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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE – CIVIL COMPLEX CENTER

PEOPLE FOR THE ETHICAL OPERATION OF PROSECUTORS AND LAW ENFORCEMENT (P.E.O.P.L.E.); BETHANY WEBB; THERESA SMITH; and, TINA JACKSON,

Plaintiffs/Petitioners,

vs.

ANTHONY J. RACKAUCKAS, in his official capacity as Orange County District Attorney; and, SANDRA HUTCHENS, in her official capacity as Orange County Sheriff,

Defendants/Respondents.

Case No. 30-2018-00983799-CU-CR-CXC
Assigned for all purposes to:
Honorable Glenda Sanders; CX-101

NOTICE OF DEMURRER AND DEMURRER TO FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND VERIFIED PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; AND DECLARATION OF REBECCA S. LEEDS IN COMPLIANCE WITH CCP § 430.41

DATE: DECEMBER 7, 2018
TIME: 1:30 P.M.
DEPT: CX-101

Initial Complaint Filed: April 4, 2018
Remand Accepted: August 8, 2018
1st Amended Complaint Filed: October 1, 2018
Trial Date: TBD

TO PLAINTIFFS/PETITIONERS, PEOPLE FOR THE ETHICAL OPERATION OF PROSECUTORS AND LAW ENFORCEMENT (P.E.O.P.L.E.), BETHANY WEBB, THERESA SMITH, TINA JACKSON, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on December 7, 2018, 2018, at 1:30 p.m., or as soon thereafter as counsel can be heard, in Department CX-101 of the above-entitled Court located at 751 West Santa Ana Boulevard, Santa Ana, California 92701, Defendants/Respondents, Anthony J. Rackauckas, in his official capacity as Orange County District Attorney ("OCDA") and Sandra Hutchens, in her official capacity as Orange County Sheriff ("OCSD") will, and hereby do, demur to the First Amended Complaint/Petition ("FAC") filed by Plaintiff/Petitioners on October 1, 2018.

This Demurrer is made following a meet and confer of counsel that took place on October 23, 2018, pursuant to Code of Civil Procedure section 430.41. (See Declaration of Rebecca S. Leeds attached hereto and incorporated herein by reference.)

This Demurrer is made pursuant to Code of Civil Procedure section 430.10, and is based on the grounds stated below, the attached Memorandum of Points and Authorities, the Declaration of Rebecca S. Leeds, the files and records of this matter, and any oral or other evidence presented to this Court.

DATED: November 2, 2018

Respectfully submitted,

LEON J. PAGE, COUNTY COUNSEL
D. KEVIN DUNN, SENIOR DEPUTY
REBECCA S. LEEDS, SENIOR DEPUTY
ADAM C. CLANTON, DEPUTY
CAROLYN M. KHOUZAM, DEPUTY
KAYLA N. WATSON, DEPUTY

By /s/
Adam C. Clanton, Deputy

Attorneys for Defendants/Respondents,
ANTHONY J. RACKAUCKAS and SANDRA HUTCHENS

OFFICE OF THE COUNTY COUNSEL
COUNTY OF ORANGE

DEMURRER TO FIRST AMENDED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE RELIEF AND DECLARATORY RELIEF

Defendants/Respondents hereby demur to the First Amended Complaint/Petition ("FAC"), and to each cause of action therein, based on the following grounds specified in Code of Civil Procedure section 430.10:

1. The FAC, and each cause of action therein, is barred as Plaintiffs lack standing. (Code Civ. Proc., § 430.10(e).)
2. The FAC, and each cause of action therein, is barred by the applicable statute of limitations and therefore fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., §§ 430.10(e), 335.1.)
3. The FAC, and each cause of action therein, does not state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10(e).)

WHEREFORE, Defendants/Respondents request that:

1. This Demurrer be sustained without leave to amend the FAC;
2. Plaintiffs/Petitioners take nothing by their FAC;
3. Defendants/Respondents recover costs of suit; and
4. Defendants/Respondents be awarded such other relief as this Court deems just and proper.

DATED: November 2, 2018

Respectfully submitted,

LEON J. PAGE, COUNTY COUNSEL
D. KEVIN DUNN, SENIOR DEPUTY
REBECCA S. LEEDS, SENIOR DEPUTY
ADAM C. CLANTON, DEPUTY
CAROLYN M. KHOUZAM, DEPUTY
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By /s/
Adam C. Clanton, Deputy

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I. INTRODUCTION

Plaintiffs' First Amended Complaint and Petition ("Complaint" or "FAC") is barred by Plaintiffs' lack of standing, by the applicable statute of limitations, and by the Plaintiffs' failure to allege facts necessary to establish each of their claims.

Plaintiffs lack standing because they fail to demonstrate that *they* have been injured in any way. Taxpayer status does not give Plaintiffs standing to intervene in criminal proceedings or prosecutorial decision making. Moreover, the First Amended Complaint is barred by the applicable statutes of limitations. The Complaint also fails as a matter of law because Plaintiffs have not alleged the facts necessary to establish each of their claims. Specifically, Plaintiffs fail to allege that Defendants/ Respondents Tony Rackauckas and Sandra Hutchens (1) violated any individual Plaintiff's civil rights; (2) used a coerced statement against any individual Plaintiff in a criminal case; (3) abridged any individual Plaintiff's own right to counsel; (4) ever criminally prosecuted any individual Plaintiff in the County of Orange; or, (5) ever incarcerated any individual Plaintiff in the Orange County jail ["OC Jail"]).

Accordingly, the Demurrer should be sustained without leave to amend.

II. STATEMENT OF RELEVANT FACTS

Defendants do not concede Plaintiffs' allegations but, for purposes of demurrer, the facts of this matter are based upon the FAC as plead by Plaintiffs. In this case, Plaintiffs consist of an association of Orange County residents called the People for the Ethical Operation of Prosecutors and Law Enforcement ("P.E.O.P.L.E."), and three taxpayers—Bethany Webb ("Webb"), Theresa Smith ("Smith"), and Tina Jackson ("Jackson"). (FAC at ¶¶ 14-24.) Plaintiffs allege that, for over thirty years, the OCSD and OCDA operated a jail "informant program," the purported use of which has violated the rights of criminal defendants who have interacted with such informants, by producing improper confessions, and non-compliance with *Brady v. Maryland* (1963) 373 U.S. 83 ("*Brady*")). (FAC ¶¶ 28, 29.) While Plaintiffs contend that the informant program has "routinely" violated criminal defendants' rights and amounts to an alleged policy, practice, and custom, they have only identified a handful of cases in which they claim there was an actual violation. (FAC at ¶¶ 64-97, 135, 150.) Relying upon

media coverage and innuendo, Plaintiffs claim that the OCDA and OCSD do not intend to correct the allegations. (FAC at ¶¶ 112-132.) Plaintiffs do not allege a violation of their own rights.

III. ARGUMENT

A. Demurrer is Proper in the Instant Action.

A demurrer may be taken "[w]hen any ground for objection to a complaint . . . appears on the face thereof, or from any matter of which the court is required or may take judicial notice." These grounds include situations where "[t]he pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., ["CCP"] § 430.10(e).) A demurrer may be taken to a writ petition as well as to a complaint. (See CCP, § 1089.) In evaluating a demurrer, the court assumes the truth of all material facts properly pled. (CCP, § 430.30(a).) If the court determines the complaint is insufficient, it must decide whether there is a reasonable possibility that Plaintiffs may cure the defect or defects by amendment. If Plaintiffs fail to meet their burden of proving such reasonable possibility, the court may properly sustain a demurrer without leave to amend. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

B. Plaintiffs Lack Standing.

1. Plaintiffs Lack Standing for Their Section 1983 Claims.

Plaintiffs lack standing to bring their *direct* First, Fourth and Seventh causes of action for Section 1983 claims, as a party "has no standing to object to a violation of another's Fifth Amendment privilege against self-incrimination" including assertions that another's "testimony is somehow coerced or involuntary." (*People v. Badgett* (1995) 10 Cal.4th 330, 343–44; see also CCP, § 367.) Likewise, a party "lack[s] standing to complain of the violation of another's Sixth Amendment right to counsel. The right to counsel is a personal right, and a violation of that right cannot ordinarily be asserted vicariously." (*Id.* at pp. 343–44 [citations omitted].) Because Plaintiffs' direct actions relate to the Fifth and Sixth Amendment rights of others, they fail to demonstrate their personal rights have been violated. The Demurrer should therefore be sustained as Plaintiffs lack standing for these claims.

2. Plaintiffs Lack Standing for Their Free-Standing State Constitutional Claims.

Similarly, Plaintiffs lack standing to bring their *direct* Second, Fifth, and Eighth causes of action for state constitutional claims. Under California law, "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." (CCP, § 367.) "Only the real party in

interest has 'an actual and substantial interest in the subject matter of the action,' and stands to be 'benefited or injured' by a judgment in the action." (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 60.) Plaintiffs raise their Second, Fifth, and Eighth claims *not* under a theory of taxpayer standing, but on a theory of direct standing. Courts have observed that absent a taxpayer standing theory, *direct* standing by a member of the public is unavailable, because "the injury is insufficient to satisfy general standing requirements under section 367." (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1249.). The Demurrer should therefore be sustained on this additional ground.

3. Plaintiffs Lack Standing for Their Mandamus Causes of Action.

Plaintiffs also lack standing to bring their Third and Sixth causes of action for mandate. At the outset, Plaintiffs fail to demonstrate any personal, beneficial interest that would allow for any form of direct standing. (See CCP, § 1086; *Braude v. City of Los Angeles* (1990) 226 Cal.App.3d 83, 87 (interest must be personal).) Indeed, while Plaintiffs premise their *direct* writ actions on allegations that OCDA and OCSD have violated Penal Code sections 1054 *et seq.* (discovery in criminal actions) and 4001.1(b) (use of in-custody informants) relating to the rights of others, they nowhere assert that Plaintiffs themselves have been so injured. More fundamentally, California law makes clear 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 . . . ." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 450; see also *People v. Martinez* (2009) 47 Cal.4th 399, 419, n.2.) "Neither specific nor preventative relief can be granted . . . to enforce a penal law . . . ." (Civ. Code, § 3369.) Not only does a *victim* lack standing despite the "specific and personal nature" of his interests but, as a matter of law, the "concept of private standing to seek enforcement of a 'public duty' is inapplicable" in relation to a penal statute because the "public prosecutor has no enforceable 'duty' to conduct criminal proceedings in a particular fashion." (*Dix, supra,* at p. 453.) The Demurrer should therefore be sustained on this additional ground.

4. Plaintiffs Lack Taxpayer or Public Interest Standing.

With no available direct standing, Plaintiffs must logically rest their laurels on taxpayer standing. However, taxpayer standing is not limitless, and is not available in a case such as this one.

"[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." (*Animal Legal Def. Fund v. California Exposition & State Fairs* (2015) 239 Cal.App.4th 1286, 1298 [emphasis in original].) Indeed, the California Supreme Court has expressly held that "a taxpayer action will not lie to enforce a Penal Code provision." (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1137.) Plaintiffs thus have no standing to pursue their mandamus claims either directly or indirectly.[1]

From a broader perspective, public interest or taxpayer standing should not lie where a Plaintiff seeks to intervene in criminal cases. (*Dix, supra,* at pp. 453-54 ["recognition of citizen standing to intervene in criminal prosecutions would have 'ominous' implications" as "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"].) Thus, under such circumstances, "'public interest' standing must yield . . ." because "a private citizen has no personal legal interest in the outcome of an individual criminal prosecution against another person. Nor may the doctrine of 'public interest' standing prevail over the public prosecutor's exclusive discretion in the conduct of criminal cases." (*Id.* at pp. 451, 453; see also *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1248 [taxpayer standing "at odds with both the executive decision making role of prosecutors, as well as the deference we ordinarily afford them."].) "[T]he appropriate tribunal for the enforcement of the criminal law is the court in an appropriate criminal proceeding." (*Nathan H. Schur, Inc. v. City of Santa Monica* (1956) 47 Cal.2d 11, 17 ("*Schur*"); see also *Leider, supra*, at p. 1133 [describing "criminal court as the appropriate forum for adjudicating violations of criminal law . . . ."].) Accordingly, despite wide latitude to permit taxpayer standing, it is not available in this type of case.

In addition to the general proposition that citizen or taxpayer standing should not extend to the sphere of criminal prosecutions, the particular circumstances of this case also cautions against such standing. Taxpayer standing should be considered on a case-by-case basis and may be appropriately

[1] Similarly, in the context of asserting a public right in a mandamus proceeding, such public right exists only when expressly established by the Legislature. (See, e.g., *Doe v. Albany* (2011) 190 Cal.App.4th 668, 684-85; *Green v. Obledo* (1981) 29 Cal.3d 126, 145.) Here, Plaintiffs also lack standing because Penal Code sections 1054 *et seq.* and 4001.1(b) do not protect or enforce any expressly-declared and legislatively-established public right.

limited "in light of the larger statutory and policy context" and "other prudential and separate of powers considerations." (*Weatherford v. City of San Rafael, supra.* at pp. 1248-49.) Considerations of volume, scope, and separation of powers caution against this action proceeding by way of citizen or taxpayer standing. Here, if this case were to proceed, Plaintiffs will certainly be seeking discovery of innumerable prosecutorial and investigative files from the OCSD and OCDA.[2] From a sheer volume perspective, to the extent that 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 pursuant to Evidence Code sections1040-1042 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. (See, e.g., *Imbler v. Pachtman* (1976) 424 U.S. 409, 425 ["if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law."]; *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."].)

Permitting broad civil discovery of prosecutorial and police informant case files by a taxpayer also produces an absurd result. Were this case to go forward under a third-party standing theory, a party with no direct interest in a criminal proceeding would be permitted a foot in the door to seek access to investigative files and informant information that far exceeds the access otherwise permitted to the underlying criminal defendants pursuant to the constitution and statutory laws of criminal discovery.[3] This is not a mere academic concern. Recognition of taxpayer standing in a case such as this would open the flood gates to civil actions challenging law enforcement and prosecutorial decisions in the

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[2] Plaintiffs have already served Requests for Production which explicitly seek information about informants, among other things.

[3] Moreover, under Plaintiffs' expansive interpretation of section 526a, a citizen "taxpayer" would potentially have more rights than the victims of crimes under Marsy's Law. (Cal. Const., art. 1, § 28, subd. (a); see also, *Dix v. Superior Court, supra.* at pp. 451 ("No private citizen, however personally aggrieved, may institute criminal proceedings independently . . . .")

context of a criminal proceeding – so long as the Plaintiff alleges that he or she is a "taxpayer." By the mere purchase of a newspaper, a plaintiff could subject OCDA and OCSD to immeasurable harassing future litigation, efforts at massive "fishing expeditions," and significant employee diversion from underlying duties of safety and enforcement to the point at which cases asserting taxpayer waste would in fact be generating it. Permitting such third-party challenges will also open the doors to causes of action that seek to improperly second-guess discretionary decisions of the executive branch, impinging on separation of powers, which the Supreme Court in *Weatherford* recognized as improper. Accordingly, in light of the policy and prudential concerns specific to this type of case, the Demurrer should be sustained for lack of taxpayer standing.

Finally, taxpayer standing is not necessary in this case in light of the underlying purpose of the doctrine. Courts have observed that the purpose of taxpayer standing 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." (See *Animal Legal Def. Fund, supra,* at p. 1298 [emphasis added]["it cannot be said that defendants' conduct . . . would go unchallenged in the absence of a taxpayer action."].) Courts have rejected taxpayer standing where the governmental action at issue is subject to alternative mechanisms of challenge by parties with a direct interest. (*Id.*) In this case, the premise of Plaintiffs' taxpayer standing is that alleged misconduct by OCDA and OCSD has implicated non-party criminal defendants' criminal cases. To the extent that any such criminal defendant believes such alleged misconduct occurred in his or her criminal proceeding, that person can certainly pursue the direct mechanisms available to challenge that proceeding. (*Schur, supra,* at p. 17 ["the appropriate tribunal for the enforcement of the criminal law is the court in an appropriate criminal proceeding."].) Indeed, Plaintiffs themselves plead as much, discussing the matters of *People v. Scott Dekraai* and *People v. Daniel Wozniak*, and emphasize that in other underlying criminal cases themselves, criminal defendants have used such direct mechanisms, purportedly "result[ing] in dismissed or severely reduced charges in at least eighteen cases . . . ." (FAC at ¶ 28.) Moreover, the federal Department of Justice, the California Department of Justice and the Orange County Grand Jury also have oversight—and have exercised it—over both the OCSD and the OCDA.

In short, significant statutory and policy concerns disfavor taxpayer standing, and Plaintiffs

themselves acknowledge that the allegations can (and have) been effectively challenged in their absence. The Demurrer should be sustained in its entirety, as Plaintiffs lack both direct and taxpayer standing.

C. Plaintiffs' Causes of Action Are Barred by the Statute of Limitations.

Although standing hurdles are dispositive, Plaintiffs' actions are also time-barred.

1. Plaintiffs' Section 1983 Actions are Untimely.

Plaintiffs' First, Fourth, and Seventh actions asserting a violation of 42. U.S.C. § 1983 are time-barred. California has a two-year statute of limitations that applies to Section 1983 actions. (See *Colony Cove Properties, LLC v. City of Carson* (9th Cir. 2011) 640 F.3d 948, 956; CCP, §§ 335.1, 340); see also *Javor v. Taggart* (2002) 98 Cal.App.4th 795, 803 (one year for claims before January 1, 2003.) This time bar exists in a section 1983 action for damages, as well as one for declaratory and injunctive relief. (See, e.g., *Levald, Inc. v. City of Palm Desert* (9th Cir. 1993) 998 F.2d 680, 688–89.) "'Although state law determines the length of the limitations period, federal law determines when a civil rights claim accrues.' .. Under federal law, 'a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action.'" (*Knox v. Davis* (9th Cir.2001) 260 F.3d 1009, 1013.

In this case, Plaintiffs filed this action on April 4, 2018. In describing the conduct making up the basis of the claims, however, the FAC shows Plaintiffs knew or had every reason to know of the subject of their complaint for much longer – perhaps decades. Indeed, Plaintiffs allege that the purported misconduct has been occurring for "over thirty years," and refer to the 1980 case of *People v. William Charles Payton*—a 38-year-old case—as an example. (FAC at ¶¶ 2, 46.) The FAC further describes that "the Informant Program was uncovered in *two of the highest profile murder cases the County of Orange has ever seen—People v. Scott Dekraai* and *People v. Daniel Wozniak.*" (FAC at ¶ 28 [emphasis added].) More specifically, the FAC cites to apparent testimony in *Dekraai* relating to informants in 2015, and specifically "February 2015." (FAC at ¶¶ 41, 116, 117.) Plaintiffs also refer elsewhere to knowledge of the issue in 2015, referencing an article on the topic dated October 22, 2015. (FAC at p. 13, n.2.) Thus, even after amending, Plaintiffs base their claims on allegations that purportedly arose long ago and are barred. The Demurrer should be sustained.

2. Plaintiffs' Claims Against OCSD Are Untimely.

All actions against OCSD are time-barred. Pursuant to CCP section 339, subdivision 2, "[a]n

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." In this case, Plaintiffs bring their actions against the "Sheriff of Orange County" asserting that she is being "sued in her official capacity." (FAC at ¶ 27.) Yet, as noted above, Plaintiffs filed this action on April 4, 2018, describing conduct alleged to have occurred as long as "thirty years" ago, and to which Plaintiffs themselves contend has been a matter of significant public interest for over three years. The Demurrer should accordingly be sustained as to OCSD because the actions are untimely.

3. Plaintiffs' California Constitution Actions Are Untimely.

Plaintiff's Second, Fifth, and Eighth actions asserting derivative violations of the California Constitution are also time-barred. To the extent that a state constitutional provision may support a cause of action, courts have determined that such an action sounds in tort. (See e.g., *Carlsbad Aquafarm, Inc. v. State Dep't of Health Servs.* (2000) 83 Cal.App.4th 809, 816; *Katzberg v. Regents of Univ. of California* (2002) 29 Cal.4th 300; *Degrassi v. Cook* (2002) 29 Cal.4th 333.) That a claim asserts injunctive or declaratory relief, the limitations period nevertheless relates to the type of obligation sought to be enforced. (See *McLeod v. Vista Unified Sch. Dist.* (2008) 158 Cal.App.4th 1156, 1165 [limitations period turns on "the nature of the governmental action being challenged rather than the basis for the challenge . . . ."].) These claims are therefore similarly constrained by the two year period in CCP section 335.1. Again, Plaintiffs premise their claims on information purportedly available to them for decades, and at least by 2015. The Demurrer should be sustained on this basis as well.

4. Plaintiffs' Mandate Actions are Untimely.

Plaintiff's Third and Sixth actions for mandamus are also untimely. "The statute of limitations applicable to a writ of mandamus under Code of Civil Procedure section 1085 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.) In this case, Plaintiffs' writ actions sound in statute, asserting Penal Code sections 1054 and 4001.1(B) as their basis. (FAC at pp. 31, 33.) Where an action is premised on statute, it is subject to a three-year limitations period, unless a different limitation period is prescribed by statute. (See CCP, §§ 312, 338.) Here, as noted above, CCP § 339 specifically prescribes for a two-year limitation period as to OCSD. Even with a three-year bar, however, the mandate action is also untimely.

Again, Plaintiffs describe having derived knowledge of the informant program from the *Dekraai* case, and refer to testimony in 2015 generally, and February of 2015 specifically. (FAC at ¶¶ 41, 116, 117.) That Plaintiffs now bring an action in April 2018 on alleged facts that arose in 2015 and earlier demonstrates that the writ actions are untimely.

5. Plaintiff's Taxpayer Action is Untimely.

Plaintiffs' Ninth cause of action is similarly untimely. Even though a Section 526a action is one seeking to prevent expenditures, it is still subject to a limitations period turning on "[t]he gravamen of a complaint and the nature of the right sued upon . . . ." (*McLeod, supra,* at p. 1165 [Section 526a action had 60-day time bar].) Again, to the extent that Plaintiffs' taxpayer action asserts Sheriff misconduct in her official capacity, or relates to a purported constitutional violation, the two-year period applies. (CCP, §§ 335.1, 339.) To the extent the taxpayer action relates to an underlying statutory violation for which there is no limitations period, a three-year limitations period applies. (CCP, § 338.) For the reasons above, the action is barred under either measure.

In sum, the Demurrer should be sustained because in addition to the dispositive hurdles of problems of standing, Plaintiffs' causes of action, and each of them, have also been filed beyond their applicable limitations periods.

D. Plaintiffs Do Not State Facts Sufficient to Constitute a Cause of Action.

Not only are Plaintiffs actions barred by the hurdles of standing and statute of limitations, but so too do Plaintiffs fail to plead facts sufficient to support their claims. The Demurrer should be sustained.

1. Plaintiffs Do Not State a Cause of Action for Taxpayer Waste.

Most importantly to the posture of this case, Plaintiffs fail to assert facts sufficient to support a taxpayer cause of action. CCP Section 526a creates a taxpayer private right of action to restrain the illegal or wasteful expenditure from "the estate, funds, or other property of a county . . . ." (*Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 482.) Waste "does not encompass the great majority of governmental outlays of money or the time of salaried government employees, nor does it apply to the vast majority of discretionary decisions made by state and local units of government." (*Id.* [citations omitted].) Moreover, a taxpayer action "must involve an actual or threatened expenditure of public funds." (*Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739,

749.) In that regard, it "cannot be predicated on the proponent's fear of something that may happen in the future." (*Id.* at p. 750.) "General allegations, innuendo, and legal conclusions are not sufficient" to sustain a taxpayer action. (*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 United States v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 356.)

Here, the crux of Plaintiffs' taxpayer waste action is that OCDA and OCSD engage in an unconstitutional policy, practice, and custom by virtue of a purported informant "program" that impacts the rights of criminal defendants. Turning to what is actually plead, however, Plaintiffs fail to adequately state facts supporting as much. Taken as true, Plaintiffs' allegations seek to extrapolate a few examples into what they insinuate establishes an overarching policy or practice. Yet, at best, Plaintiffs' allegations establish that unidentified members of OCDA or OCSD have, at undefined times, under undefined circumstances and in unknown numbers, used informants in a manner contrary to law. While an individual criminal defendant may be entitled to challenge these individual purported violations, *Plaintiffs do not identify a policy or practice by either OCDA or OCSD in this case directing or authorizing its officers to use informants in this fashion, and thus plead no policy or practice of "waste" to be remedied by the Court.* Alleging, or even establishing, that some officers employed by OCDA or OCSD have violated the law does not lead to a conclusion that *all* officers, or a significant number of them, are now doing so. Indeed, the law presumes that officers obey and follow the law (See Evid. Code § 664) and they take an oath to uphold the same. In short, Plaintiffs' FAC extrapolates limited and speculative circumstances into a conclusory policy or practice of waste. This is insufficient to state a claim.

Moreover, the facts plead fail to adequately support the existence of a present injury. For example, even assuming arguendo that Plaintiffs had adequately plead facts that "thirty years ago" such an informant program or policy existed, the existence of a policy or practice *in 1988* is not an adequate factual pleading of a *present* policy or practice that must be enjoined. In addition, Plaintiffs use innuendo and conclusions contrary to the facts they actually plead. Indeed, Plaintiffs plead that both the District Attorney and OCSD *directly denied* the existence of an informant program of the type they

allege. (FAC ¶¶ 124, 126). Although, in turn, Plaintiffs imply that such a denial should instead be regarded as evidence to the contrary – to infer the present existence of such a program – the actual facts plead counter their own conclusions. In short, as plead, Plaintiffs seek to turn a molehill into a speculative mountain. They fail to adequately plead sufficient facts to support a present or future policy that undertakes the alleged waste of which they speculate. (See also *Magnolia Square Homeowners Assn. v. Safeco Ins. Co.* (1990) 221 Cal.App.3d 1049, 1057 ["information and belief" insufficient to establish essential facts].) The Demurrer should be sustained for failure to allege facts sufficient to constitute a cause of action.

2. Plaintiffs Do Not State a Cause of Action Under Section 1983.

As to their remaining direct claims, Plaintiffs also fail to plead adequate facts. At the outset, Plaintiffs fail to state a 1983 action. To state a Section 1983 action, Plaintiffs must "plead that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes." (*Gibson v. U.S.* (9th Cir. 1986) 781 F.2d 1334, 1338.) As a corollary to the problem of standing, Plaintiffs fail to meet the second element for all of its section 1983 actions asserted under a theory of direct injury, for as third parties, they fail to show that *their own rights* under the federal constitution have been deprived. While that ends the inquiry, even then, additional specific pleading failures exist as to each cause of action.

a. Plaintiffs Do Not Allege Facts Sufficient to Establish a *Brady* Violation.

As to Plaintiffs First cause of action, *Brady* disclosures are "a right that the Constitution provides as part of its basic 'fair trial' guarantee." (*U. S. v. Ruiz* (2002) 536 U.S. 622, 628.) To establish a *Brady* violation the criminal defendant must prove the following three facts: "(1) The evidence at issue must be 'favorable to the accused, either because it is exculpatory, or because it is impeaching'; (2) the State suppressed the evidence, 'either willfully or inadvertently'; and (3) 'prejudice . . . ensued.' ".) (*Skinner v. Switzer* (2011) 562 U.S. 521, 536.) Thus, a *Brady* violation only exists where "the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict" in a criminal case. (*Strickler v. Green* (1999) 527 U.S. 263, 281 [emphasis added].)

Moreover, "Most courts that have directly considered the question have held that an acquittal extinguishes a Section 1983 plaintiff's due process claim for nondisclosure of *Brady* material." (See

Ambrose v. City of New York (S.D.N.Y. 2009) 623 F.Supp.2d 454, 468, 469.) "Other courts have reached essentially the same conclusion without making direct reference to the *Brady* rule or to the Due Process Clause." (*Id.* at pp. 469-470, citing *McCune v. City of Grand Rapid* (6th Cir. 1988) 842 F.2d 903, 907 (there is no injury for "'. . . wrongful suppression of exculpatory evidence'" when a Defendant is acquitted, in the absence of injury there is a failure to state a claim).)

A Fifth Amendment violation based on a failure to disclose *Brady* material does not occur unless the criminal defendant was wrongfully convicted. Accordingly, if an acquitted *defendant* cannot state a Section 1983 COA based on a *Brady* violation, Plaintiffs cannot do so here. Even if Plaintiffs could overcome the hurdle that they themselves have suffered no injury, Plaintiffs fail to plead facts that a nondisclosure would have produced a different outcome. Plaintiffs' Section 1983 claim based on the alleged *Brady* violation fails. The Demurrer should be sustained.

b. Plaintiffs Do Not Allege Facts Sufficient to Establish a Sixth Amendment Violation.

As to Plaintiffs' Fourth cause of action, a Sixth Amendment violation occurs when a criminal defendant has incriminating statements elicited from him/her after the right to counsel has attached, which statements are then used against him/her as evidence in a prosecution. (See *Massiah v. U.S.*, 377 U.S. 201, 206, 207 (1964).) As the Ninth Circuit recently wrote:

> *Massiah* prohibits the government from "deliberately elicit[ing]" incriminating statements *from a defendant* after the Sixth Amendment right to counsel attaches. *United States v. Henry* . . . extended this prohibition to "the use of jailhouse informants who relay incriminating statements *from a prisoner* to the government."..."[A] *defendant does not make out a violation* of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the *defendant* must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks."

(*Sanders v. Cullen* (9th Cir. 2017) 873 F.3d 778, 812 [emphasis added, citations omitted].)

Again, Plaintiffs cannot overcome the determinative hurdle that they themselves have suffered injury. Even if they could, they have not adequately further demonstrated that the purported violative incriminating statement was later used against the criminal defendant. Thus, the FAC fails to state a claim under section 1983 for violation of the Sixth Amendment. The demurrer should be sustained.

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c. Plaintiffs Do Not Allege Facts Sufficient to Show a Coercive Interrogation Violation.

Plaintiffs plead the Seventh action based on a "guarantee of freedom from coercive interrogation" (See FAC at ¶ 161). There is no such free-standing constitutional guarantee. Rather, the Fifth Amendment protects *criminal defendants* from having a compelled statement used against them *during trial*. As the U.S. Supreme Court wrote, "contrary to the Ninth Circuit's view, *mere coercion* does not violate the text of the Self–Incrimination Clause absent use of the compelled statements in a criminal case against the witness." (*Chavez v. Martine* (2003) 538 U.S. 760, 769 (emphasis added).) Indeed, "a violation of the constitutional right against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case." (*Id.* at p. 770.) Not only do Plaintiffs suffer the determinative hurdle that they themselves are not an injured party, but so too do they fail to plead the additional necessary facts that such statement was later used against them in a criminal case. The FAC fails to adequately support this claim.

3. Plaintiffs Do Not State a Cause of Action Under the State Constitution.

a. Plaintiffs' Allegations Do Not Support a Violation of Article 1, Section 7.

Plaintiffs' direct causes of action for violation of the California Constitution parallel the First, Fourth and Seventh causes of action. The Second and Eighth causes of action are premised on the California Constitution's due process clause under article 1, Section 15.

In California, a "claimant must ... identify a statutorily conferred benefit or interest of which he or she has been deprived to trigger procedural due process under the California Constitution. . . ." (*Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1071.) This limits the universe of potential due process claims because "presumably not every citizen adversely affected by governmental action can assert due process rights; identification of a statutory benefit subject to deprivation is a prerequisite." (*Ryan*, at p. 1071, citing *Schultz v. Regents of Univ. of California* (1984) 160 Cal.App.3d 768, 786.) Plaintiffs fail to allege that their own due process rights under the California Constitution have been implicated by any government action, asserting only the rights of others. Based on the foregoing authorities, Plaintiffs have not plead facts in their direct claims of a right to which they have been deprived. The Demurrer should be sustained.

b. Plaintiffs' Facts Do Not Support a Violation of Article 1, Section 15.

In their Fifth COA, Plaintiffs allege a violation of article 1, section 15, which guarantees a defendant in a criminal case the assistance of counsel, and prohibits a defendant from being compelled to be a witness against himself or herself, "or be deprived of life, liberty, or property without the due process of law." (Cal. Const. art. 1, § 15.) This provision protects multiple rights of *criminal defendants* also protected by various provisions of the U.S. Constitution. However, this provision does not protect the rights of citizens *in general*; rather the rights attach, based on the plain language of article 1, section 15, only when someone is a "defendant in a criminal cause." Plaintiffs do not plead facts sufficient to support a theory of direct injury because they have not and presumably cannot allege that they are or were criminal defendants who had any of the enumerated rights in article 1, section 15 violated. Accordingly, the Demurrer should be sustained on this basis.

4. Plaintiffs' Allegations Do Not Support a Claim for Writ Relief.

As with the constitutional claims, the corollary of Plaintiffs' standing problems also resonates in their failure to adequately state a claim. Again, Plaintiffs' mandamus claims seek to compel compliance with Penal Code sections 1054.1, *et seq.* and 4001.1(b). (FAC, at p. 36.) Yet, as noted above, California law provides that "[n]either specific nor preventative relief can be granted . . . to enforce a penal law . . . ." (Civ. Code, § 3369.) The explanation behind this is that "private standing to seek enforcement of a 'public duty' is inapplicable" in relation to a penal statute because the "public prosecutor has no enforceable 'duty' to conduct criminal proceedings in a particular fashion." (*Dix, supra*, at p. 453.) The inability to enforce a penal statute exists regardless whether it is plead under a direct or indirect theory, for again, courts have expressly concluded that "a taxpayer action will not lie to enforce a Penal Code provision." (*Leider, supra*, at p. 1137.)

Even absent this express and determinative prohibition on direct or public interest standing, Plaintiffs fail to plead facts sufficient to overcome the remaining typical writ hurdles. Plaintiffs fail to

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plead facts showing a "beneficial interest" in the relief they seek.[4] (*See Braude, supra,* at p. 87.) Likewise, mandamus does not lie to vindicate abstract rights. (*California High-Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th 676, 710.) Rather, "there must be a present duty for a writ of mandamus to issue." (*Id.*; see also *mcleo v. Warren* (1948) 32 Cal.2d 351, 362–363 ["to be entitled to the writ, one must assert a clear legal right to the performance of the particular duty sought to be enforced"].) Here, Plaintiffs claim that the OCDA and OCSD "customarily suppress evidence that is favorable to the defense," that they "have concealed . . . the existence of evidence" and "failed to conduct inquires, etc." (FAC at ¶ 146.) However, these allegations do not identify a clear and present duty owed by OCSD and the OCDA to Plaintiffs.

E. The Demurrer Should Be Sustained Without Leave to Amend.

Not only should the Demurrer be sustained, but it should be sustained without leave to amend. Leave to amend should only be granted where the Plaintiff can demonstrate a reasonable possibility that he can cure the defects of the Complaint. (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711.) Here, were the Court to sustain the demurrer, Plaintiffs would not be able to cure the defects. Were the court to sustain on the grounds of standing or statute of limitations, those defects would be dispositive. Further, as Plaintiffs have already had two operative complaints, they have already shown an inability to plead further essential facts necessary to constitute a cause of action.

IV. CONCLUSION

For the foregoing reasons, the County respectfully requests that the Demurrer be sustained without leave to amend.

DATED: November 2, 2018

Respectfully submitted,
LEON J. PAGE, COUNTY COUNSEL
ADAM C. CLANTON, DEPUTY

By /s/
Adam C. Clanton, Deputy
Attorneys for Defendants/Respondents

[4] This analysis applies equally to P.E.O.P.L.E., because to establish associational standing, a plaintiff "must demonstrate that its members would otherwise have standing to sue in their own right." (See e.g., *Associated Builders and Contractors, Inc. v. San Francisco Airports Com.*, 21 Cal.4th 352, 361–62 (1999).) Because Plaintiffs cannot establish the standing of its members, Plaintiffs cannot allege standing of P.E.O.P.L.E.

DECLARATION OF REBECCA S. LEEDS

IN COMPLIANCE WITH CODE OF CIV. PROC. §430.41

I, REBECCA S. LEEDS, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am employed as a Senior Deputy County Counsel for the County of Orange and I represent Defendants/Respondents, Anthony J. Rackauckas, in his official capacity as Orange County District Attorney and Sandra Hutchens, in her official capacity as Orange County Sheriff (collectively, "Defendants"). I have personal knowledge of the facts stated herein, except for those facts stated on information and belief and as to those facts, believe them to be true. If called as a witness, I could and would competently testify under oath to the matters stated herein.

2. On October 23, 2018, I reached out to Brendan Hamme, one of the attorneys for Plaintiffs in this matter, regarding our meet and confer obligations pursuant to Code of Civil Procedure section 430.41. I acknowledged that we had previously met and conferred extensively on both August 31, 2018, via telephone, in conjunction with our prior demurrer to Plaintiffs' original complaint, as well as on June 4, 2018, via telephone, in conjunction with the Rule 12(b)(6) Motion we had filed in federal court. Multiple attorneys participated on both sides in each meet and confer conference. As the arguments in the present demurrer have all been previously raised and discussed without reaching any agreement, the parties believe that we have complied with our meet and confer obligations.

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

Executed November 2, 2018, at Santa Ana, California.

Rebecca S. Leeds, Declarant

OFFICE OF THE COUNTY COUNSEL
COUNTY OF ORANGE

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 email address is patti.owens@coco.ocgov.com. I am not a party to the within action.

On November 2, 2018, I served the following document, **NOTICE OF DEMURRER AND DEMURRER TO FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND VERIFIED PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; AND DECLARATION OF REBECCA S. LEEDS IN COMPLIANCE WITH CCP § 430.41,** on all other parties to this action in the following manner:

BY ELECTRONIC SERVICE: Pursuant to California Rules of Court, rule 2.251(c)(2), I caused an electronic version of the document(s) to be sent to the person(s) listed below.

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

Dated: November 2, 2018

Patricia A. Owens

Attorneys for Plaintiffs/Petitioners: PEOPLE FOR THE ETHICAL OPERATION OF PROSECUTORS AND LAW ENFORCEMENT (P.E.O.P.L.E.); BETHANY WEBB; THERESA SMITH; and, TINA JACKSON:

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