-101.)

B. Procedural History

Plaintiffs filed this suit on April 4, 2018, in Orange County Superior Court. (AA 5, 248.) Defendants then removed the case to federal court, claiming there was federal question jurisdiction. (AA 251.) In federal court, Plaintiffs moved for remand and Defendants filed a motion to dismiss. (AA 51, 62.)

The U.S. District Court for the Central District of California granted Plaintiffs' motion to remand, holding that there was no federal subject matter jurisdiction over the case; it therefore dismissed Defendants' motion to dismiss. (AA 51, 62.) The District Court recognized that state courts do not have the same standing requirements as federal courts and noted that California (1) has created a broad taxpayer standing statute in section 526a and (2) allows for public interest standing for writs of mandate. (AA 53-58.)

On remand, Defendants demurred and Plaintiffs filed the operative FAC. (AA 64, 255, 258.) Defendants then filed a second demurrer, asserting that Plaintiffs lack standing for their claims; that the claims are barred by statutes of limitation; and that Plaintiffs have failed to allege sufficient facts to support their claims. (AA 104-106, 261.) Defendants refused to acknowledge the clear findings of this Court in *Dekraai* about the systemic nature of the Informant Program, and the numerous examples of other cases in the FAC. (AA 113-114.) Instead, Defendants asserted that Plaintiffs "have only identified a handful of cases" involved in the Informant Program and rely on "media coverage and innuendo." (*Ibid.*)

In opposition, Plaintiffs argued that controlling case law supports their exercise of both taxpayer standing and public interest standing, the latter as an exception to the beneficial interest requirement for Plaintiffs' writ of mandate claims. (AA 139-143, 147-151.) Plaintiffs also argued

that their claims are supported by ample factual allegations in their detailed, 38-page FAC, and are not barred by statutes of limitations because they allege ongoing and continuous violations within the limitations periods. (AA 139-151.)

At the demurrer hearing, the Superior Court, the Honorable Glenda Sanders presiding, informed the parties that it was inclined to dismiss all of the causes of action with prejudice. (Reporter's Transcript ("RT") 6-7.) The Superior Court identified three cases, *Weatherford*,[6] *Dix*,[7] and *Manduley*,[8] as "caus[ing] [it] to question whether relief under 526(b) of the Code of Civil Procedure is appropriate in light of the separation of powers issues raised in those cases," noting that "the propriety of a private person's judicial challenge to executive acts depends, in part, on the amenability of the issue to judicial redress." (RT 6-7.)

Throughout the hearing, the Superior Court expressed doubts over Plaintiffs' requested remedies. (E.g., RT 7 ["A review of the prayer for relief alone casts doubt on the amenability of the issues presented to judicial redress."]; see also RT 10-11, 14.) As noted above, the Superior Court also raised separation of powers concerns, consistent with Defendants' arguments that "[c]onsiderations of volume, scope, and

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[6] *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241 (*Weatherford*).

[7] *Dix v. Superior Court* (1991) 53 Cal.3d 442 (*Dix*).

[8] *Manduley v. Superior Court* (2002) 27 Cal.4th 537 (*Manduley*).

separations of powers caution against this action proceeding by way of citizen or taxpayer standing." (AA 117; see also RT 11, 14, 27-28.)

On February 5, 2019, the Superior Court issued its order sustaining the demurrer, stating only, "For all the reasons stated on the record, Defendants' Demurrer to Plaintiffs' First Amended Complaint is sustained as to all causes of action," and giving Plaintiffs fifteen days to amend. (AA 194.) Plaintiffs did not amend. Defendants filed an ex parte motion for dismissal and the Superior Court, the Honorable William Claster presiding, granted Defendants' motion and entered judgment against Plaintiffs on February 26, 2019, which was served on Plaintiffs the same day. (AA 195-200, 269-270.) This is the final order from which Plaintiffs have appealed. (AA 201-204.)

Plaintiffs timely filed their notice of appeal on April 2, 2019. (AA 201-204, 271.) On appeal, Plaintiffs seek review of only their taxpayer claim under Code of Civil Procedure section 526a and their requests for writs of mandate as to violations of Penal Code sections 4001.1, subdivision (b), and 1054 et seq. Plaintiffs are not appealing the specific causes of action under title 42 United States Code section 1983 and the California Constitution; the allegations relating to those constitutional violations are subsumed in the taxpayer and mandate causes of action,

which allege the same unconstitutional and illegal conduct related to the Informant Program.[9] (See AA 93-101 [¶¶ 133-172].)

SUMMARY OF ARGUMENT

Plaintiffs appeal the dismissal of this suit and, in particular, the Superior Court's order sustaining the demurrer as to the taxpayer and writ of mandate claims on standing grounds.

For taxpayer standing, Plaintiffs plainly have pleaded that they are taxpayers seeking to enjoin the government's illegal activity. The Superior Court did not dispute that Plaintiffs had pleaded the basic elements of taxpayer standing; instead, it focused on four "prudential" concerns, primarily relating to what it termed "separation of powers" issues. But on review of a demurrer, the only question is whether Plaintiffs have stated a cause of action on the face of the FAC. The law is clear that none of the Superior Court's concerns—Plaintiffs' requested prayer for relief, the potential scope of discovery in the case, the alleged availability of relief in underlying criminal cases, and prosecutorial discretion—is an appropriate basis for demurrer. And the Superior Court's vague concern that taxpayer

[9] Plaintiffs believe that these causes of action are appropriate to bring as taxpayers, (*California DUI Lawyers Assn. v. California Department of Motor Vehicles* (2018) 20 Cal.App.5th 1247, 1257-1261 & fn.1 (*Cal. DUI Lawyers Assn.*) [considering constitutional claims under 42 U.S.C. § 1983, brought via taxpayer standing]; *Mendoza v. County of Tulare* (1982) 128 Cal.App.3d 403, 407, 415 (*Mendoza*) [same]), but have not pursued them to streamline the appeal.

standing would impinge on prosecutorial discretion was unfounded, as Defendants have no discretion to violate the law. Permitting Defendants to cloak illegal activity under the guise of "discretion" would eviscerate the plain text, intent, and courts' historically liberal interpretation of section 526a as a broad remedy for government misconduct.

For Plaintiffs' writ of mandate claims, the Superior Court abused its discretion by holding that Plaintiffs did not have public interest standing. The Superior Court failed to account for the significant public interest in the statutory fair trial rights at issue in this case. Neither Defendants nor the Superior Court raised any serious countervailing government interest against enforcing these laws. It was therefore an abuse of discretion for the Superior Court to deny Plaintiffs public interest standing to seek writs of mandate.

Defendants also argued below that Plaintiffs failed to state claims upon which relief could be granted. But Plaintiffs' FAC alleges detailed facts about Defendants' Informant Program, including widespread illegal activity in numerous individual criminal cases stretching back thirty years, corroborating and expanding upon this Court's findings in *Dekraai*. This is sufficient to state Plaintiffs' taxpayer and writ of mandate claims.

Finally, Defendants argued below that Plaintiffs' claims are barred by statutes of limitations. The argument fails for two reasons. First, Plaintiffs allege that Defendants committed misconduct within the

limitations period. Second, Plaintiffs allege that Defendants continue to commit violations and harms related to the Informant Program and such allegations satisfy the "continuing violations" and "continuing accrual" exceptions to any limitations period. This Court should reverse.

ARGUMENT

I. Plaintiffs Have Pleaded a Taxpayer Claim Under Section 526a to Enjoin Defendants' Expenditures and Wastes of Public Funds on the Illegal and Unconstitutional Informant Program

A. Standard of Review

On appeal from a dismissal after an order sustaining a demurrer, this Court reviews the Superior Court's order "de novo, exercising its independent judgment whether the complaint states a cause of action as a matter of law." (*Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 539.) This Court "assume[s] the truth of allegations in the first amended complaint that have been properly pleaded and gives it a reasonable interpretation by reading it as a whole and with all its parts in their context." (*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1102.)

"Both standing and the interpretation of statutes are questions of law," which this Court reviews de novo. (*San Luis Rey Racing, Inc. v. California Horse Racing Bd.* (2017) 15 Cal.App.5th 67, 73; *Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1032

["Upon review of action on a demurrer, we review the determination of standing de novo."].)

B. The Superior Court Erred in Holding that Plaintiffs Lack Taxpayer Standing to Assert a Claim for Waste and Illegal Expenditure Under Section 526a

Plaintiffs brought their taxpayer claim pursuant to Code of Civil Procedure section 526a, which "authorizes actions by a resident taxpayer against officers of a county … to obtain an injunction restraining and preventing the illegal expenditure of public funds."[10] (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 267 (*Blair*); see also *Weatherford*, *supra*, 2 Cal.5th at p. 1247 [section 526a's "statutory language" identifies the "classes of taxpayers that may maintain an action" and "the type of tax that they must be liable to pay and where they must pay it"].)

The allegations in Plaintiffs' FAC satisfy each of the taxpayer standing requirements set forth in section 526a. First, there is no dispute that the FAC alleges that Plaintiffs Webb, Jackson, and Smith are residents

[10] The statute provides: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a local agency, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax that funds the defendant local agency, including, but not limited to, the following: (1) An income tax. (2) A sales and use tax or transaction and use tax initially paid by a consumer to a retailer. (3) A property tax, including a property tax paid by a tenant or lessee to a landlord or lessor pursuant to the terms of a written lease. (4) A business license tax." (Code Civ. Proc., § 526a, subds. (a)(1)-(4).)

of and pay sales tax to Orange County, that Plaintiff Webb pays property taxes to Orange County, and that Plaintiff P.E.O.P.L.E. is an association of Orange County residents that includes at least one member who pays property taxes to Orange County. (AA 68-69 [¶¶ 14, 17-25].) Second, Defendants are county officials being sued in their official capacities. (AA 70 [¶¶ 26-27].) Third, Plaintiffs seek to prevent Defendants from wasting and illegally expending public funds on the Informant Program through this lawsuit. (AA 93-98 [¶¶ 133-172].)

In their demurrer, Defendants argued that Plaintiffs lack taxpayer standing because Plaintiffs "plead no policy or practice of 'waste' to be remedied by the Court." (AA 122, italics removed.) Instead, Defendants asserted, any misconduct was "speculative" and "at best" the result of individual transgressions. (*Ibid.*) This assertion ignores both the law and the allegations in the FAC. (See, e.g., AA 68, 98 [¶¶ 15, 18, 169-172].)

First, Defendants pointed to no law requiring Plaintiffs to establish a "policy or practice" in order to state a taxpayer claim under section 526a. Regardless of whether the Informant Program was part of a formalized policy or practice—and Plaintiffs have alleged that the Informant Program qualifies as both—the operation of a government system that violates people's constitutional rights "is illegal and a waste under section 526a." (*Cal. DUI Lawyers Assn., supra,* 20 Cal.App.5th at p. 1259.) Indeed, merely "expending the time" of government officials who are "performing

illegal and unauthorized acts" constitutes an unlawful use of funds that can be enjoined under section 526a. (*Wirin v. Horrall* (1948) 85 Cal.App.2d 497, 504-505; see also *Serrano v. Priest* (1971) 5 Cal.3d 584, 618-619 (*Serrano*).)

Numerous courts have found taxpayer standing in the precise circumstance presented here: a group of taxpayers bringing suit to prevent "a government entity [from] engaging in 'waste' by implementing and maintaining a … system that violates [constitutional] rights." (*Cal. DUI Lawyers Assn.*, *supra*, 20 Cal.App.5th at p. 1251; see also *Mendoza, supra*, 128 Cal.App.3d at p. 415 [taxpayer challenge to unconstitutional practices of sheriffs regarding jail conditions]; *White v. Davis* (1975) 13 Cal.3d 757, 763 (*White*) [taxpayer challenge to police surveillance at university in violation of First Amendment rights]; *Blair*, *supra*, 5 Cal.3d at p. 265 [taxpayer challenge to illegal expenditures on law enforcement's unconstitutional execution of claim and delivery law]; *Wirin v. Parker* (1957) 48 Cal.2d 890, 891 [taxpayer challenge to unconstitutional police use of concealed microphones for surveillance]; *Wirin v. Horrall*, *supra*, 85 Cal.App.2d at pp. 498-499 [taxpayer challenge to unconstitutional police use of warrantless blockades to stop and search].)

Second, the FAC robustly alleges Defendants' expenditure of government time and resources on the Informant Program, including specific illegal and unauthorized acts. (See, e.g., AA 68, 98 [¶¶ 15, 18,

169-172].) These acts include cultivating confidential informants and placing them near targeted criminal defendants to facilitate interrogation without counsel; taking time off informants' sentences and providing other benefits in exchange for the collection of incriminating statements from represented defendants; and keeping detailed logs and databases of informant movements to track and facilitate interactions with criminal defendants while concealing such records from criminal defendants—to say nothing of Defendants paying the informants taxpayer money as part of the illegal scheme. (AA 70-74, 76, 80-84 [¶¶ 29, 36-37, 39, 42, 47-48, 55, 72-73, 76, 81, 89].) OCSD deputies also expended government time and resources to lie under oath and shred documents in failed efforts to keep the Informant Program and its records secret. (AA 71, 77-78, 81 [¶¶ 33, 59-60, 77].) And Defendants have unlawfully spent taxpayer money by suppressing evidence that could expose these violations, by failing to disclose such evidence in the timely manner required by state law, and by using the illegally-obtained confessions and information in criminal trials. (AA 72, 74-75, 79-82 [¶¶ 35, 49-52, 69, 74, 78-80, 82].)

The well-pleaded factual allegations in Plaintiffs' FAC paint a clear picture of systemic misconduct and must be treated as true for purposes of Defendants' demurrer. (*Serrano*, *supra*, 5 Cal.3d at p. 591.) But Defendants failed to do so. Instead, they asserted that Plaintiffs' allegations amount only to "a few examples" that fail to "identify a policy or practice

by either OCDA or OCSD in this case directing or authorizing its officers to use informants in this fashion." (AA 122, italics removed.) These conclusory denials, contrary to the well-pleaded allegations in the FAC, are improper on a demurrer. They are also particularly surprising in light of this Court's decision in *Dekraai*, which confirmed that Defendants' Informant Program is a "well-established," "sophisticated, synchronized, and well-documented" program "to investigate criminal activity in contravention of targeted defendants' constitutional rights." (*Dekraai*, *supra*, 5 Cal.App.5th at pp. 1141-1142, 1145.)

Moreover, the only question at the demurrer stage is whether Plaintiffs have alleged sufficient facts such that it "appear[s] plaintiff[s] are entitled to some relief." (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 123 (*Selby Realty*).) To sustain a demurrer here, this Court would need to find that Orange County taxpayers have no ability whatsoever to petition the courts to enjoin these unlawful acts, despite this Court's already having found that the OCDA and the OCSD engaged in a number of the unconstitutional acts that form the basis of the FAC. That is plainly not the law.

C. Prudential Concerns Identified by Defendants and the Superior Court Do Not Bar Taxpayer Standing Under Section 526a on a Demurrer

Plaintiffs have pleaded all of the elements required to establish a taxpayer cause of action based on ongoing waste and illegal expenditures of

public funds. (See *supra*, section I.B.) Yet Defendants argued below that even if Plaintiffs properly alleged the elements of a taxpayer claim, Plaintiffs still should be denied taxpayer standing based on prudential and separation of powers concerns. (AA 116-118.) Despite the lack of a single case supporting that argument, the Superior Court repeatedly raised prudential and separation of powers concerns at the demurrer hearing and then sustained the demurrer. (RT 6-7, 10-14, 27-28; AA 194.)

First, throughout the demurrer hearing, the Superior Court suggested that the FAC's prayer for relief violated separation of powers principles. (RT 6-7, 10, 14, 22].) Second, the Superior Court questioned whether the discovery necessary to prove Plaintiffs' claims would raise separation of powers concerns. (RT 11-14.) Third, the Superior Court opined that taxpayer standing may be inappropriate because the rights at issue could be vindicated in other ways by other individuals. (RT 27-28.) Fourth, the Superior Court questioned whether the case as a whole would interfere with prosecutorial discretion. (RT 6-7, 10-12.)

None of these concerns is a proper basis for sustaining a demurrer. A demurrer may attack only the sufficiency of a complaint as pleaded, and a "court should only rule on matters disclosed in that pleading." (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881; see also *Harboring Villas Homeowners Assn. v. Superior Court* (1998) 63 Cal.App.4th 426, 429 (*Harboring Villas*) ["It is axiomatic that a demurrer

lies only for defects appearing on the face of the pleadings."].) None of the prudential concerns that Defendants identified and the Superior Court relied upon is based on the allegations in the FAC; therefore, they cannot be proper bases for sustaining the demurrer. Further, two of the concerns—the prayer for relief and discovery—categorically may not be considered at the demurrer stage. And even if such prudential concerns were properly considered on demurrer, they do not support sustaining Defendants' demurrer in this case.

To be clear, Plaintiffs do not suggest that taxpayer standing is unlimited or that a taxpayer may bring any challenge to any government action simply by virtue of paying taxes. But it is also true that "California courts have consistently construed section 526a liberally to achieve [its] remedial purpose." (*Blair*, *supra*, 5 Cal.3d at p. 268.) Because this case falls squarely within the contours of section 526a, it is unnecessary for this Court to define the outer limits of taxpayer standing in this case.

1. The Prayer for Relief Is Not a Basis for Demurrer

The Superior Court expressed concern about the prayer for relief throughout the demurrer hearing and went so far as to suggest that it could sustain the demurrer so Plaintiffs would amend their prayer. (RT 7, 10-11, 14, 22, 27-28.) But it is black letter law that "a prayer for relief is not subject to demurrer and the fact that a plaintiff has requested [relief] to which he may not be entitled does not affect the sufficiency of his

complaint." (*Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 883; see also *Selby Realty*, *supra*, 10 Cal.3d at p. 123 ["[A]gainst a general demurrer the only requirement is that upon a consideration of all the facts stated it must appear plaintiff is entitled to some relief, notwithstanding that … plaintiff may demand relief to which he is not entitled under the facts alleged."].) The Superior Court's premature and improper concerns about the relief requested in the FAC do not have any bearing on whether Plaintiffs have standing to bring this case.

2. Potential Future Discovery Is Not a Basis for Demurrer

Defendants also argued that the scope of discovery Plaintiffs might need to prove their case is a proper basis for demurrer, and the Superior Court considered the scope of discovery while reviewing the demurrer. (AA 117; RT 12.) Again, this argument is directly contrary to settled law: "As this case comes to [the court] on review of a demurrer, questions concerning … the proper scope of discovery are not before [it]." (*McLean v. State of California* (2016) 1 Cal.5th 615, 631, fn. 9.) The reason is self-evident: "It is axiomatic that a demurrer lies only for defects appearing on the face of the pleadings." (*Harboring Villas*, *supra*, 63 Cal.App.4th at p. 429.) Questions as to the potential scope of discovery are unrelated to the sufficiency of the complaint.

The FAC does not contain allegations about anticipated discovery in this matter. Yet Defendants (1) speculated that such discovery will be vast and burdensome and (2) argued that discovery in this case would somehow be improper because Plaintiffs might be entitled to more discovery than would an individual criminal defendant in an individual criminal case. (AA 117-118.) Even though, as explained above, this Court need not and should not engage in discovery-related considerations at this stage, both positions also are meritless.

First, Defendants' speculation about discovery is just that: speculation. "[U]nsworn averments in a memorandum of law prepared by counsel do not constitute evidence." (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 454.) Plaintiffs have made clear that they agree with Defendants' expressed concerns about safety and personally identifying information and "are willing to work with Defendants to craft a protective order that addresses them." (AA 143; RT 14.) But the mere *possible* burden of discovery is not a valid reason to deny standing to Orange County taxpayers. Because "the pleadings do not disclose the existence of the matter relied on" (i.e., the purported discovery concerns), those concerns simply are not a basis for demurrer. (*Harboring Villas, supra*, 63 Cal.App.4th at p. 429.)[11]

[11] Whether the scope of discovery that Plaintiffs serve is overbroad or burdensome are questions Defendants can and should resolve by objecting

Second, the argument that permitting this case to go forward would give Plaintiffs access to more discovery than an individual criminal defendant highlights the problem this suit aims to solve. This Court *already* found in *Dekraai* that Defendants do not understand or abide by their constitutional duties, including their duty to provide *Brady* material, in individual criminal cases. (See, e.g., *Dekraai*, *supra*, 5 Cal.App.5th at pp. 1126-1127 ["Petersen, an experienced deputy district attorney … conceded his understanding of *Brady* was 'evolving' as he read more cases."].) This lawsuit seeks, in part, to rectify these failures, which this Court has characterized as "systemic." (*Id.* at p. 1149.) It beggars belief that Plaintiffs cannot bring this lawsuit *at all* because they would be entitled to more discovery than what Defendants currently provide to criminal defendants. Even if it were a valid ground to deny standing—which it is not—that argument assumes Defendants are providing proper discovery to criminal defendants in the first place, when Plaintiffs have specifically alleged that Defendants are not doing so.

Defendants' argument also elides the fundamental difference between the questions presented by this civil taxpayer suit and the

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to the scope of discovery and through other well-established court procedures to resolve discovery disputes.

questions presented in individual criminal cases.[12] This civil taxpayer suit is about Defendants' illegal expenditures and waste of public funds on an unconstitutional Informant Program, not any individual criminal case. Thus, even if discovery were a proper consideration at the demurrer stage (and it is not), speculative concerns about whether discovery in a civil taxpayer lawsuit seeking systemic reform might differ from discovery in an individual criminal prosecution are simply irrelevant.

3. The Potential Existence of Other Procedural Avenues Does Not Affect Taxpayer Standing

Defendants argued that taxpayer standing should be denied because individual criminal defendants could vindicate the same rights in their criminal cases, and again, the Superior Court noted this argument at the demurrer hearing. (See AA 118; RT 7, 27-28.) The argument is wrong on both the law and the facts.

The availability of other potential plaintiffs or avenues of relief do not undercut a taxpayer's standing to sue. "'Numerous decisions have affirmed a taxpayer's standing to sue despite the existence of potential plaintiffs who might also have had standing to challenge the subject actions or statutes.'" (*Cal. DUI Lawyers Assn., supra,* 20 Cal.App.5th at p. 1263 [quoting *Van Atta v. Scott* (1980) 27 Cal.3d 424, 447-448 (*Van Atta*)].)

[12] It also creates perverse incentives. By Defendants' logic, the broader the scope of alleged wrongdoing—and, therefore, the broader the discovery and relief required to address it—the greater the chance that taxpayers will not be granted standing.

Indeed, other California courts, including the Supreme Court, have rejected Defendants' argument. (*Ibid.* ["This reasoning was rejected decades ago by the Supreme Court."].) Thus, "the existence of individuals directly affected by the challenged governmental action … has not been held to preclude a taxpayers' suit." (*Van Atta, supra*, 27 Cal.3d at pp. 447-449; see also *Mendoza, supra*, 128 Cal.App.3d at p. 415 [same].)

Defendants' demurrer ignored these authorities, instead relying on *Animal Legal Defense Fund v. California Exposition & State Fairs* (2015) 239 Cal.App.4th 1286, for the proposition that taxpayer standing is available only when there are no other avenues to challenge the government action at issue. (AA 118.) But the Court of Appeal has already rejected this argument and limited *Animal Legal Defense Fund* to the particular facts of that case. In *Cal. DUI Lawyers Assn.*, the defendant argued that there were other avenues to challenge the statutory scheme that the plaintiffs claimed was unconstitutional, relying on *Animal Legal Defense Fund*. But the court in *Cal. DUI Lawyers Assn.* distinguished *Animal Legal Defense Fund* because the statutory scheme for enforcing the animal cruelty laws at issue in that case was the "exclusive mechanism[] for … such enforcement" and "the more general remedy of a taxpayer action was not intended to be used in" place of that exclusive mechanism. (*Cal. DUI Lawyers Assn.*, *supra*, 20 Cal.App.5th at p. 1264.) The court held that where, as here, the constitutional right at issue did not have the same

exclusive enforcement provisions as the animal cruelty laws, *Animal Legal Defense Fund* was "not applicable." (*Cal. DUI Lawyers Assn., supra,* 20 Cal.App.5th at p. 1264.) Instead, "an action under section 526a is an appropriate means to" assert constitutional rights—the exact kinds of rights at issue in this case. (*Ibid.*)

Moreover, as a practical matter, individual criminal cases are not an adequate alternative to this taxpayer suit. Plaintiffs are not seeking the same relief as an individual criminal defendant, such as a new trial, and the systemic, countywide relief Plaintiffs seek is not available in any direct criminal case. Individual criminal defendants cannot prevent the waste and illegal expenditure of public funds on an illegal and unconstitutional Informant Program, as section 526a allows taxpayers like Plaintiffs to do. *Dekraai* is instructive on this point. There, the Superior Court did not, and could not, directly address the OCDA's and the OCSD's systemic problems; instead, it disqualified the entire OCDA from continuing to prosecute the case. Indeed, this Court noted that the Superior Court's role was "not to fashion a global remedy based on evidence about other cases" but to examine "whether 'in this case' law enforcement engaged in outrageous government conduct." (*Dekraai*, *supra*, 5 Cal.App.5th at p. 1131.)

What Plaintiffs seek here is exactly the remedy that the Superior Court in *Dekraai* could not provide: ensuring that the systemic problems in

the OCDA and the OCSD are addressed and resolved, so that cases like *Dekraai* and the illegal expenditures and waste that flows from them do not continue to recur.

4. There Are No Separation of Powers or Prosecutorial Discretion Concerns in This Case Because Defendants Have No Discretion to Violate the Law

Defendants argued that permitting these particular taxpayers standing under section 526a would violate separation of powers principles, primarily by interfering with prosecutorial discretion, and the Superior Court expressed the same concern at the demurrer hearing. (RT 6-7, 10-12; AA 116-118.) The argument has no basis in the law. First, judicial review of unconstitutional and illegal government acts, including through section 526a suits, simply does not violate separation of powers principles. Indeed, as discussed both above and below, numerous taxpayer cases have challenged unconstitutional government activity, and courts routinely have rejected arguments that plaintiffs in those cases lack standing. (See *supra*, section I.B.) Second, prosecutorial discretion is not implicated here because Defendants have no discretion to engage in the illegal and unconstitutional acts Plaintiffs allege. Third, the cases Defendants and the Superior Court relied upon do not support their position.

Applying separation of powers concerns in the sweeping fashion advocated by Defendants and seemingly adopted by the Superior Court

would eviscerate the broad standing the California Legislature has granted to taxpayers. Such an approach cannot be reconciled with the long history of California cases challenging illegal government conduct, including law enforcement conduct, under section 526a.

(a) Judicial Review of Unconstitutional and Illegal Acts by Law Enforcement Does Not Implicate Separation of Powers Principles

The principle of separation of powers serves to respect the different roles and responsibilities among the co-equal branches of government. (See Cal. Const., art. III, § 3.) It does not follow, however, that every action by one branch that may affect the actions of another is barred automatically by the doctrine. "The separation of powers doctrine 'recognizes that the three branches of government are interdependent, and it permits actions of one branch that may "significantly affect those of another branch." [Citation.]'" (*Manduley, supra*, 27 Cal.4th at p. 557.)

The Legislature enacted section 526a in 1909 to enshrine the common law right of taxpayers to challenge wasteful and illegal government expenditures, particularly when such expenditures may "'otherwise go unchallenged in the courts because of the standing requirement.'" (*Blair, supra*, 5 Cal.3d at pp. 267-268.) The statute represents the Legislature's judgment that taxpayer suits respect the proper balance among the three branches of government, even though the very nature of the cause of action means that the judiciary will be involved in

suits respecting—and potentially limiting or even enjoining—the powers and actions of the executive and legislative branches. Judicial power is at its strongest when the courts are both following the dictates of the Legislature and performing their inherent duty to enforce and determine the law. (Cf. *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579, 635-636 (conc. opn. of Jackson, J.).) After all, "[c]ourts have the power to 'determine whether or not the municipal bodies acted within the limits of their power and discretion.' [Citation.]" (*People ex rel. Harris v. Rizzo* (2013) 214 Cal.App.4th 921, 939-944.) That is precisely what Plaintiffs' taxpayer suit is asking the Court to do here.

Yet Defendants and the Superior Court suggested that separation of powers principles prohibit taxpayer suits against law enforcement in particular. That argument, too, is squarely foreclosed by the law. "The use of section 526a as a means of challenging the legality of ongoing police investigatory activities has a long and firmly established heritage in this state." (*White*, *supra*, 13 Cal.3d at p. 763.) Such challenges do not violate the separation of powers: "[T]axpayers' suits that seek to measure governmental performance against a legal standard[] do not trespass into the domain of legislative or executive discretion." (*Harman v. City & County of San Francisco* (1972) 7 Cal.3d 150, 160-161 (*Harman*).) Plaintiffs' allegations that government conduct is violating the state and federal constitutions and specific state statutes provide the "legal standard"

by which to measure the government's action and are sufficient to overcome concerns about impeding executive discretion. (E.g., *County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 130, fn. 9 (*County of Santa Clara*) [noting that a taxpayer suit under section 526a "was not subject to a demurrer … because, on the face of the complaint, there was no indication that the challenged policies were political or involved the exercise of any discretion"]; *Harman, supra,* 7 Cal.3d at pp. 160-161 ["By asserting 'a failure on the part of the governmental body to perform a duty specifically enjoined,' [citation], plaintiff presents a justiciable complaint."].) Therefore, judicial review here would not violate separation of powers principles.

(b) Defendants Cannot Escape Judicial Review by Claiming that Their Unconstitutional Acts Are Discretionary

Nor can the demurrer be sustained on the basis that Defendants' acts are discretionary and that separation of powers principles prohibit the judiciary from interfering with the exercise of executive discretion.

First, the OCDA and the OCSD do not have discretion to act unconstitutionally. California courts repeatedly have held that law enforcement lacks discretion to act illegally. "It is elementary that public officials must themselves obey the law." (*Wirin v. Parker*, *supra*, 48 Cal.2d at p. 894.) The California Supreme Court has recognized its "'long-standing approval of citizen actions to require governmental officials to

follow the law'" and noted that such approval is, among other things, "'expressed in our expansive interpretation of taxpayer standing' [citations]." (*Kinlaw v. State of California* (1991) 54 Cal.3d 326, 344.) A taxpayer has standing to challenge alleged illegal activity because "if defendants acted as alleged their acts were unlawful and beyond the scope of their authority" and defendants were, therefore, "illegally expending and wasting the public funds." (*Wirin v. Horrall*, *supra*, 85 Cal.App.2d at p. 504.)

In *Wirin v. Parker*, *supra*, a taxpayer plaintiff sued the Los Angeles Chief of Police to "enjoin the alleged illegal expenditure of public funds to conduct police surveillance by means of concealed microphones." (48 Cal.2d at p. 891.) The Chief made many of the same arguments Defendants now advance, asserting that an injunction would "deter the police from permissible and essential activity for fear of transgressing its limits" and that "the court cannot determine in advance the reasonableness of police surveillance, which turns on the facts of the particular case." (*Id.* at p. 895.) The dissent likewise made the same arguments that the Superior Court did here: that the injunctive relief sought was "beyond the power of a court to impose and constitutes an attempt by judicial action to impose restraints on other branches of the government in violation of the separation of powers doctrine" and violated Code of Civil Procedure section 526. (*Id.* at p. 896 (dis. opn. of Shenk, J.).)

The Supreme Court rejected these arguments. It noted that "[i]t is elementary that public officials must themselves obey the law" and that "[i]t has been expressly held in this state that expediency cannot justify the denial of an injunction against the expenditure of public funds in violation of the constitutional guarantees here involved." (*Wirin v. Parker*, *supra*, 48 Cal.2d at p. 894.) Moreover, the requested injunction would "in no way inhibit *lawful* police activity." (*Id.* at p. 895, italics added.) That is the case here as well: if Defendants are acting as alleged in the FAC, their activity is unconstitutional and illegal, and carrying out those activities constitutes illegal expenditures and waste of public funds, which is properly enjoined under section 526a.

Second, because a demurrer looks only to the sufficiency of the complaint, it is improper to ask whether any of Defendants' mandatory duties require the exercise of discretion. (E.g., *County of Santa Clara*, *supra*, 171 Cal.App.4th at p. 130, fn. 9.) The ultimate decision of whether the government conduct at issue involves nondiscretionary statutory or constitutional duties is not a threshold standing issue; rather, it is "a substantive determination of the ultimate issue in th[e] case" that is not decided on a demurrer. (*Cal. DUI Lawyers Assn.*, *supra*, 20 Cal.App.5th at p. 1260.) To the extent that any discretionary actions are included in the Defendants' Informant Program—and Plaintiffs do not concede that there

are—those actions would not be the subject of this suit because they would not constitute waste or illegal expenditures. (See *id.* at pp. 1258-1260.)

Put differently, Plaintiffs' claims are not based on allegations relating to discretionary acts, but on allegations that Defendants fail to follow the mandatory duties prescribed by the U.S. and California Constitutions and state statutes. (AA 79-98 [¶¶ 64-172].) Defendants' argument that Plaintiffs lack standing to challenge any of the acts alleged in the FAC is, in essence, a bald assertion, contrary to the FAC's allegations, that Defendants do not act unconstitutionally or illegally and that they have full discretion with respect to the Informant Program. (AA 122-123.) That argument should be rejected.

(c) The Cases the Superior Court and Defendants Relied on Are Inapposite to Whether this Taxpayer Suit Violates the Separation of Powers Doctrine

As shown above, there is no basis in section 526a or the case law to deny taxpayer standing to challenge unconstitutional acts by government officers due to concerns regarding separation of powers or prosecutorial discretion. The cases Defendants cited in their demurrer and on which the Superior Court relied compel the same conclusion. The Superior Court stated that the "separation of powers concerns" raised in three cases led it to conclude that Plaintiffs lacked taxpayer standing under section 526a. (RT 6-7].) Those three cases—*Dix*, *Manduley*, and *Weatherford*—do not even

suggest, much less hold, that a Superior Court may rely on purported separation of powers concerns to deny standing to taxpayers who seek to challenge illegal law enforcement actions. Indeed, *Dix* did not involve taxpayer standing; *Manduley* did not concern standing at all; and *Weatherford* actually *expanded* taxpayer standing under section 526a.

Dix v. Superior Court. *Dix* concerned the criminal prosecution of Alan Dale Bradley. Bradley was convicted and sentenced, but the Superior Court subsequently recalled his sentence. (*Dix*, *supra*, 53 Cal.3d at p. 447.) Bradley's victim, Dix, then sought a writ of mandate or prohibition to "overturn the recall order and prevent substitution of a new sentence." (*Ibid.*) The Supreme Court held that Dix lacked public interest standing—an exception to the beneficial interest requirement for writ of mandate cases, completely distinct from taxpayer standing[13]—to challenge Bradley's sentencing under the "general rule 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." (*Id.* at p. 450.) In reaching that conclusion, the *Dix* Court discussed at length the prosecutor's discretion "to decide in the public interest whether to seek, oppose, accept, or challenge judicial actions and rulings." (*Id.* at p. 452.)

[13] See *infra*, section II.B., on the difference between public interest standing and taxpayer standing.

The question in *Dix*—whether a citizen may challenge an individual, discretionary decision within an ongoing criminal case—is far afield from the situation here, where Plaintiffs challenge Defendants' countywide unconstitutional and illegal Informant Program in a civil taxpayer lawsuit. Indeed, the *Dix* Court explicitly held that "nothing we say here affects *independent* citizen-taxpayer actions raising criminal justice issues." (*Dix*, *supra*, 53 Cal.3d at p. 454 & fn. 7, original italics.) It was, in fact, the very availability of taxpayer suits that helped to ensure that the "rule against public intervention in individual criminal cases will not cause important issues to evade review." (*Ibid.*)

Dix is not applicable here. Plaintiffs do not seek to intervene in or overturn the result of any criminal case, nor are they requesting that the Orange County Superior Court do the same. Rather, they seek declaratory and injunctive relief to address Defendants' illegal and wasteful conduct, which is precisely the purpose for which the Legislature enacted section 526a.

At its core, Defendants' argument is that *Dix*'s prohibition against citizens inserting themselves into individual criminal proceedings by writ of mandate should be extended to prohibit *taxpayer* challenges alleging widespread illegal actions by law enforcement. The argument proves too much and turns the logic of *Dix* on its head. It would prevent taxpayers from challenging any illegal actions so long as those actions were in any

way related to criminal prosecutions, thereby giving the government, including the OCDA and the OCSD here, free rein to continue constitutional violations under the guise of "prosecutorial discretion"—even though prosecutorial discretion does not even apply to law enforcement agencies such as the OCSD. Nothing in *Dix* supports such an absurd result. (*Dix, supra*, 53 Cal.3d at p. 454 & fn. 7.)

Manduley v. Superior Court. Not only did *Manduley*, like *Dix*, not concern taxpayer standing, it did not concern standing at all. The petitioners in *Manduley* were juveniles who challenged the constitutionality of since-repealed Welfare and Institutions Code section 707, subdivision (d), which authorized the district attorney to file a criminal complaint against certain juveniles directly in criminal court rather than in a juvenile proceeding. Petitioners argued, among other things, that the code section "usurps an exclusively judicial power" by giving the district attorney the discretion to file in criminal or juvenile court, thereby "limit[ing] the dispositional alternatives available to the court." (*Manduley, supra,* 27 Cal.4th at pp. 555, 559.) The Supreme Court rejected this argument, noting that prosecutors have wide discretion in charging crimes and that the challenged discretion was "no different from the numerous prefiling decisions made … that limit the dispositions available to the court after charges have been filed." (*Id.* at p. 555.)

But this holding, like the holding in *Dix*, stands for nothing more than the uncontroversial proposition that prosecutors have significant discretion in deciding whether and how to *legally* prosecute an individual criminal case. It does not, and cannot, mean that Orange County taxpayers are unable to seek a remedy from the courts for the *illegal* actions of government officials.

Indeed, as *Manduley* notes, even a discretionary "exclusive executive function," granted explicitly by statute, is not unlimited: the executive must still exercise its discretion within the bounds of the Constitution and the "judicial branch" may review the executive's decisions to ensure they do not violate "certain constitutionally impermissible factors." (*Manduley*, *supra*, 27 Cal.4th at p. 556.) Thus, *Manduley* does not support the argument that Plaintiffs' taxpayer standing is precluded by prosecutorial discretion, particularly given that Plaintiffs have alleged violations of mandatory duties.

Weatherford v. City of San Rafael. Finally, the Superior Court suggested that "the dicta in *Weatherford v. City of San Rafael*" supported the determination that Plaintiffs lacked taxpayer standing. (RT 7.) As an initial matter, and as the Superior Court itself noted, *Weatherford*'s holding has nothing to do with separation of powers. The question in *Weatherford* was whether section 526a required that the plaintiff pay property taxes. The California Supreme Court noted, again, that section 526a's purpose is

to enable "'a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.'" (*Weatherford*, *supra*, 2 Cal.5th at p. 1249 [quoting *Blair*, *supra*, 5 Cal.3d at pp. 267-268].) Recognizing that "[i]n light of this purpose, it is crucial that the statute provide a 'broad basis of relief,'" the Court refused to limit section 526a standing to parties who could allege that they paid property taxes. (*Id.* at p. 1251.)

The "dicta" to which the Superior Court referred was the Supreme Court's discussion of section 526a "in light of the statute's larger legal context—a context encompassing the evolution of standing in California from its common law roots to its various statutory incarnations." (*Weatherford*, *supra*, 2 Cal.5th at p. 1247.) After discussing basic standing principles, the Supreme Court noted that its "standing jurisprudence nonetheless reflects a sensitivity to broader prudential and separation of powers considerations elucidating how and when parties should be entitled to seek relief under particular statutes." (*Id.* at p. 1248.) As an example, the Court looked at "'public interest' standing," a judicially created exception to Code of Civil Procedure section 1086's "beneficial interest requirement" for seeking a writ of mandate, which is different from a section 526a taxpayer claim. (*Ibid.*) Noting "the need for limits in light of the larger statutory and policy context," the *Weatherford* Court pointed to cases like *Dix* and *Manduley* as providing a limit on *public interest*

standing—not taxpayer standing—in cases that involve "a core aspect of prosecutorial discretion" such as "'whom to charge, what charges to file and pursue, and what punishment to seek.'" (*Id.* at pp. 1248-1249 [quoting *Dix*, *supra*, 2 Cal.5th at p. 451].)

This discussion makes clear, as Plaintiffs acknowledge, that standing, including taxpayer standing, is not *unlimited*. But nothing in *Weatherford* or the text of section 526a suggests that taxpayer standing may be limited by separation of powers concerns where, as here, taxpayers seek to prevent the government from illegally expending and wasting public funds on nondiscretionary, unconstitutional, and illegal acts. Instead, the Supreme Court has repeatedly admonished that it has "always construed section 526a liberally—though not in a manner inconsistent with the explicit statutory limits it imposes on taxpayer standing—in light of its remedial purpose." (*Weatherford*, *supra*, 2 Cal.5th at p. 1251.) Plaintiffs' suit fits easily within the explicit statutory limits on taxpayer standing and the long line of California cases challenging executive misconduct through section 526a suits. (See *supra*, section I.B.)

The Superior Court improperly expanded the basic notion of prosecutorial discretion discussed in *Weatherford*, *Dix*, and *Manduley* to shield the *nondiscretionary*, *illegal*, and *unconstitutional* actions of the OCDA (and, somehow, the OCSD) from a challenge by Orange County taxpayers. In doing so, the Superior Court radically circumscribed the

availability of taxpayer standing, in direct contravention of the Legislature's purpose in enacting section 526a and the California Supreme Court's repeated admonition that section 526a is to be interpreted liberally.

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For the reasons stated above, none of the prudential and separation of powers concerns that Defendants identified or on which the Superior Court relied is an appropriate basis for sustaining a demurrer for myriad reasons, both legal and factual. The Superior Court's decision effectively prevents any challenge by Orange County citizens to what this Court has recognized as the "systemic problems" infecting the law enforcement apparatus that is supposed to protect and serve those same citizens. The law does not permit, much less require, such a result.

II. The Superior Court Abused its Discretion in Denying Plaintiffs Public Interest Standing for Their Writ of Mandate Claims

A. Standard of Review

The Superior Court's denial of public interest standing is reviewed for abuse of discretion. (*Citizens for Amending Proposition L v. City of Pomona* (2018) 28 Cal.App.5th 1159, 1174 (*Citizens for Amending Proposition L*), rehg. den. Nov. 28, 2018.)

When a plaintiff asserts public interest standing, the court is required to balance the public interests advocated by the plaintiff against "competing considerations of a more urgent nature." (*Green v. Obledo* (1981) 29

Cal.3d 126, 145 (*Green*).) A court that fails to properly balance those interests abuses its discretion. (E.g., *Hector F. v. El Centro Elementary School Dist.* (2014) 227 Cal.App.4th 331, 342 (*Hector F.*) ["There is a manifest public interest in enforcing the anti-bullying statutes and there are no urgent competing interests which outweigh that public interest. Thus, the trial court erred in sustaining the district's demurrer on the grounds Hector lacked standing."]; cf. *Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1218 [the abuse of discretion standard does not require that the trial court's decision be "utterly irrational"].)

B. The Superior Court Failed to Properly Balance the Manifest Public Interest in Enforcing Defendants' Mandatory Statutory Duties

The default rule is that a party seeking a writ of mandate must be "beneficially interested," meaning that the party has a "legal or special interest in the result." (*Green*, *supra*, 29 Cal.3d at p. 144; see also Code Civ. Proc., § 1086.) Plaintiffs do not allege that they possess such a direct beneficial interest. But where, as here, "'the question is one of public right and the object of mandamus is to procure the enforcement of a public duty,'" a petitioner "'need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.'" (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166 (*Save the Plastic Bag Coalition*).) This exception to the general beneficial

interest requirement is referred to as "public interest standing" and is intended to "promote[] the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." (*Ibid.*)

Plaintiffs seek writs of mandate enforcing Defendants' mandatory duties under Penal Code sections 4001.1, subdivision (b), and 1054 et seq. (AA 94-97 [¶¶ 143-147, 156-159].) As described below, the public interest in enforcing these statutory rights is manifest, and neither Defendants nor the Superior Court identified any urgent competing interests that outweigh that manifest public interest. Accordingly, the Superior Court's decision to deny Plaintiffs public interest standing was an abuse of discretion.

Unlike taxpayer standing, when a court evaluates whether a petitioner has public interest standing for a writ of mandate, the court is required to weigh the interest of the petitioner in ensuring that the government performs its mandatory duties against any "competing considerations of a more urgent nature." (*Green*, *supra*, 29 Cal.3d at p. 145.) But where, as here, there is a "manifest public interest" in ensuring Defendants' mandatory statutory duties are enforced, and there are no "urgent considerations that outweigh" that public interest, it is an abuse of discretion to deny public interest standing.[14] (*Hector F.*, *supra*, 227

[14] Defendants cited *Board of Social Welfare v. Los Angeles County* (1945) 27 Cal.2d 98 (*Bd. of Soc. Welfare*), for the proposition that the underlying

Cal.App.4th at p. 342; see also *Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 875 ["'When the duty is sharp and the public need weighty, the courts will grant a mandamus at the behest of an applicant who shows no greater personal interest than that of a citizen who wants the law enforced.'"].) "Compliance with the law, particularly one enacted by voter initiative … is in [the court's] view a 'sharp' public duty." (*Citizens for Amending Proposition L*, *supra*, 28 Cal.App.5th at p. 1177.)

The public interest in enforcement of Penal Code sections 1054 et seq. and 4001.1, subdivision (b), is manifest. Both statutes enshrine public rights and provide vital procedural protections for every individual accused of a crime in the state of California and for the effective operation of the criminal justice system as a whole. Section 1054—which was adopted by voter initiative—is explicit in its purposes: "To promote the ascertainment of truth in trials," "[t]o protect victims and witnesses from danger,

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statute must explicitly create a "public right" for public interest standing. (RT 23 ["[T]he *Board of Social Welfare* case … includes the language that in order for the exception to apply, the underlying legislation has to be legislation which establishes a public right."]; AA 159-160.) This is incorrect. *Bd. of Soc. Welfare* references the fact that the underlying statute declared that the administration of aid to the elderly is a "matter of statewide concern." (27 Cal.2d at p. 100.) Nowhere does the opinion make such language required. In fact, in case after case, courts grant public interest standing by looking to the substance of the right, without requiring any particular statutory language. (See, e.g., *Green*, *supra*, 29 Cal.3d at p. 145 [holding that "there can be no question that the proper calculation of [aid to families with dependent children] benefits is a matter of public right" and not engaging in any analysis as to whether the underlying federal statute explicitly establishes a 'public right' for mandamus purposes].)

harassment, and undue delay of the proceedings," "[t]o save court time," and "[t]o provide that no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." (See Pen. Code, § 1054.) Section 1054 et seq. achieves these purposes by, among other things, delineating the specific information the prosecution *must* disclose to the defense and the timeline on which such disclosures *must* be made. (*Id.*, §§ 1054.1, 1054.7.)

Penal Code section 4001.1, subdivision (b), protects criminal defendants' right to counsel by prohibiting law enforcement from deliberately eliciting incriminating information from criminal defendants, codifying *Massiah*, *supra*, and related cases. (See Stats. 1989, ch. 901, § 4 ["It is the intent of the Legislature that subdivision (b) of Section 4001.1 of the Penal Code is a restatement of existing case law and where the language in that subdivision conflicts with the language of that case law, the decisions of Kuhlmann v. Wilson, 91 L.Ed.2d 364, and United States v. Henry, 65 L.Ed.2d 115, and other United States Supreme Court decisions which have been decided at the time this act is enacted shall be controlling."].) Legislative history indicates that the Legislature's purpose in enacting the statute was "to prevent in-custody informants from giving false testimony in criminal cases." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill. No. AB 278 (1989–90 Reg.

Sess.) July 1, 1989, p. 2; see also Sen. Com. on Judiciary, com. on Assem. Bill No. 278 (1989–90 Reg. Sess.) July 18, 1989, p. 2.)

The importance of the rights created by these statutes and the ability of citizens to vindicate them are illustrated perfectly here. Defendants' failure to abide by these statutes is part of the "systemic problems" infecting Defendants' Informant Program, which already has violated and continues to violate criminal defendants' rights and which has unraveled numerous criminal cases. (*Dekraai*, *supra*, 5 Cal.App.5th at pp. 1114, 1149.) The public's interest in ensuring that those problems are rectified is extraordinary.[15]

Defendants and the Superior Court did not identify any countervailing "urgent considerations" that outweigh the clear public interest in enforcing Defendants' mandatory statutory duties. Indeed, it is difficult to imagine *any* consideration, much less an "urgent" one, that could outweigh the public interest in Defendants following the law. It is

[15] By comparison, the public interest exception has been granted in a wide variety of cases, including those implicating rights that are not connected to fundamental constitutional rights, unlike the important public rights at issue here. (See, e.g., *Bd. of Soc. Welfare*, *supra*, 27 Cal.2d at p. 101 ["public aid to the needy aged"]; *Green*, *supra*, 29 Cal.3d at p. 145 ["calculation of AFDC benefits"]; *Save the Plastic Bag Coalition*, *supra*, 52 Cal.4th at p. 160 ["determination on the preparation of an environmental impact report"]; *Doe v. Albany Unified School Dist.* (2010) 190 Cal.App.4th 668, 678 [requirement that school children receive "not less than 200 minutes [of physical education] each 10 schooldays"]; *Weiss v. City of Los Angeles* (2016) 2 Cal.App.5th 194, 200-201 [procedure for conducting initial review of parking citations].)

not enough to assert, as Defendants did below, that permitting public interest standing here would raise separation of powers concerns. "The purpose of the [separation of powers] doctrine is to prevent one branch of government from exercising the complete power constitutionally vested in another [citation]; it is not intended to prohibit one branch from taking action properly within its sphere that has the incidental effect of duplicating a function or procedure delegated to another branch." (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 120 [ordering the California Attorney General "to accept and act upon [an] application for destruction of records"].) The key question for courts in writ of mandate cases is whether the duties the petitioner seeks to enforce are discretionary or mandatory. If they are discretionary, then there can be no public interest standing. (E.g., *Dix*, *supra*, 53 Cal.3d at pp. 451-452.) But if the duties are mandatory, then there is no separation of powers concern because the very purpose of public interest standing is to permit citizens to ensure that the government abides by the mandatory duties imposed by the Legislature. (E.g., *Citizens for Amending Proposition L*, *supra*, 28 Cal.App.5th at p. 1177.)

Defendants have no discretion to disregard the law (see *supra*, section I.C.4.b.), and nothing in sections 1054 et seq. or 4001.1, subdivision (b), even hints that the duties they impose are somehow discretionary. In fact, the statutes include plainly mandatory language. (See, e.g., Pen. Code, § 1054.1 ["The prosecuting attorney *shall* disclose to the defendant or his

or her attorney all of the following materials and information…."], italics added; Pen. Code, § 4001.1, subd. (b) ["*No law enforcement agency* and no in-custody informant acting as an agent for the agency, *may* take some action, beyond merely listening to statements of a defendant, that is deliberately designed to elicit incriminating remarks."], italics added; see also, e.g., *People v. Lewis* (2015) 240 Cal.App.4th 257, 266 ["California's criminal discovery statutes *require* the prosecution to disclose '[a]ny exculpatory evidence' to the defense [citation] …"], italics added; *People v. Little* (1997) 59 Cal.App.4th 426, 432 ["Section 1054.1 concisely lists six specific items that the prosecution *must disclose* to the defendant or his or her attorney, and, consistent with the stated purposes of discovery provisions of Proposition 115, the prosecution has a duty to inquire in order to satisfy these requirements."], italics added.)

This case is unlike those in which a party seeks a writ of mandate to compel a district attorney to prosecute or not prosecute a case, such as *Dix*. As explained above, Plaintiffs do not dispute that such a decision is committed to the district attorney's discretion. But it does not follow that every act a prosecutor takes in relation to a criminal case (and every act taken by the Sheriff's Department as well) is transformed into an unassailable discretionary decision. Public interest standing is available to

ensure that district attorneys and sheriffs perform their mandatory duties.[16] (See, e.g., *Bradley v. Lacy* (1997) 53 Cal.App.4th 883, 889 (*Bradley*).)

Contrary to the Superior Court's statements at oral argument and Defendants' arguments below, this also is not a case in which those with a beneficial interest, like criminal defendants, may effectively ensure that Defendants abide by their mandatory duties. (RT 27 ["In the cases in which the public interest is being considered, there is no other forum that is examining the conduct of the executive or legislative branch in question."]; AA 118.)

First, as set forth above, criminal defendants *at most* can raise such challenges only after the violations have occurred and only as to their individual proceeding. (See *supra*, section I.C.3.) They cannot ensure that Defendants actually abide by the mandatory duties set forth by the

[16] Defendants also asserted that mandate is not available to enforce any mandatory duties codified in the Penal Code, relying on Civil Code section 3369, *Dix*, and *Leider v. Lewis* (2017) 2 Cal.5th 1121. (AA 115, 126-127.) However, section 3369 "is but the expression of the fundamental rule that courts of equity are not concerned with criminal matters and they cannot be resorted to *for the prevention of criminal acts*, except where property rights are involved." (*Perrin v. Mountain View Mausoleum Assn*. (1929) 206 Cal. 669, 671, italics added.) Plaintiffs do not seek to prevent any criminal acts in this case. And neither *Dix* nor *Leider* involved enforcement of mandatory statutory duties. *Dix* is discussed in detail above, *supra*, section I.C.4.c., and *Leider* merely stands for the common sense proposition that a private individual cannot prosecute another individual for commission of a crime through a civil action. (2 Cal.5th at pp. 1130-1136.) Plaintiffs are not seeking to prosecute Defendants for any criminal acts.

Legislature in all cases by seeking systemic review and prospective enforcement.

Second, even if there were another forum available to enforce these statutory rights on a systemic basis, that does not automatically preclude public interest standing to enforce them in a writ of mandate. In *Bradley*, *supra*, 53 Cal.App.4th 883, a private citizen successfully petitioned for mandamus to direct the district attorney to abide by Government Code section 3063, which requires the district attorney to initiate a prosecution if a grand jury accuses a public officer of impropriety. (*Id.* at pp. 886-887.) If the district attorney complies with the rule, the accusation can result in a jury trial "'in the same manner as the trial of an indictment.'" (*Id.* at p. 888.) Therefore, there were not one (grand jury) but two ("trial of an indictment") other fora that could have addressed the district attorney's failure. However, these alternative fora were irrelevant to the *Bradley* court's determination that mandamus was appropriate.[17]

The Superior Court's abuse of discretion here is highlighted by the fact that it denied public interest standing at the same time it denied

[17] Moreover, accepting the Superior Court's rationale that the existence of any other possible fora eliminates public interest standing essentially gives Defendants and all law enforcement statewide carte blanche to violate the mandatory duties at issue in this case. Violations of Penal Code sections 1054 et seq. and 4001.1, subdivision (b), occur almost exclusively under Defendants' own watch, shielded from scrutiny by criminal defendants, their attorneys, judges, or the public.

taxpayer standing. In doing so, the Superior Court cut off *all* avenues for relief. Although public interest standing and taxpayer standing are not mutually exclusive, (see, e.g., *Hector F.*, *supra*, 227 Cal.App.4th at p. 342), by incorrectly denying Plaintiffs *both* taxpayer standing and public interest standing, the Superior Court held that the citizens of Orange County are absolutely barred from seeking relief in Orange County courts for Defendants' unlawful conduct. That decision was an abuse of discretion and should be reversed. (See *Dix*, *supra*, 53 Cal.3d at p. 454 & fn. 7 [noting the denial of public interest standing in that case pursuant to the long-standing rule against intervening in an ongoing criminal case would "not cause important issues to evade review" because "nothing we say here affects *independent* citizen-taxpayer actions raising criminal justice issues"], original italics.) Orange County residents must be allowed the access to the judicial system to which they are entitled. Plaintiffs here plainly satisfy the requirements for public interest standing, and the Superior Court abused its discretion in holding otherwise.

III. The Superior Court's Erroneous Ruling Cannot Be Sustained on any Other Ground Raised in the Demurrer

A. Plaintiffs Have Alleged Sufficient Facts to State Taxpayer and Writ of Mandate Claims

As discussed in sections I.B. and II.B. above, the FAC contains allegations sufficient to meet every requirement for a taxpayer claim pursuant to section 526a and a writ of mandate under section 1085.

Plaintiffs' FAC amply alleges that Defendants engage in systemic violations of criminal defendants' constitutional and statutory rights through their Informant Program. (See AA 66-67, 74, 79, 86-89 [¶¶ 6, 49, 64, 98-111].) These allegations are taken as true on demurrer. (See, e.g., *Dunn-Edwards Corp. v. South Coast Air Quality Management Dist.* (1993) 19 Cal.App.4th 536, 542.)

Moreover, contrary to Defendants' assertion that the egregious misconduct detailed in the FAC is limited to isolated instances of wrongdoing by unknown deputies and prosecutors, this Court found in *Dekraai* that the informant program "create[d] and maintain[ed]" by the OCSD is a "well established program" that is "sophisticated, synchronized, and well-documented." (*Dekraai*, *supra*, 5 Cal.App.5th at pp. 1141-1142.) Indeed, this Court concluded that Defendants' failure to acknowledge past wrongdoing—just as Defendants continue to do in this case—is indicative of a likelihood of future wrongdoing. This Court stated that it "disagree[d] with the Attorney General it is 'sheer speculation that law enforcement will continue to conceal information' when the OCDA has failed to and continues to fail to properly supervise the sheriff." (*Id.* at p. 1149.) The "OCDA's past substantial discovery failures are evidence it cannot be relied upon to comply with its discovery obligations in this case moving forward." (*Id.* at p. 1147.) And, as Plaintiffs' FAC alleges, there is

evidence post-*Dekraai* that such misconduct is ongoing. (AA 93-94 [¶¶ 133-136].)

In light of this Court's judicial findings and all of the detailed allegations in the FAC, described above, Plaintiffs' claims more than satisfy the pleading standard.

B. Plaintiffs' Claims Are Not Barred by Statutes of Limitations

"In 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." (*McMahon v. Republic Van & Storage Co., Inc.* (1963) 59 Cal.2d 871, 874; see also *Mitchell v. State Department of Public Health* (2016) 1 Cal.App.5th 1000, 1007.) Further, claims of ongoing conduct are subject to two exceptions to the statute of limitations: continuing violations ("a pattern of reasonably frequent and similar acts" that is treated as "an indivisible course of conduct actionable in its entirety") and continuous accrual (which "applies whenever there is a continuing or recurring obligation" such that "'a cause of action accrues each time a wrongful act occurs, triggering a new limitations period'"). (See *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1198-1199.)

The FAC alleges, on its face, that Defendants committed misconduct within the limitations periods, as well as ongoing violations and harms since the inception of Defendants' Informant Program, which satisfy the requirements for establishing both the continuing violations and continuous accrual exceptions to the statute of limitations. (AA 66-67, 70-72, 74, 79-80, 82-90 [¶¶ 6, 11, 28-29, 34-35, 46-48, 65-69, 74, 80, 86, 94-96, 98-106, 111-113, 123-137, 139-172].) For instance, Plaintiffs' FAC alleges that Defendants committed ongoing constitutional violations related to the Informant Program involving events after June 9, 2016 in at least 146 specific criminal cases in Orange County. (AA 93 [¶ 131].) As just one example, the FAC alleges that Defendants withheld exculpatory evidence regarding the Informant Program, in violation of the prosecution's *Brady* obligations, in 2018 as part of the prosecution of Oscar Galeno Garcia. (AA 92-93 [¶ 130].) Moreover, Plaintiffs allege that Defendants concealed the Informant Program; it was only discovered after protracted proceedings in the *Dekraai* and *Wozniak* cases, particularly through the eventual disclosure of the SHU Log in 2016, which detailed Defendants' intentional movement of informants in violation of criminal defendants' rights. (AA 70-73, 76-78 [¶¶ 28-35, 42, 54-61].) Thus, the allegations in the FAC preclude a demurrer on the statute of limitations.

CONCLUSION

For the reasons set forth above, this Court should reverse.

Dated: July 1, 2019

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 13,249 words according to the word count feature of the computer program used to prepare this brief.

Dated: July 1, 2019

MUNGER, TOLLES & OLSON LLP

By: */s/ John L. Schwab*
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 350 South Grand Avenue, Fiftieth Floor, Los Angeles, CA 90071-3426.

On July 1, 2019, I served true copies of the following document(s) described as **APPELLANTS' OPENING BRIEF** on the interested parties in this action as follows:

See Attached Service List

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on July 1, 2019, at Los Angeles, California.

/s/ Carol Jette

CAROL JETTE

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