S232622

IN THE SUPREME COURT OF CALIFORNIA

AARON LEIDER,

Plaintiff and Appellant,

v.

JOHN LEWIS, et al.,

Defendants and Appellants.

SUPREME COURT
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After a Decision by the Court of Appeal, Second Appellate District, Case No. B244414

OPENING BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(California Rules of Court, rule 8.208)

For the City of Los Angeles and John Lewis, there are no interested entities or persons that must be listed in this certificate under California Rule of Court, rule 8.208.

July 26, 2016

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I. ISSUES PRESENTED.

1. Does Civil Code section 3369 bar taxpayer actions brought under the authority of Code of Civil Procedure section 526a seeking to enjoin violations of Penal Code provisions concerning animal abuse?

2. Does the law of the case doctrine foreclose petitioners' reliance upon that legal argument in this appeal?

II. INTRODUCTION.

A Los Angeles taxpayer sued a city and its employee, seeking to close the city's new $42 million elephant exhibit at its zoo, because of alleged crimes against elephants. The taxpayer, Aaron Leider, claims standing under Code of Civil Procedure section 526a, while the City of Los Angeles (City) and John Lewis assert his action is barred by Civil Code section 3369.[1]

Civil Code section 3369: Under section 3369, equitable relief cannot be granted "to enforce a penal law, except in the case of nuisance or as otherwise provided by law." Taxpayer

[1] This brief refers to individuals by their last names after an initial reference, the City and Lewis are sometimes referred to as "City" or "defendants," and the Los Angeles Zoo is referred to as "LA Zoo."

actions, which authorize equitable remedies to restrain illegal expenditures by state and local governments, could be an exception to this prohibition if, like nuisance and unfair competition, the Legislature authorized it. It could have done this by including taxpayer actions in section 3369, as it did with nuisance and unfair competition, or in Code of Civil Procedure section 526a. Finding exceptions to section 3369 only where the Legislature has made them clear by "declaration" minimizes the insidious collateral effects on the rights of those accused of crimes in equity. (*People v. Lim* (1941) 18 Cal.2d 872, 879-880 (*Lim*).)

The Legislature has not declared taxpayer actions are an exception to the bar of Civil Code section 3369, despite having the opportunity three times when the question was before it. This indicates the Legislature intended to leave the law as it stood at the time of enactment or amendment, when taxpayer actions were not excepted. (See *Cole v. Rush* (1955) 45 Cal.2d 345, 355 (*Cole*), overruled on another ground in *Vesely v. Sager* (1971) 5 Cal.3d 153; *Torres v. Automobile Club of Southern California* (1997) 15 Cal.4th 771, 779 (*Torres*).) Without an express declaration, the Supreme Court should not imply an exception to

section 3369 for taxpayer actions. (*Lim, supra,* 18 Cal.2d at pp. 879-880.)

This case squarely presents the foregoing concerns. The City and Lewis were tried in equity for several animal cruelty crimes. Lewis testified against himself without a jury and under the preponderance standard of proof. The court found he and the City violated Penal Code section 597t and entered injunctions against them. According to the dissent: "The majority's decision in this case will empower Leider to bring endless contempt proceedings against the ... LA Zoo ...." (*Leider v. Lewis* (2016) 243 Cal.App.4th 1078, 1107 (dis. opn. of Bigelow, P.J.) (*Leider*).) In those proceedings, Leider will be the prosecutor and Lewis may be fined and imprisoned for violating the injunctions. The Legislature enacted Civil Code section 3369 so this scenario would not come to pass and this court decided *Nathan H. Schur v. City of Santa Monica* (1956) 47 Cal.2d 11 (*Schur*), so it would not happen in taxpayer actions.

Law of the case: The law of the case doctrine does not preclude the City and Lewis from asserting Civil Code section 3369 bars Leider's action. The issue section 3369 presents was

not decided explicitly or implicitly in the first appeal, which decided that Leider's claim was justiciable because Penal Code section 596.5 provided a legal standard to test the claim. Whether a taxpayer may enjoin government from committing crimes was not a basis of the first appeal. If it was, the exception to the doctrine for an unjust decision applies.

The Supreme Court should hold that Civil Code section 3369 bars this action, Code of Civil Procedure section 526a is not an exception to it, and law of the case does not preclude the City and Lewis from asserting it. They respectfully request the court to direct that judgment be entered for them.

III. FACTUAL AND PROCEDURAL SUMMARY.

A. Factual Summary.

1. The Parties.

Leider lives in the city and pays taxes there; the City operates the LA Zoo. (1 CT 39; 5 RT 735-736.) Lewis has been the LA Zoo's Director since 2003 and still holds that position. (7 RT 1375, 1379.) He reports to the City's mayor. (7 RT 1376.)

2. The LA Zoo.

The LA Zoo holds a Class C license issued by the United States Department of Agriculture (USDA). (7 RT 1376.) The USDA ensures compliance with the federal Animal Welfare Act by institutions that exhibit mammals. (7 RT 1376.) The USDA conducts a physical inspection as part of its annual certification process. (7 RT 1377.) The LA Zoo's new elephant exhibit opened to the public in December 2010. (5 RT 745.) By the time of trial in May 2012, the USDA had inspected the new exhibit three times, including one month before trial. It found "no non-complaint items." (7 RT 1377-1378.)

The LA Zoo is also accredited by the Association of Zoos and Aquariums, or AZA. (7 RT 1378.) The AZA reviews all aspects of zoo operations during a rigorous accreditation process every five years. (7 RT 1378-1379.) If a problem arises during that period, the AZA can re-inspect and revoke an institution's accreditation. (7 RT 1379.)

3. The City Council Twice Voted to Build the New Elephant Exhibit.

When Lewis arrived at the LA Zoo in 2003, a new elephant exhibit was already being planned. (7 RT 1379.) Initially, it was

shelved because of cost and then redesigned to create more space for elephants. (7 RT 1379-1380.) A further re-design required City Council approval because of the project's changed scope. (7 RT 1380.) By that time Antonio Villaraigosa, the City's new mayor, asked that the proposed exhibit be evaluated to determine whether there should continue to be an elephant habitat at the LA Zoo. (7 RT 1380; exhibit 204, p. 19.)

The City's Chief Administrative Officer investigated the status of the LA Zoo's elephants, the elephant industry, and financial issues associated with building a new exhibit, and he ultimately recommended that the new exhibit be built. (7 RT 1381; exhibit 204, pp. 4, 1-16.)

In 2006, over organized opposition, the Los Angeles City Council voted 13 to 2 to continue to exhibit elephants at the LA Zoo and to build the Elephants of Asia exhibit (then known as Pachyderm Forest) starting in 2007 at a cost of $40 million. (1 CT 18; 5 RT 715-716; 7 RT 1380; exhibit 204, p. 6.) While the new exhibit was under construction from 2008 to 2009, the City Council reconsidered the project, including whether elephants should remain at the LA Zoo, Billy (the LA Zoo's bull elephant)

should be sent elsewhere, and whether the now-$42 million construction project should continue. (5 RT 716-717, 719-720; 7 RT 1382-1383.) After extensive committee and City Council hearings, the City Council voted to continue with construction. (5 RT 719-720; 7 RT 1383-1384.)

4. The Elephant Exhibit and the Elephants.

a. The Exhibit's Architectural Features.

The new elephant exhibit consists of a large barn with heated floors and padded stalls encircled by four yards. (5 RT 751-752, 760, 764, 768.) Their substrate is two feet of riverbed sand. (5 RT 747, 754-755, 762, 766.) The yards include enrichment devices such as boomer balls (5 RT 747, 754-756), a large sand pile (746, 748), a large hollow log into which items are placed for foraging (746, 748), and water features in every yard (5 RT 746-747, 752, 754, 761, 765). The elephants are excluded with electrified wire from planters to keep them from eating all the vegetation. (5 RT 753.) Subtracting these areas and including water features, 2.78 acres is accessible to elephants. (8 RT 1512-1513.) They typically have access to one or two yards at a time

because the LA Zoo's male and female elephants must be separated. (5 RT 770-771; 6 RT 925-926.)

Leider's expert Joyce Poole testified that the new exhibit is "much better" than the old one with its water features, sloped terrain, enrichment devices, and size, though it did not go nearly far enough. (4 RT 473-474.) The trial court singled Poole out as "far and away the most qualified witness at trial." (6 CT 1230.) Defense expert Jeff Andrews testified that the new exhibit is larger and "more state-of-the-art" than all but a few other exhibits in the country. (6 RT 1097.)

Leider presented evidence that the elephants' huge size compacted the soil and that compaction is related to smaller spaces. (3 RT 50, 74.) The exhibit's sand had become "compacted and densified" and as hard as concrete. (3 RT 66, 71, 73.) Hard substrates create the risk of injuring the elephants' joints, feet, and nails (6 CT 1223, 1226), with captive elephants inevitably developing foot problems from lack of exercise (6 CT 1236-1239). The trial court credited this evidence and it became the basis of the court's exercise and rototilling injunctions.

b. The LA Zoo's Elephants.

(1) Tina and Jewel Were Rescued From an Abusive Texas Home.

Tina and Jewel, 50 and 46 years old, respectively, at the time of trial, are former circus elephants that arrived at the LA Zoo in October 2010. (3 RT 112; 5 RT 789-790; 7 RT 1323.) In 2009 Andrews, then Assistant Curator of Mammals for all San Diego Zoo-related entities (San Diego Zoo), assisted the USDA with confiscating them from an abusive Texas home. (6 RT 1038, 1042, 1044.) They had been chained in a tiny area unable to interact or take more than a few steps in either direction (6 RT 1039-1040), and their physical condition was terrible (6 RT 1043-1044).

(2) The San Diego Zoo Selected the LA Zoo to Be Tina and Jewel's Home.

In the early 1990s, the San Diego Zoo developed the protected contact system of elephant management for safety reasons. (6 RT 1035-1036.) In protected contact, a physical barrier or restraint separates person from elephant to keep the person safer. (6 RT 1036.) "[T]he system ... employs a positive reinforcement trust-based training system, so the elephants are trained to want to cooperate" instead of being forced to by

physical dominance. (6 RT 1036.) At the time of trial, neither the USDA, AZA, nor the California Fish and Game Department required protected contact elephant management. (6 RT 1036.)

The San Diego Zoo took great care in evaluating whether the LA Zoo would be a good fit for Tina and Jewel, a decision to which the LA Zoo's long-standing protected-contact management of Billy was important. (6 RT 1046-1047, 1049-1051.) The U.S. Fish and Wildlife Service gave the San Diego Zoo permission to send Tina and Jewel to the LA Zoo. (6 RT 1045-1047; 1049-1051.) The LA Zoo, unlike the San Diego Zoo, could keep the "very well-bonded" elephants together. (6 RT 1045.) Andrews then headed a San Diego Zoo team that extensively trained the LA Zoo's elephant keepers. (6 RT 1047-1049.) According to Andrews, the LA Zoo's protected contact system and its training, management, and elephant husbandry practices are state of the art. (6 RT 1097.) Those practices are stated in the LA Zoo's elephant care manual, which provides that only protected contact and positive reinforcement shall be used with the elephants. (Exhibit 264, pp. 4, 16-20, 27; 5 RT 782, 785-786 [protected contact and positive reinforcement are required].)

In late 2010 the two zoos entered into an AZA Exhibit Loan Agreement for Tina and Jewel. (Exhibit 220, pp. 1-4; 7 RT 1387-1388.) When they arrived at the LA Zoo, Jewel was still underweight and both elephants still had abscesses on their feet that resolved with further treatment. (5 RT 789-790.) Under the Agreement the San Diego Zoo retained ownership of Tina and Jewel. (Exhibit 220.) The Agreement specified that protected contact would be used on all LA Zoo elephants, and that it could not use or keep bullhooks. (Exhibit 220, p. 4, ¶¶ 2, 4.2.)

c. Billy Had Long Been Managed With Protected Contact.

Billy is an Asian elephant brought to the LA Zoo in 1989. (6 CT 1215.) He was 27 years old at the time of trial (5 RT 743) and had been managed solely with protected contact since he was eight years old (6 RT 997).

Before moving to the new exhibit, for eight years Billy had been kept on less than a half-acre. (6 RT 979.) In the new exhibit, Billy's muscle tone improved from exercise and walking on varied terrain. (6 RT 903.) According to Leider's expert, Billy looked to be "in very good condition" and his foot issues were being

addressed on a daily basis. (4 RT 418, 407; 7 RT 1370 [defense expert].)

d. The Elephants' Interactions With Each Other.

Billy is kept apart from Tina and Jewel for safety reasons but he is not in isolation, according to Leider's expert. (6 RT 926; 4 RT 377-378.) He is in their company across a barrier, and communicates significantly with them. (6 RT 926; 4 RT 377-378.) Bulls at PAWS (an elephant sanctuary to which Leider wants to send Billy) are also separated from females. (4 RT 378.)

Senior Elephant Keeper Vicky Guarnett testified that Tina, Jewel, and Billy interact often, and touch and caress each other through yard gates. (5 RT 792-793; 6 RT 901-902.) Poole testified that the elephants interacted just once during her six-hour observation of them. (4 RT 432, 439.)

B. Procedural Summary.

1. Leider Filed a Taxpayer Action, the Trial Court Granted Summary Judgment, and the Court of Appeal Reversed.

In 2007 Leider and Robert Culp filed a taxpayer action under Code of Civil Procedure section 526a, alleging the City and Leider were violating Penal Code section 596.5 by abusing

elephants. (1 CT 16.) The trial court granted summary judgment, which the Court of Appeal reversed. (*Culp v. City of Los Angeles* (Sept. 23, 2009, B208520) [nonpub. opn.] (*Culp*).)

2. Leider Amended His Complaint, Alleging the City and Lewis Committed Additional Crimes.

Leider filed a first amended complaint (complaint) that pled claims for injunctive and declaratory relief. (1 CT 49, 52.) Culp had died, leaving Leider the sole plaintiff. (1 CT 38.) The complaint's opening lines stated that Leider sought to "enjoin illegal conduct, injury to elephants (City property) and waste"—the three bases for a taxpayer action under Code of Civil Procedure section 526a. (1 CT 38.) Leider alleged an injunction was necessary to prevent the LA Zoo from torturing and abusing elephants in violation of Penal Code sections 596.5, 597, and 597.1, and that the LA Zoo had been criminally abusing elephants for over 30 years. (1 CT 39 [¶ 5], 40 [¶ 8], 41 [¶¶ 9-10], 47 [¶ 31], 50-52, 54.) Leider raised Penal Code section 597t, on which the judgment is based, at trial. (4 CT 902.)

Leider sought an order enjoining the City from constructing the new elephant exhibit and a judicial declaration that the LA Zoo's old and new exhibits were "inadequate, illegal (abusive),

damaging and wasteful[.]" (1 CT 54.) Alternatively, Leider sought "an injunction prohibiting any past or reasonably anticipated conduct, as proven at trial, which would violate Penal Code sections 597, 597.1, or 596.5." (1 CT 54.)

Leider alleged that the LA Zoo "simply does not have the real estate" for an elephant exhibit and that its substrates are too hard for elephants. (1 CT 47 [¶ 32], 48 [¶¶ 35-36].) These physical characteristics, he alleged, constitute animal abuse in violation of Penal Code sections 597, 597.1, and 596.5, and it is therefore a crime for the City to maintain an elephant exhibit and an illegal expenditure of City funds under Code of Civil Procedure section 526a. (1 CT 50 [¶ 44].)

In addition to the elephant exhibit's criminal architectural features, Leider alleged that the LA Zoo has a history of criminally abusing elephants with "chains, drugs, bull hooks, [and] electric shock" (1 CT 41 [¶ 9]) and has killed over a dozen elephants by starvation, dehydration, lack of observation and medical care, and drug overdose (1 CT 42-47). "All of these abusive acts and omissions are illegal pursuant to Penal Code sections 597, 597.1 and section 596.5[.]" (1 CT 50 [¶ 44].)

3. The City and Lewis Asserted by Demurrer and Writ Petition That Civil Code Section 3369 Bars This Action.

The City and Lewis generally demurred to the complaint, arguing that courts may not use their equitable powers to enforce the Penal Code, a principle contained in Civil Code section 3369. (1 CT 60, 72-76; Code Civ. Proc., § 647.) The parties filed supplemental briefs after Leider asserted that a 1977 amendment to section 3369 would render it inapplicable to this case. (2 CT 293, 301, 303.) The trial court took judicial notice of the amendment's legislative history, and the Court of Appeal augmented the record to include it.[2]

The trial court overruled the demurrer (3 CT 558), and the City and Lewis petitioned for extraordinary review (*Lewis v. Superior Court*, B230233; Code Civ. Proc., § 647 [demurrer rulings are deemed excepted to]). The Court of Appeal summarily denied the petition. (See docket in B230233.) The City and Lewis

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[2] Court of Appeal orders dated October 9 and 28, 2013, augmented the record with (1) two volumes of Exhibits to Motion to Augment Record on Appeal (Augmented CT 20) and (2) the reporter's transcript of the demurrer hearing (Augmented RT 8-9 [taking judicial notice]). This brief cites only the first volume of the augmented Clerk's Transcript and so does not include volume numbers in citations.

raised Civil Code section 3369 again in their trial brief. (5 CT 964-965, 968.)

4. The Trial.

The court held a bench trial in June 2012. (6 CT 1213.) Leider requested, as an alternative to closing the elephant exhibit, that Billy be sent to an elephant "sanctuary." (6 CT 1215.)

5. The Statement of Decision.

a. The Court's Framework.

The trial court analyzed the three bases for injunctive relief in Code of Civil Procedure section 526a—illegal expenditures, waste, and injury to City property. (6 CT 1219, 1264-1265.) Relying on the Court of Appeal's prior opinion, the court noted that "all three prongs require some legal standard against which the governmental action can be measured" and that courts will "only 'restrict conduct that can be tested against legal standards.' " (6 CT 1218, quoting *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 160-161.)

b. The Court Found Illegal Expenditures Based Upon Penal Code Violations.

(1) The Court Found Leider Entitled to an Injunction Under Penal Code Section 597t to Exercise the Elephants and Rototill the Exhibit's Soil.

Leider's primary claim has been that the elephant exhibit is insufficiently large and its substrates are abusively hard. (See 6 CT 1222.) Yet the court found Leider's evidence was "inconclusive" on the "seemingly crucial disputed issue" of how much space a captive elephant needs. (6 CT 1222.)

The court did find, however, that the substrates are too hard and create a risk of injury to the elephants' joints, feet, and nails, and that the exhibit was not being rototilled. (6 CT 1223, 1226.) The court credited a defense expert's testimony on the inevitability of captive elephants developing foot problems, with lack of exercise as the main culprit. (6 CT 1236-1239.) A minimum of one to two hours of walking exercise a day keeps elephants' joints, tendons, ligaments, and feet healthy—a minimum the LA Zoo did not meet. (6 CT 1236, 1261.)

Based on Penal Code section 597t, the trial court ordered the City and Lewis to exercise the elephants at least two hours a day and to rototill the exhibit's soil. (6 CT 1261-1262.)

(2) Leider Did Not Prove the City and Lewis Generally Abused Elephants in Violation of Penal Code Section 596.5, But the Court Enjoined Any Future Use of Bullhooks or Electric Shock.

The trial court considered Leider's claim under Penal Code section 596.5 that the exhibit constitutes illegal expenditures under Code of Civil Procedure section 526a. (6 CT 1219.) The City and Lewis could violate section 596.5 by (1) engaging in abusive behavior in general toward elephants (6 CT 1221-1248) or (2) engaging in the inappropriate methods of discipline listed in subdivisions (a) through (f) (6 CT 1248-1249).

The court addressed whether captivity is abuse under the statute. "Captivity is a terrible existence for any intelligent, self-aware species, which the undisputed evidence shows elephants are." (6 CT 1242, 1229 [elephants' quality of life is "particularly poor"].) The elephants engage in stereotypic behavior (meaningless activity such as head-bobbing or rocking) which stresses their joints and feet. (6 CT 1229.) The court was critical

of Guarnett's contrary view on this and other points. (6 CT 1231-1232, 1239-1240 ["disturbing[,]" "absurd" beliefs].)

But under the standards for animal abuse that the court examined in a number of cases (6 CT 1243-1248), Leider's claim failed because the "exhibit is [not] subjecting the elephants to needless suffering or inflicting unnecessary cruelty on the[m]." (6 CT 1247-1248.) While Leider proved the City and Lewis "are not treating the elephants very well," he did not prove they were engaging in abusive behavior "by keeping them in their current captive environment." (6 CT 1248.)

The trial court did, however, enter injunctions against using bullhooks and electric shock based on the LA Zoo's bygone use of those discipline methods. (6 CT 1248-1256.) The LA Zoo has no reason or desire to use a bullhook again, and using electric shock on an elephant has long been illegal. (Pen. Code, § 596.5, subd. (b).) Although the City and Lewis believe the injunctions are reversible error, they nonetheless challenged them in the Court of Appeal under Civil Code section 3369 alone.

(3) Leider Was Not Entitled to Relief Under the Other Statutes He Pled.

Leider did not show the City and Lewis subjected the elephants to "needless suffering or ... unnecessary cruelty" as Penal Code section 597 requires. (6 CT 1257.) "[T]he LA Zoo's conduct is not abusive, does not amount to causing suffering, and is not cruel beyond the 'ordinary' circumstance of captivity (which plaintiff does not challenge)." (6 CT 1258.)

Nor did Penal Code section 597.1 or 9 C.F.R. section 3.128 provide a legal standard by which the City and Lewis's conduct could be measured under Code of Civil Procedure section 526a's illegal expenditures provision. (6 CT 1258, 1259 [elephants are not "stray or abandoned" under section 597.1], 1260, 1264 [section 3.128 did not apply because the elephants had sufficient space "to make normal adjustments of their posture and social movements[]"].)

c. Leider Did Not Show Actionable Waste or Injury to City Property.

Building "a new elephant exhibit for the public to visit" was not "a useless or completely unnecessary expenditure of public

funds," so Leider did not prove waste under Code of Civil Procedure section 526a. (6 CT 1265.)

Nor did he show actionable injury to City property. Although the court found the LA Zoo was injuring the elephants, governments "are not subject to an injunction every time they injure something. As the Court of Appeal in this case stated, 'when there is no illegal conduct to enjoin, and no waste, as in *Sundance*, the matter may be one of governmental discretion and the court properly declines to get involved.' [Citation]." (6 CT 1265-1266.)

6. The Final Judgment and Appeals.

The trial court entered a final judgment on August 6, 2012, and both sides timely appealed. (Code Civ. Proc., § 904.1, subd. (a)(1); 6 CT 1299 [judgment], 1360 [notice of entry], 1427 [City and Lewis appeal], 1429 [Leider appeal].) The judgment made declarations consistent with the exercise and rototilling injunctions and awarded Leider costs. (6 CT 1300-1301.)

7. The Court of Appeal's Decision.

The Court of Appeal majority found that the law of the case doctrine precluded the City and Lewis from asserting Civil Code

section 3369 as a defense to Leider's action. (*Leider, supra,* 243 Cal.App.4th at p. 1089.) The decision in *Culp* implicitly decided the section 3369 issue, so the doctrine applied absent an exception. (*Leider*, at pp. 1091-1092.) The exception for a manifest misapplication of existing principles did not apply because there was no misapplication, either as to section 3369 or *Schur, supra,* 47 Cal.2d 11. (*Leider*, at pp. 1095-1099.) *Schur* did not apply because the Supreme Court did not view it as a taxpayer action, but rather as an action to enjoin a crime. (*Id.* at p. 1096.) Section 3369 did not apply because "any illegal expenditures" in Code of Civil Procedure section 526a includes criminal as well non-criminal illegal expenditures. (*Id.* at pp. 1097-1098.)

The dissent disagreed on each point. *Schur, supra,* 47 Cal.2d 11, held that Code of Civil Procedure section 526a is not an exception to Civil Code section 3369, and *Schur* controls the outcome of the case. Law of the case did not preclude the City and Lewis from relying on section 3369 because the first appeal did not implicitly decide the issue. (*Leider, supra,* 243 Cal.App.4th at pp. 1108-1111 (dis. opn. of Bigelow, P.J.).) Assuming law of the

case did apply, however, so did the exception for an unjust decision, because affirming the unlawful injunctions will cause endless contempt proceedings over the City and Lewis's compliance. (*Ibid.*)

IV. CIVIL CODE SECTION 3369 BARS TAXPAYER ACTIONS THAT SEEK TO ENJOIN ANIMAL ABUSE CRIMES.

A. The Standard of Review Is De Novo.

The standard of review of an order overruling a demurrer is de novo, as is the question whether a statute bars an action. (*Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 182-183; *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 912-913.)

B. The Statutory Scheme for Equitable Relief Includes Civil Code Section 3369's Bar Against Enforcing Criminal Laws in Equity.

1. Civil Code Section 3369 Bars Seeking Equitable Relief Against Violating Criminal Laws Unless a Statutory Exception Exists.

Leider's claims for injunctive and declaratory relief are based on Civil Code sections 3274 and 3367, both enacted in 1872. Section 3274 provides that "specific and preventive relief may be given in no other cases than those specified in this Part of

the Civil Code." Section 3367 provides that specific relief is given "by declaring and determining the rights of the parties,..." Section 3368 provides that "preventive relief is given by prohibiting a party from doing that which ought not to be done."

Also enacted in 1872, Civil Code section 3369 provides a significant limitation on the power to grant equitable relief: "Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or as otherwise provided by law."

The statute expresses 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[.]" (*Perrin v. Mountain View Mausoleum Assn.* (1929) 206 Cal. 669, 671 (*Perrin*).) In *Perrin*, the plaintiff alleged that the defendant had been convicted of violating a Los Angeles criminal ordinance and intended to violate it in the future. (*Id.* at p. 670.) "[P]rimarily, plaintiff is seeking the enforcement of the ordinances referred to by injunctive proceedings." (*Ibid.*) Relying on Civil Code section 3369, the court held that courts of equity cannot be used to prevent criminal acts and that violating criminal ordinances

alone provides no basis for injunctive relief. (*Id.* at p. 671.) Because the nuisance exception to the statute did not apply, the court dismissed the action. (*Id.* at p. 674.)

A year later, in *Carter v. Chotiner* (1930) 210 Cal. 288, 290-291 (*Carter*), the Supreme Court held it is "elementary that violation of a penal ordinance does not of itself create a private nuisance *per se*, and it is likewise eleme[n]tary that in the absence of special injury an injunction will not be granted on the application of a private individual merely to prevent violation of a penal statute."[3]

2. The Statute's Purpose Is to Protect the Accused From Losing Fundamental Rights in Equitable Courts.

In the cases discussed above, courts barred private parties from enforcing penal laws in equity unless they could plead or prove a private nuisance. In *People v. Seccombe* (1930) 103 Cal.App. 306 (*Seccombe*), the Court of Appeal applied the rule to an action for a public nuisance brought by a prosecutor. The

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[3] Nuisance has always been an exception to Civil Code section 3369. Many early cases such as *Perrin* and *Carter* explore whether the plaintiff—if a private party—alleged or proved the "exceptional" damage necessary to sue for a private nuisance or, if a public prosecutor, alleged or proved a public nuisance.

prosecutor alleged that the defendant had twice been convicted of violating statutes outlawing usury, he intended to commit more such crimes, and the People had no adequate remedy at law to prevent this continuous course of illegal conduct. (*Id.* at pp. 308-309.)

The Court of Appeal found that the prosecutor's allegations failed to state a claim for a public nuisance. Allegations of the defendant's prior convictions and his intent to offend in the future were merely "an allegation of past and a conclusion as to future criminality[,]" and "offenses of which he has not been actually convicted he must be presumed innocent." (*Seccombe, supra,* 103 Cal.App. at pp. 310-311.) The court quoted Civil Code section 3369, then wrote: " 'It is not the criminality of the act that gives jurisdiction in equity, but the deprivation of personal and property rights interfered with, injured, destroyed or taken away by the unlawful act. For the mere vindication of the criminal law and the enforcement of the public policy of the state,... the legal remedy by indictment and prosecution is fully adequate and peculiarly appropriate.' " (*Id.* at p. 314, citation omitted.) As in

Perrin and *Carter*, without a nuisance, section 3369 barred the action.

Eleven years after *Seccombe*, in *Lim, supra,* 18 Cal.2d 872, the Supreme Court announced a more restrictive test for when equity can enjoin a crime. The court held that an action brought under a statute which authorized prosecutors to sue to abate public nuisances would not lie unless a public nuisance as defined specifically by the Legislature in Civil Code sections 3479 and 3480 was adequately pled. (*Id.* at pp. 880-881.) The court also held that the common law nuisance of operating a gambling house that was outside the statutory definition of a public nuisance would not support an injunction action: "Conduct against which injunctions are sought in behalf of the public is frequently criminal in nature. While this alone will not prevent the intervention of equity where a clear case justifying equitable relief is present [citations], it is apparent that the equitable remedy has the collateral effect of depriving a defendant of the jury trial to which he would be entitled in a criminal prosecution for violating exactly the same standards of public policy." (*Id.* at p. 880.)

Further, "The defendant also loses the protection of the higher burden of proof required in criminal prosecutions and, after imprisonment and fine for violation of the equity injunction, may be subjected under the criminal law to similar punishment for the same acts. For these reasons equity is loath to interfere where the standards of public policy can be enforced by resort to the criminal law, and in the absence of a legislative declaration to that effect, the courts should not broaden the field in which injunctions against criminal activity will be granted." (*Lim, supra,* 18 Cal.2d at p. 880.)

A month after *Lim*, the Court of Appeal decided *Monterey Club v. Superior Court* (1941) 48 Cal.App.2d 131, 146: "A court of equity will not undertake to enforce the criminal law.... [A]n individual accused of crime by way of prohibition or injunction would not only be required to prove his own innocence, but as well would be deprived of the right of trial by jury, the protection of the presumption of innocence and the doctrine of reasonable doubt; and in the final analysis, upon an order to show cause would be forced to become a witness against himself."

The year after *Lim*, the Supreme Court addressed an analogous situation. (*International Assn. of Cleaning and Dye House Workers v. Landowitz* (1942) 20 Cal.2d 418, 419-420 (*Landowitz*).) The Legislature had amended Civil Code section 3369 in 1933 to make unfair competition a tort and an exception to section 3369. (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129-130, fn. 13 (*Kraus*), superseded by statute on another ground as stated in *Arias v. Superior Court* (2009) 46 Cal.4th 969.) In *Landowitz*, the plaintiffs argued that violating San Francisco criminal ordinances setting minimum prices for retail dry cleaning was unfair competition. (*Landowitz*, at pp. 419-420.) But the court held the defendant's practices did not fit within the statutory definition of unfair competition. Therefore, the plaintiffs could not take advantage of the exception to section 3369. (*Id.* at p. 421.) Because the action to restrain violation of the criminal ordinance was not specifically authorized as an exception to section 3369 (*ibid.*), the trial court properly sustained without leave to amend a general demurrer to the complaint (*id.* at pp. 422-423).

Similarly, in *Stegner v. Bahr and Ledoyen, Inc.* (1954) 126 Cal.App.2d 220, 231, the court held, "Failing to prove that the operation of the quarry constitutes a nuisance and failing to prove that [it] results in legal injury to them, plaintiffs are in effect seeking, solely and simply, to enforce a penal law. No such remedy is available to them."

3. Civil Code Section 3369 Enforces the District Attorney's Primacy in Making Charging Decisions.

In *Seccombe, supra,* 103 Cal.App. at page 314, the Court of Appeal referred to the central and unique role of the district attorney in enforcing the criminal laws. An important element of public policy underlying Civil Code section 3369 is that only a prosecutor may represent the People in filing criminal actions. "In California, all criminal prosecutions are conducted in the name of the People of the State of California and by their authority. [Citation.] California law does not authorize private prosecutions." (*People v. Eubanks* (1996) 14 Cal.4th 580, 588.)

The Supreme Court explained in *Dix v. Superior Court* (1991) 53 Cal.3d 442, 450-451, "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. [¶] The prosecutor ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek. [Citation.] No private citizen, however personally aggrieved, may institute criminal proceedings independently [citation], and the prosecutor's own discretion is not subject to judicial control at the behest of persons other than the accused. [Citations.]"

In *People v. Municipal Court* (1972) 27 Cal.App.3d 193, 197, 205-206, the municipal court appointed a special prosecutor to file a complaint the district attorney refused to file, but the Court of Appeal held that only the People, acting through the district attorney, could allege criminal activity: "Thus the theme which runs throughout the criminal procedure in this state is that all persons should be protected from having to defend against frivolous prosecutions and that one major safeguard against such prosecutions is the function of the district attorney in screening criminal cases prior to instituting a prosecution." This theme breaks down when citizens are empowered to try each

other for crimes in equitable courts without specific legislative authorization, as happened here.

4. The Supreme Court in *Schur* Applied the Bar of Civil Code Section 3369 to a Taxpayer Action Against a City.

a. The Facts and Holdings of *Schur*.

In *Schur, supra,* 47 Cal.2d at page 13, two plaintiffs filed separate actions over gambling licenses, each directed at the other. The cases were ultimately consolidated for trial but in significant respects proceeded independently until then. The Supreme Court addressed and decided the cases with parallel reasoning and holdings. The court's holding in the taxpayer action recognized that such actions are not an exception to Civil Code section 3369. (*Id.* at pp. 17-18.)

In *Schur, supra,* 47 Cal.2d at pages 12-13, plaintiff Nathan H. Schur, Inc. (Schur) sued the City of Santa Monica and its police chief, alleging that an ordinance allowing Santa Monica to issue gambling licenses was itself a crime and that issuing the licenses also was a crime. Further, "the City [was] illegally spending money in such licensing and in policing the games." (*Id.* at p. 13.) Schur alleged that Santa Monica had issued licenses to

Roy Troeger and others for illegal gambling games, and it requested "that the city be enjoined" from issuing the licenses. (*Ibid.*) Schur alleged he had standing to sue because he was a city taxpayer. (*Ibid.*)

Meanwhile, Troeger applied to renew his existing licenses, and sued Santa Monica and its police chief. (*Schur, supra,* 47 Cal.2d at p. 13.) Schur and Troeger's actions were consolidated for trial. (*Ibid.*) Before trial, Troeger made undisputed allegations in a supplemental complaint that the police chief had denied his renewal applications and the city council held a public hearing on the denials, heard evidence, and Schur's principal's testimony. (*Id.* at pp. 13-14.) The city council found Troeger's games were legal and he was entitled to the licenses, but the police chief still refused to issue them. (*Id.* at p. 14.) At trial, the court refused Troeger's request to review the city council proceedings, admitted evidence of the games' legality over his objection, and found the games were illegal. (*Ibid.*)

The Supreme Court reversed the judgment in the Troeger action. (*Schur, supra,* 47 Cal.2d at pp. 16-17.) It held that review of the City council's quasi-judicial decision must be based only on

the administrative record and review must be by mandamus, not de novo. (*Ibid.*) The only appropriate question at trial, the court held, was whether the evidence was sufficient to support the city council's findings. (*Ibid.*)

The trial court in Schur's action granted Schur injunctive relief against Santa Monica and declared the games were illegal. (*Schur, supra,* 47 Cal.2d at p. 14.) The Supreme Court recognized the judgment "presents a different question[]" than Troeger's. (*Id.* at p. 17.) "Basically the action was to enjoin the City officials from possibly committing a crime by issuing licenses for gambling games contrary to state law" and Schur "also asked that they be restrained from expending the city funds involved in issuing these particular licenses[.]" (*Ibid.*) In other words, it was a taxpayer action that sought to enjoin illegal expenditures that were a crime.

The Supreme Court reversed Schur's judgment for two reasons: (1) city officials were authorized to determine the questions before them so it was improper to receive independent evidence to review their decisions; and (2) "unless the conduct ... constitutes a nuisance as declared by the Legislature, equity will

not enjoin it even if it constitutes a crime, as the appropriate tribunal" to enforce criminal laws "is the court in an appropriate criminal proceeding." (*Schur, supra,* 47 Cal.2d at p. 17.) The court then cited Code of Civil Procedure section 526a and *Simpson v. City of Los Angeles* (1953) 40 Cal.2d 271, a section 526a case, stating, "[i]t is true that a taxpayer may obtain preventative relief against the illegal expenditure of funds by a municipal corporation"—which is what the statute says. (*Schur,* at p. 17.) The court also cited Civil Code section 3369 and quoted *Lim, supra,* 18 Cal.2d at page 880, for the collateral effects of enforcing criminal laws in equity. (*Schur,* at pp. 18-19.) Thus, the court recognized that section 526a yields to section 3369.

The majority in the Court of Appeal here found that the Supreme Court in *Schur, supra,* 47 Cal.2d 11, did not treat the case as a taxpayer action so *Schur* is not relevant. (*Leider, supra,* 243 Cal.App.4th at pp. 1095-1096.) The majority placed too little importance on the fact that one of two consolidated actions in *Schur* was a taxpayer action in which Schur sought to enjoin Santa Monica's illegal expenditures that constituted a crime, and that the Supreme Court decided the question Schur's action

posed. The majority placed no weight on that holding. Had the majority heeded it, the outcome in the Court of Appeal would have likely have been different.

b. Leider's Action Is Like Schur's—Both Are Barred.

Leider's action is indistinguishable from Schur's action. Leider alleged the City and Lewis have been operating a criminally abusive elephant exhibit and would continue to abuse elephants in the future. (1 CT 41, 47-48, 50.) He sought to enjoin the City's illegal expenditures on the exhibit. (1 CT 54; 6 CT 1248-1256 [§ 596.5], 1260-1262 [§ 597t], 1300.) Schur's taxpayer action alleged that Santa Monica was committing crimes by issuing and administering illegal gaming licenses, which Schur sought to enjoin as illegal expenditures. Both actions were "basically ... to enjoin ... a crime"—which did not make them any less taxpayer actions, contrary to the majority's assertion. (*Schur, supra,* 47 Cal.2d at p. 17; *Leider, supra*, 243 Cal.App.4th at p. 1096.) The Supreme Court's holding that Civil Code section 3369 was one of two reasons why Schur's judgment must be reversed also requires reversal here. Under *Schur,* section 526a is not an

exception to section 3369. (*Leider,* at p. 1117 (dis. opn. of Bigelow, P.J.).)

Unless the Court of Appeal's judgment is reversed, Lewis and other City employees like Guarnett risk being fined and imprisoned without receiving their fundamental rights when Leider tries to hold them in contempt for violating the injunctions. That outcome is likely now that the majority has given the trial court continuing jurisdiction and told Leider to police the injunctions. (*Leider, supra,* 243 Cal.App.4th at pp. 1106-1107.)

The majority dismissed the possibility that the collateral effects discussed in *Lim, supra,* 18 Cal.2d 872, could occur here because Lewis was sued in his official capacity. (*Leider, supra,* 243 Cal.App.4th at pp. 1098-1099.) First, assuming the majority is correct, getting sued and having a judgment of criminal wrongdoing entered against you still is non-trivial. It is upsetting and frightening to get sued, even in a civil matter. Second, Lewis is a career zoo professional. It is easy to imagine the impact on his reputation and career to have suffered a judgment finding he criminally abused animals in his care. Consider, for example, the

career future of a lawyer enjoined from having sex with clients. (See Cal. Rules of Prof. Conduct, rule 3-120.)

Third, the majority's point is incorrect. For example, county supervisors may be held in contempt for their official acts that violate a judgment of which they have actual notice even though they are not parties to the action. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 902-905.) Parties and their agents may be fined and imprisoned for contempt. (Code Civ. Proc., § 1218.) The supervisors in *Ross* were held in contempt because they were agents of a state official in administering welfare benefits. (*Ross,* at p. 905.) In *City of Vernon v. Superior Court* (1952) 39 Cal.2d 839, 841-843, city council members were held in contempt, fined, sentenced to jail for five days, and also sentenced to jail until they purged their contempt. The Supreme Court affirmed the contempt orders. (*Id.* at pp. 842-843.) In addition, even if Lewis was not sued, the *Lim* considerations would still apply to the City, as the *Schur* court recognized. Every entity including the City can attempt to comply with injunctions only through its agents, who may be held in contempt in any dispute. (*Ross*, at p. 905; Code Civ. Proc., § 1218.) Lewis and Guarnett could similarly

be held in contempt when the inevitable disagreements with Leider about compliance arise.

Leider has pursued his cause with dedication and zeal since 2007. He now has the Court of Appeal's mandate to enforce the rototilling and exercise injunctions. We cannot know with complete certainty whether the dissent's warning of "endless contempt proceedings" over compliance is prescient. What we can know is that Leider's action is barred. The City and Lewis should not have to live indefinitely with the threat of contempt proceedings and actual proceedings based on invalid injunctions.

5. The Legislature's 1977 Amendment to Civil Code Section 3369 Did Not Add Taxpayer Actions to Its Exceptions.

a. The Legislature Intended to Move the Unfair Competition Law Out of the Wrong Code, Not Substantively Change the Law.

Leider has contended that *Schur* is no longer good law because it was based on a version of Civil Code section 3369 that changed with the 1977 amendment of the statute in AB 1280. Changing "except in a case of nuisance or unfair competition" to "except in a case of nuisance or as otherwise provided by law," he contends, was a response to *Schur* and the fact that the pre-1977

version of section 3369 created impassable conflicts with Code of Civil Procedure section 526a and other laws (which he has not identified). Leider is incorrect. The statutory language, scheme, legislative history, and cases fail to support his position.

"When construing a statute, we must ' "ascertain the intent of the lawmakers so as to effectuate the purpose of the law." ' " (*Torres, supra,* 15 Cal.4th at p. 777, citations omitted; Code Civ. Proc., § 1859.) "We begin by examining the language of the statute, giving the words their ordinary meaning. [Citation.] 'The words, however, must be read in context, considering the nature and purpose of the statutory enactment.' [Citation.] In this regard, sentences are not to be viewed in isolation but in light of the statutory scheme. [Citation.]" (*Ibid.*)

Civil Code section 3369 began in 1872 as a simple prohibition against one citizen trying another for a crime in an equitable court, but it changed into something quite different as the unfair competition law overtook the statute's original purpose. That change began with a 1933 amendment that added unfair competition to the statute's exceptions and made its entire text into subdivision 1. (Stats. 1933, ch. 953, § 1, p. 2482.)

The 1933 amendment also added several subdivisions devoted exclusively to unfair competition. (*Kraus, supra,* 23 Cal.4th at pp. 129-130, citing Stats. 1933, ch. 953, § 1, p. 2482 [adding subdivisions (2) through (5)].) This made sense at the time because the Civil Code governed injunctive and declaratory relief and an injunction was the only relief available in unfair competition cases. (Civ. Code §§ 3274, 3367, 3368; *Kraus, supra,* 23 Cal.4th at p. 131.) In 1972, the unfair competition law started being used for general consumer protection when the Supreme Court in *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 109-110, confirmed a broad definition of unfair competition and held that private plaintiffs could enforce it with injunctions. (*Kraus, supra,* 23 Cal.4th at p. 130, citing *Barquis, supra,* 7 Cal.3d at p. 94.) Civil Code section 3369 had shifted nearly completely from its original focus on limiting the injunctive and preventative relief that sections 3367 and 3368 authorize to containing a body of substantive law that had become an engine of litigation in its own right. (See *Kraus,* at p. 130.)

At that point, Civil Code section 3369 provided for injunctive relief against acts of unfair competition, penalties for

violating injunctions, and enforcement by public prosecutors. (Augmented CT 32.) Language regulating competition obscured the original, simple text of section 3369, but the amendment reversed the decades-long process by nearly restoring the statute's original text and clarity.

AB 1280 enacted Business and Professions Code sections 17200 [defining unfair competition], 17203 [unfair competition can be enjoined], and 17204 [prosecutors and anyone acting on his or her own behalf can seek an injunction]. (Augmented CT 33-34.) The amendment transferred the unfair competition law virtually verbatim from Civil Code section 3369 to the Business and Professions Code. (Augmented CT 33-36.) Also transferred were sections 3370.1 and 3370.2, which penalized unfair competition and violating injunctions against it. They became new Business and Professions Code sections 17206 and 17207. (Augmented CT 34-38.)

Amending Civil Code section 3369 to provide "or as otherwise provided by law" instead of "or unfair competition" reflected the fact of that transfer (Augmented CT 32, 35-36), as did new Business and Professions Code section 17202:

"Notwithstanding Section 3369 of the Civil Code, specific or preventative relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition." (Augmented CT 40.) The bill did not add to Code of Civil Procedure section 526a a similar "notwithstanding" provision.

The change from "or unfair competition" to "as otherwise provided by law" in Civil Code section 3369 can be understood by identifying what the Legislature did and did not do. It *moved* the unfair competition law to the Business and Professions Code and *preserved* unfair competition's exclusion from section 3369's bar by both changing its language slightly ("as otherwise provided by law"), to refer to new section 17202, and by enacting section 17202. The change in section 3369's language and section 17202's enactment were complementary, and preserved section 3369's exception for unfair competition. The Legislature did not add similar excluding language ("[n]otwithstanding Section 3369 of the Civil Code" [§ 17202]) to Code of Civil Procedure section 526a or to section 3369 though it easily could and would have had it so intended.

b. The Legislative History Confirms the Plain Meaning Analysis.

"To determine the validity of [the party's] argument, we examine the legislative history. Our objective, of course, is always to look for the intention of the Legislature, and it is appropriate to search for same in committee reports and other sources of legislative history. [Citation.]" (*Salem v. Superior Court* (1989) 211 Cal.App.3d 595, 600; *Hale v. Southern California IPA Medical Group, Inc.* (2001) 86 Cal.App.4th 919, 927 [courts properly take judicial notice of "various legislative materials, including committee reports"].)

Courts always may examine legislative history to interpret a statute even when statutory language is assertedly plain. In *Kulshrestha v. First Union Commercial Bank* (2004) 33 Cal.4th 601, 607, fn. 7, the Supreme Court unanimously rejected the argument that "we need not, and should not, consult [Code of Civil Procedure] section 2015.5's history, because the statute is unambiguous on its face. However, as our cases make clear, courts may always test their construction of disputed statutory language against extrinsic aids bearing on the drafters' intent.

(*Oldstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 813[]; *In re Eddie M.* (2003) 31 Cal.4th 480, 497[].)"

During the 1977-1978 Regular Session the Assembly Committee on Judiciary sponsored AB 1280. No one opposed the bill and it passed both chambers unanimously. (Augmented CT 85, 87.) The Assembly Committee described the bill as follows: "The Civil Code contains a chapter (commencing with Section 3366) which contains the general principles governing injunctive relief. As injunctive relief became more prevalent in unfair competition cases, a process began of adding provisions to that chapter which related only to unfair competition cases. As a result of this process there is now a body of statutory law dealing solely with the enforcement of unfair competition laws which is located in the wrong part of the codes. [¶] This bill transfers these provisions, without substantive change, from the Civil Code to a more appropriate location in the Business and Professions Code." (Augmented CT 72.) (Citations to authority for each type of

legislative history discussed in this section are in the following footnotes.)[4]

The Assembly Committee answered "Code adjustment" to the question, "What problem or deficiency under existing law does the bill seek to remedy?" (Augmented CT 77.)[5] The bill's purpose was "to place unfair competition statutes in the appropriate code." (Augmented CT 78.)[6] "[T]his technical legislation" "would merely transfer the Civil Code provisions [on unfair competition] to be included under the relevant [Business and Professions] Code sections. This would 'clean up' the codes somewhat, by placing all relevant sections under one heading."

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[4] Assem. Judiciary Com. Digest, Assem. Bill No. 1280 (1977-1978 Reg. Sess.) as amended June 3, 1977 [admissible under *Hutnick v. U.S. Fidelity and Guaranty Co.* (1988) 47 Cal.3d 456, 465 & fn. 7 (*Hutnick*)].

[5] Sen. Com. on Judiciary Background Information, Assem. Bill No. 1280 (1977-1978 Reg. Sess.) [relied upon in *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 899-900].

[6] Sen. Com. on Judiciary Rep., Assem. Bill No. 1280 (1977-1978 Reg. Sess.) as amended June 3, 1977 [admissible under *Hutnick, supra,* 47 Cal.3d at p. 465 & fn. 7].

(Augmented CT 27, 86.)[7] "According to the Senate Judiciary Committee analysis, this bill merely makes a technical code adjustment in the location of various statutes relating to unfair competition." (Augmented CT 27, 82.)[8]

Given what is known about the Legislature's purpose and intent, it was preserving the unfair competition exception to Civil Code section 3369 with its "otherwise provided by law" language, which referred to the express exception in new Business and Professions Code section 17202. But the Legislature declined to enact an express exception for Code of Civil Procedure section

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[7] Enrolled Bill Report of Assem. Bill. No. 1280 (1977-1978 Reg. Sess.); *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 218-219 [considering enrolled bill reports]; *Tafoya v. Hastings College* (1987) 191 Cal.App.3d 437, 444 [relying on governor's legal affairs department's bill analysis]; *Post v. Prati* (1979) 90 Cal.App.3d 626, 634 [trial court properly took judicial notice among others of committee reports, the act's "final history[,]" testimony, and correspondence to the governor]; but see *McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1161, fn. 3 [citing numerous cases relying on executive branch materials but declining to do so].

[8] Assem. Conc. in Sen. Am. to Assem. Bill No. 1280 (1977-1978 Reg. Sess.) as amended June 3, 1977 [authored by Assembly Office of Research]; *Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417, 428 & fn. 7 [taking judicial notice of Assembly Office of Research Digest], superseded by statute on another ground as recognized in *Samuels v. Mix* (1999) 22 Cal.4th 1.

526a. Especially given *Schur*'s holding, of which the Legislature is presumed to be aware, this meant the Legislature intended no change in the scope of the exceptions to section 3369. (See, e.g., *People v. Overstreet* (1986) 42 Cal.3d 891, 897 (*Overstreet*).) As of 1977 and to this day, the Legislature has not excepted section 526a from section 3369.

Leider has asserted that the legislative history is silent about the "otherwise provided by law" language of amended Civil Code section 3369. He has also contended that the Legislature intended AB 1280 to overrule *Schur* and add taxpayer actions to section 3369's exceptions. Leider errs. The legislative history unvaryingly states the bill's purpose is to adjust the codes "without substantive change" by transferring the unfair competition law to the Business and Professions Code. (See, e.g., Augmented CT 27, 72, 77, 82.) Overruling *Schur* and adding taxpayer actions to section 3369's exceptions would have been substantive changes. "The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent

to leave the law as it stands in the aspects not amended." (*Cole, supra,* 45 Cal.2d at p. 355.)

In *Torres, supra,* 15 Cal.4th at pages 779-781, to construe a statute as the defendant urged, the Supreme Court would have had to find the Legislature intended to overturn a rule of law established in a 35-plus-year-old Supreme Court case. The court wrote that "[i]n circumstances such as these, we are assisted by the rule that courts should not presume the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless that intention is made clearly to appear either by express declaration or by necessary implication." (*Id.* at p. 779.) In *Torres*, the legislative history was silent, so the court declined to find the earlier Supreme Court case was legislatively overruled. (*Ibid.*)

Here, the legislative history is not silent. The Legislature made no suggestion let alone an express declaration that it intended either to expand Civil Code section 3369's exceptions or to supersede *Schur*. It did neither in AB 1280.

C. Code of Civil Procedure Section 526a Is Not an Exception to the Bar Against Enforcing Penal Laws in Equitable Courts.

1. Three Times When the Subject Was Before It, the Legislature Declined to Except Taxpayer Actions From Civil Code Section 3369.

Code of Civil Procedure section 526a 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 county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, ... by a citizen resident therein, ... who is ... liable to pay ... a tax therein."

Code of Civil Procedure section 526a's purpose is "to permit a large body of persons to challenge wasteful government action that otherwise would go unchallenged because of the standing requirement. [Citation.] To this end, the statute has been construed liberally. [Citation.] Therefore, although by its terms the statute applies to local governments, it has been judicially extended to all state and local agencies and officials. [Citation.] ... Regardless of liberal construction, the essence of a taxpayer action remains an illegal or wasteful expenditure of public funds

or damage to public property. [Citation.]" (*Humane Society of the United States v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 355 (*Humane Society*).) As *Humane Society* noted, the statute "has been the subject of considerable litigation in this state since its enactment almost a century ago." (*Ibid.*)

Civil Code section 3369 was enacted in 1872. When Code of Civil Procedure section 526a was enacted in 1909, section 3369 was well-established law. "[T]he Legislature is deemed to be aware of existing laws ... in effect at the time the legislation is enacted and to have enacted and amended statutes 'in light of such decisions as have a direct bearing upon them.' [Citations.]" (*Overstreet, supra,* 42 Cal.3d at p. 897.) When the Legislature enacted section 526a, it knew that section 3369 barred enforcing criminal laws in equity and that the exception—nuisance—was explicitly stated there. Even so, the Legislature did not include a similar exception for section 526a, either in its text or in section 3369.

In 1933 when the Legislature added unfair competition to Civil Code section 3369 and excepted it from the statute's bar, it did not except Code of Civil Procedure section 526a by amending

either statute. Finally, in 1977 when the Legislature enacted Business and Professions Code section 17202 to continue unfair competition's exception, it did nothing to except taxpayer actions. This was especially notable because the 1977 amendment was the first time after *Schur, supra,* 47 Cal.2d 11, that this subject was before the Legislature, and by then *Schur* had been on the books for 21 years. Certainly, faced with *Schur*, the Legislature would have acted if it wanted to except section 526a from section 3369. Its failure to change the statute in this particular way when it changed the statute in other ways indicates that it intended to leave the law as settled in *Schur*. (*Cole, supra,* 45 Cal.2d at p. 355.)

The Legislature did not explicitly except taxpayer actions from Civil Code section 3369. When it intends to create an exception, it knows how, as with nuisance and unfair competition. Taxpayer actions therefore are not excepted, based not only on principles of construction but also on substantive law. In *Lim, supra,* 18 Cal.2d at page 880, the Supreme Court warned that "in the absence of a legislative declaration to that effect, the courts should not broaden the field in which injunctions against

criminal activity will be granted." To find that the Legislature did intend to except taxpayer actions from section 3369 requires a Legislative declaration saying so. There has been none.

2. The Court Should Not Imply an Exception to Civil Code Section 3369 for Taxpayer Actions.

Does "any illegal expenditures" in Code of Civil Procedure section 526a implicitly except it from Civil Code section 3369? The majority so held, relying on *Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, 764-767, which construed an illegal act exclusion against an insurer to find coverage for the accidental shooting death of the policyholder's guest. (*Leider, supra,* 243 Cal.App.4th at pp. 1097-1098.) In *Safeco*, a homeowners policy excluded coverage " 'arising out of any *illegal* act committed by or at the direction of an insured.' " (*Safeco*, at p. 763.) The Court of Appeal interpreted "illegal" as the violation of any civil or criminal law. This, the Supreme Court wrote, would include the violation of any duty imposed by law, such as to refrain from negligence or to exercise ordinary care, because the violation of any law is an illegal act. (*Id.* at pp. 764-765.) But the Supreme Court rejected the definition as being so broad it rendered the

illegal acts exclusion illusory and invalid. (*Id.* at pp. 765-766.) The court did not apply the definition in that case. (*Ibid.*)

Applying to Code of Civil Procedure section 526a the parade-of-horribles construction of "illegal" the *Safeco* court crafted to be so broad it invalidated the exclusion would be error. It would engraft onto the taxpayer standing statute an exceedingly broad definition of "illegal" from an insurance case where principles of construction are different than they are here. (*Safeco, supra,* 26 Cal.App.4th at pp. 763 [construction based on insured's reasonable expectations; ambiguity is resolved for the insured and based on its understanding at the time of formation].)

Lim, supra, 18 Cal.2d at pages 879-880, and its progeny explained the policy underlying Civil Code section 3369 of not interpreting exceptions expansively and requiring a legislative declaration to find one. That policy is at least equal to the policy of broad construction in the taxpayer standing context. In addition, Code of Civil Procedure section 526a must not be construed in isolation, but with section 3369. (*Torres, supra,* 15 Cal.4th at p. 777.) As discussed in this brief, doing so shows that

section 3369 limits section 526a to equitable relief not directed at enforcing criminal laws, and thereby defines "any illegal expenditures" to exclude such enforcement.

The invoked rules of construction do not support the majority's analysis. (*Leider, supra,* 243 Cal.App.4th at p. 1098.) The majority rewrites Code of Civil Procedure section 526a to make its "specific controls over the general" point fit. More accurately stated, Civil Code section 3369 bars injunctive relief to affirmatively enforce a penal law, but nuisance and unfair competition are exceptions, while section 526a provides that taxpayers may enjoin government from making illegal expenditures, waste, or injuring property. (*Stone Street Capital, LLC v. California State Lottery Com.* (2008) 165 Cal.App.4th 109, 119.) Section 3369 is more specific and controls over section 526a because it is a limitation on section 526a and is aimed at only one of its three categories (illegal expenditures). Nor is it necessary to add words to section 526a to limit "illegal" to non-criminal illegal conduct, because section 3369 limits it by operation of law. (*Leider,* at p. 1098.)

These points aside, the Supreme Court should not imply an exception to Civil Code section 3369 for Code of Civil Procedure section 526a. First, the notion of construing section 526a broadly commands lower value than the principle that courts should find exceptions to section 3369 only when the Legislature has declared them. (*Lim, supra,* 18 Cal.2d at pp. 879-880.) Second, *Schur, supra,* 47 Cal.2d 11, applied the bar of section 3369 to a taxpayer action. Third, at least four courts have found limits on section 526a in statutes or legal principles where taxpayer standing might otherwise appear to be available. The first of those courts is the Supreme Court in *Schur*, which needs no additional discussion. The others are discussed below.

"The cases have ... been careful to note that [Code of Civil Procedure] section 526a has its limits. ... [T]he courts have stressed that the statute should not be applied to principally 'political' issues or issues involving the exercise of the discretion of either the legislative or executive branches of government." Civil Code section 3369, of course, is intended to keep criminal prosecution in the executive branch of government, and keeping elephants in zoos is a fundamentally political and therefore

legislative question. (*Humane Society, supra,* 152 Cal.App.4th at p. 356.) "[T]he courts should not take judicial cognizance of disputes which are primarily political in nature, nor should they attempt to enjoin every expenditure which does not meet with a taxpayer's approval." (*Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1138-1139.) It was on *Sundance* that the trial court's initial grant of summary judgment to the City and Lewis was based.

Daar v. Alvord (1980) 101 Cal.App.3d 480, 485-486, and *Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 495, 497-498, held that taxpayers lack standing to enjoin state and local governments from spending illegally imposed and collected taxes even though a refund action could never redress the harm suffered. "[T]he Legislature would be presumed to have been aware of the common law aversion to enjoining tax collection[,]" just as it was presumed to know of Civil Code section 3369 and *Schur* when it enacted Code of Civil Procedure section 526a or amended section 3369. (*Id.* at p. 498.)

The most recent case to address limits on taxpayer actions is *Animal Legal Defense Fund v. California Exposition and State*

Fairs (2015) 239 Cal.App.4th 1286, 1298 (*ALDF*), which held that a taxpayer lacked standing under Code of Civil Procedure section 526a to enjoin illegal expenditures that violated Penal Code sections 597t and 597—two of the statutes involved in this case. The *ALDF* court relied on *Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 142, which was not a taxpayer action and held there was no private right of action to enforce section 597t. Both courts relied on the Legislature's 1905 statutory scheme which provides for humane corporations, officers, and citizens to enforce the animal cruelty laws. (*ALDF*, at p. 1298.) Because of that scheme, animal cruelty would not go unchallenged in the absence of a taxpayer action, so the plaintiff lacked standing. "[] Section 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. To this list, we add a claim for alleged governmental waste based on an alleged violation of 597 or 597t." (*ALDF*, at p. 1298.)

Humane Society, Daar, Chiatello, ALDF, and *Schur* all found sensible limits on taxpayer actions. The court should not

imply an exception to Civil Code section 3369 for Code of Civil Procedure section 526a and should confirm the longstanding rule that taxpayers may not enforce criminal laws in equity.

D. The Errors Were Prejudicial.

Prejudicial error is reversible. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) Reversible error occurs when an appellate court concludes it is reasonably probable that lower courts would have reached a different result absent their errors. (*Cassim v. Allstate Insurance Co.* (2004) 33 Cal.4th 780, 800.) Here, the prejudice analysis is straightforward. If the Court of Appeal had reversed the trial court's order overruling the City and Lewis's demurrer, judgment would have been entered for them.

V. THE LAW OF THE CASE DOCTRINE DOES NOT PRECLUDE THE CITY AND LEWIS FROM ASSERTING CIVIL CODE SECTION 3369.

A. To Be Law of the Case, a Prior Appellate Decision Must Have Determined the Issue in Question.

An appellate decision "stating a rule of law necessary to the decision ... conclusively establishes that rule and makes it determinative of the rights of the same parties" in subsequent proceedings. (*Nally v. Grace Community Church of the Valley* (1988) 47 Cal.3d 278, 301-302 (*Nally*).) The doctrine is "merely a

rule of procedure and does not go to the power of the court[.]" (*DiGenova v. State Bd. of Equalization* (1962) 57 Cal.2d 167, 179.) It is "subject to ... various qualifications ..., such as the requirements that the point of law involved must have been necessary to the prior decision [and] that the matter must have been actually presented and determined by the court[.]" (*Pigeon Point Ranch, Inc. v. Perot* (1963) 59 Cal.2d 227, 231, overruled on another ground in *Kowis v. Howard* (1992) 3 Cal.4th 888.) An exception to this general rule applies where an issue was "implicitly decided because [it] was essential to the decision on the prior appeal." (*Estate of Horman* (1971) 5 Cal.3d 62, 73, citation omitted (*Horman*).)

It is undisputed that the City and Lewis did not raise Civil Code section 3369 in the earlier appeal and the Court of Appeal did not decide it expressly. The questions, discussed below, are whether it was implicitly decided and, if so, whether applying law of the case would result in an unjust decision.

B. The Court of Appeal Did Not Implicitly Decide the City and Lewis's Civil Code Section 3369 Defense in the Earlier Appeal.

Where a point was essential to an earlier appellate decision and the decision could not have been issued without determining it, then "a necessary conclusion is that the point was *implicitly* decided," even though counsel did not expressly raise or mention it. (*Eldridge v. Burns* (1982) 136 Cal.App.3d 907, 921.)

Applied here, this test means that if Civil Code section 3369 was a bar, the Court of Appeal in *Culp* would have reached out to affirm summary judgment on that ground even though the City did not argue it. An appellate court implicitly decides an issue only when one of two conditions exists: (1) the issue was a necessary step in the *ratio decidendi* or (2) as a matter of standard procedure, the appellate court normally would decide the issue even if its opinion did not mention doing so. An illustration is a decision affirming dismissal of a cause of action based on a general demurrer. The court must reverse if the complaint states a cause of action on any legal theory, so the appellate court must have considered, for example, whether a cause of action labeled slander states a cause of action for libel.

Here, the Court of Appeal was considering a summary judgment. Not only would appellate courts not usually reach for not-argued grounds to affirm, Code of Civil Procedure section 437c, subdivision (m)(2), prohibited this Court of Appeal from doing so unless it gave notice of the intent to do so and permitted supplemental briefing. It did neither.

Leider's original taxpayer claim alleged the City was making illegal expenditures on an abusive elephant exhibit that violated Penal Code section 596.5. In the first appeal, Leider argued that the trial court erred by granting summary judgment against him on the ground that his claim was not justiciable. (*Culp, supra,* B208520, at **4-5.) A taxpayer claim is justiciable if it seeks to measure the government's performance against a legal standard and it does not trespass on legislative or executive discretion. (*Id.* at *9.) The Court of Appeal reversed, holding that section 596.5 provided a legal standard for measuring Leider's claim and it was therefore justiciable. (*Culp,* at **8-9.)

The City and Lewis's subsequent post-remand challenge under Civil Code section 3369 that a taxpayer action may not seek to enjoin a crime was not an implicit basis of the earlier

decision, which could have been reached without it. "Our first decision did not state a rule of law necessary to the decision of the case that we may apply in this subsequent appeal to resolve the section 3369 issue. (*Greene v. Bank of America* (2015) 236 Cal.App.4th 922, 932 []; *Sefton v. Sefton* (2015) 236 Cal.App.4th 159, 172, fn. 6 [].)" (*Leider, supra,* 243 Cal.App.4th at p. 1109 (dis. opn. of Bigelow, P.J.).)

In *Horman, supra,* 5 Cal.3d at page 69, the state failed until just before a retrial to raise the five-year period in which Probate Code section 1026 requires claimants to appear in probate proceedings. (*Horman,* at p. 69.) In a second appeal, the Supreme Court considered whether law of the case precluded the defense as having been "implicitly decided because [it was] essential to the decision on the prior appeal." (*Id.* at p. 73, citation omitted.) The matters presented and determined in the first appeal were whether the survivors established the decedent's identity, their relationship to him, and rulings on motions and evidence. (*Id.* at pp. 73-74.) The court found that neither party raised section 1026 and the court did not expressly determine it. "Neither can it fairly be said that determination of

the issue was essential to the decision." (*Id.* at p. 74.) The state could therefore raise section 1026 at the next trial. (*Ibid.*)

Here, the earlier decision determined that Leider's taxpayer claim was justiciable because Penal Code section 596.5 provided a legal standard by which it could be tested. The City and Lewis, by contrast, have sought to assert Civil Code section 3369 to bar Leider from seeking to enjoin their alleged crimes. Like the five-year claims period in *Horman*, the rule of section 3369 was not essential to the court's earlier decision—it was extraneous to and independent of it. Both are in the nature of defenses, not elements of affirmative claims that might be implicitly determined before concluding the plaintiff stated a claim. Neither are a necessary step in the courts' *ratio decidendi*. The general rule that the law of the case doctrine does not extend to undetermined issues applies here to section 3369. (See also *Nally, supra,* 47 Cal.3d at p. 302 [prior opinion reversing summary judgment based on finding a material issue of fact did not preclude determining the admissibility of evidence].)

Other cases confirm this conclusion. In *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 311 (*Yu*), the

defendants relied on a California Supreme Court case in a first appeal in which they opposed claims arising out of distant forum abuse. In a second appeal, they were precluded from arguing the Supreme Court case had been wrongly decided. (*Ibid.*) They were also precluded from merely "refin[ing] their arguments" on the question whether the plaintiffs had a claim for abuse of process under existing precedent which was unchanged. (*Ibid.*) Relying on and then attacking a key authority must be a textbook situation where law of the case applies. It is unlike the City and Lewis's assertion that equity may not restrain a crime in a taxpayer action after an earlier determination that the action could proceed because it was justiciable.

In *Puritan Leasing Co. v. Superior Court* (1977) 76 Cal.App.3d 140, 149 (*Puritan Leasing*), the court in an earlier appeal implicitly rejected the argument that a lease was unenforceable due to fraud or mistake because the earlier decision found it was valid and enforceable. Similarly, in *Nevcal Enterprises, Inc. v. Cal-Neva Lodge, Inc.* (1963) 217 Cal.App.2d 799, 804 (*Nevcal*), a land sale contract's validity under Nevada law was an "essential condition precedent" to the earlier decision,

which precluded an argument in the second appeal that the same contract was illegal under Nevada law.

The City and Lewis's Civil Code section 3369 defense is like *Horman* and *Nally* and unlike *Yu, Puritan Leasing,* and *Nevcal.* In the latter cases there is often a have-it-both-ways quality to the arguments presented and precluded because they were implicitly decided in an earlier appeal. In *Yu*, the defendants took different positions on the same Supreme Court case in two appeals, which would be like the City and Lewis arguing opposite interpretations of Civil Code section 3369. And in *Nevcal* and *Puritan Leasing*, the parties' later positions were inconsistent with earlier determinations on the same subject.

The majority's notion that avoiding the law of the case doctrine depends on one decision being on the merits and the other decision being procedural lacks support. In *Horman* and here, for example, Probate Code section 1026 and Civil Code section 3369 were both threshold issues that barred the plaintiffs' claims. Whether they are technically procedural or substantive makes no difference.

Civil Code section 3369's bar against trying crimes in equity is not related to whether Leider's illegal expenditures claim based on Penal Code section 596.5 was justiciable. The City and Leider's section 3369 defense was not implicitly determined in the first appeal.

C. Assuming Law of the Case Applies, the Exception for an Unjust Decision Also Applies.

In early decisions, law of the case was inflexible, and courts held they lacked power to depart from it. (*Klauber v. San Diego Street Car Co.* (1893) 98 Cal. 105, 107 [earlier decisions are "invariably" conclusive].) The doctrine is now "recognized as a harsh one ... and the modern view is that it should not be adhered to when ... it results in a manifestly unjust decision.... [Citation.]" (*England v. Hospital of the Good Samaritan* (1939) 14 Cal.2d 791, 795; *Searle v. Allstate Ins. Co.* (1985) 38 Cal.3d 425, 435 [quoting *England* with approval].)

The modern test for departing from law of the case in pertinent part is where there has been "a manifest misapplication of existing principles resulting in substantial injustice[.] ... The unjust decision exception does not apply when there is a mere disagreement with the prior appellate

determination." (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491-492 (*Morohoshi*).) The City and Leider do not, as the defendant did in *People v. Gray* (2005) 37 Cal.4th 168, 197-198, merely attempt to reargue an issue they argued and lost earlier. That would be precluded.

The City and Lewis instead contend that if the *Culp* court decided the Civil Code section 3369 bar, *Culp* manifestly misapplied existing principles because section 3369, enacted in 1872, bars Leider's action, as does the 1956 decision in *Schur, supra,* 47 Cal.2d 11. And *ALDF, supra,* 239 Cal.App.4th at pages 1297-1298, discusses other long-settled principles that support finding the Court of Appeal misapplied existing principles. The City and Lewis do not repeat these substantive points here, and they assume the points have merit for the purpose of discussing the substantial injustice they would suffer if the court finds that their section 3369 defense is precluded. (*Morohoshi, supra,* 34 Cal.4th at pp. 491-492.)

Leider passionately believes, as he alleged, that the City and Lewis are criminals who are killing and torturing elephants. As the dissent pointed out, such strong disagreement about

adequate compliance with the injunctions is likely to breed "endless" contempt proceedings with Leider as prosecutor. (*Leider, supra,* 243 Cal.App.4th at p. 1111 (dis. opn. of Bigelow, P.J.).) Lewis showed above that the majority should not have dismissed the threat contempt proceedings pose to him, that he can be fined and imprisoned for violating the injunctions, and that he suffers other serious harms. (See, e.g., *Ross, supra,* 19 Cal.3d at pp. 902-904, 905.) Nor should the City be subjected to endless litigation based on erroneous injunctions. The City and Lewis will suffer substantial injustice unless the injunctions are reversed.

Finally, the concern that underlies the law of the case doctrine does not exist here. It is " 'to avoid another reversal and proceedings on remand that would result if the initial ruling were not adhered to in a later appellate proceeding.' " (*Nally, supra,* 47 Cal.3d at p. 302.) Declining to adhere to the initial erroneous decision now would not result in additional proceedings, because the City and Lewis's Civil Code section 3369 defense would result in judgment in their favor.

VI. THE AWARD OF COSTS TO LEIDER MUST BE REVERSED IF THE JUDGMENT IS REVERSED.

The unspecified amount of costs the judgment awarded to Leider was filled in by the clerk. (6 CT 1301.) The City and Lewis's notice of appeal therefore "subsume[d] any later order setting the amount of the award." (*Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 998.) If the Supreme Court reverses the judgment, it should also reverse Leider's costs award.

VII. CONCLUSION.

The Supreme Court should hold that Civil Code section 3369 bars taxpayer actions, like this one, that seek to enjoin conduct that violates the animal cruelty laws. If it does so, the rototilling and exercise injunctions and the bullhook and electric shock injunctions must be reversed, along with Leider's costs award.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(California Rules of Court, rule 8.520)

The foregoing Opening Brief on the Merits consists of 13,356 words as counted by the Microsoft Word word processing program used to prepare it.

July 26, 2016

Kathryn E. Karcher

Kathryn E. Karcher

PROOF OF SERVICE

I, KATHRYN E. KARCHER, declare:

I am and was at the time of the service described below a resident of Washington state, Kitsap County, and at least 18 years old. I am not a party to the above-entitled action. My business addresses are 11011 NE Boulder Place, Bainbridge Island, Washington, 98110, and 401 B Street, Suite 2450, San Diego, California, 92101.

On July 26, 2016, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy of it a sealed envelope, addressed as shown below with the postage prepaid, and depositing it in the U.S. mail at Bainbridge Island, Washington:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and that this declaration was executed on July 26, 2016.

Kathryn E. Karcher

KATHRYN E. KARCHER