S232622

IN THE SUPREME COURT OF CALIFORNIA

AARON LEIDER,

Plaintiff and Respondent,

v.

JOHN LEWIS, et al.,

Defendants and Appellants.

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

ANSWER BRIEF ON THE MERITS

CASSELMAN LAW GROUP
DAVID B. CASSELMAN, BAR NO. 81657
5567 RESEDA BOULEVARD, SUITE 330
TARZANA, CALIFORNIA 91356
TELEPHONE: (818) 609-2300

ESNER, CHANG & BOYER
STUART B. ESNER, BAR NO. 105666
234 EAST COLORADO BOULEVARD, SUITE 750
PASADENA, CALIFORNIA 91101
TELEPHONE: (626) 535-9860

Attorneys for Respondent AARON LEIDER

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PASADENA, CALIFORNIA 91101
TELEPHONE: (626) 535-9860

Attorneys for Respondent AARON LEIDER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

I. ISSUES PRESENTED.

1. Whether Civil Code §3369 bars taxpayer actions brought under the authority of Code of Civil Procedure §526a seeking to enjoin violations of Penal Code provisions concerning animal abuse.

2. Whether the law of the case doctrine forecloses petitioners' reliance upon that legal argument in this appeal.

II. INTRODUCTION.

The California legislature used plain language to provide taxpayer standing to enjoin certain acts of public entities or officials. (Code of Civil Procedure Section 526a ("§526a")) It also separately crafted Civil Code Section 3369 ("§3369") which would prevent the use of equity to enjoin crimes, unless authority for such actions is "otherwise provided by law." As drafted and amended, these statutes work in complete harmony.

Robert Culp and Aaron Leider filed this case eight years ago relying upon §526a to save elephants at the Los Angeles Zoo. This case involves abusive activities which have been ongoing for literally decades. The sole agency charged with protecting these animals and sworn to

enforce the Penal Code is the City of Los Angeles. Perhaps not surprisingly, it has consistently refused *to prosecute itself for known violations of Animal Cruelty Penal Codes.* Without §526a, it is beyond dispute that these abuses would have continued unabated to this day: quite literally, a series of wrongs without a remedy.

Even with clear statutory support, the standing issue in this case alone has consumed massive amounts of time, effort and expense. This is true despite voluminous evidence of truly inhumane public conduct. It confirms the critical need for taxpayer standing under §526a.

The City Zoo caused the death of 16 elephants, inflicting abuses never publicly disclosed. Left completely free to do as they wished, Zoo officials applied electric shock, used bull hooks, isolated their elephants in stunningly small spaces, on hard ground, and injured them in many other ways. Indeed, it was undisputed at trial that their **Asian elephants died, on average, fully ten years younger than in <u>all other North America Zoos</u>**.

Nonetheless, Appellants' Opening Brief ("AOB") filed by the City of Los Angeles and John Lewis ("Appellants") misstates the trial court

record, ignoring every single (stunning) trial court finding. Telling summaries of those findings are set forth in the Leider AOB filed with the Court of Appeal at pages 9-10 and 62-80. As set forth therein, it is beyond debate that appellants have been violating Animal Cruelty statutes, causing serious injuries and death to its publicly owned elephants for decades. Yet, at no time has any prosecutor or agency taken action of any kind.

Without taxpayer standing, these wrongs would have continued unabated. Now, faced with simple injunctive orders addressing only some of their abuses, Appellants seem to be promising to violate those injunctions. Indeed, this is *the premise for their complaint that the resulting consequences will be too harsh.* Promises of such willful disobedience raise concerns beyond the standing issue before this Court.

Worse still, Appellants raise these alleged concerns as part of an apparent effort to rewrite the record. The facts are easily demonstrated, *infra.* Their attempts at sleight of hand should thus be rejected. But, beyond the facts, there is an even greater problem with their assertions to this Court. Appellants' transparent goal is to destroy standing in this and other comparable cases. Quite literally, they hope to achieve this

negative accomplishment by turning the rules of statutory construction upside down.

Specifically, they urge this Court to pretend that an unexpressed (alleged) intent in §3369 should be applied instead of *the plain meaning of the language actually used in that statute.* Why?

Then, they seek to apply that imagined, unexpressed intent so as to completely emasculate another unambiguous statute (§526a). They would thus have this Court violate a variety of well established rules of statutory construction at the same time. Specifically:

1) Appellants would have this Court ignore the express exception to Civil Code §3369, which plainly authorizes equitable remedies to enjoin a crime, if such relief is "otherwise provided by law;"

2) *Instead* of applying this plain meaning, they would further have this Court effectively write that language out of the statute, so as to conclude that §3369 provides no such exception, and thus bars all such requests for injunctive relief; and

3) On that basis, they claim that the instant case should be barred, despite the plain meaning and obvious intent ("otherwise provided") in §526a, to create standing for just such actions.

Absolutely no statutory, legal or policy reason is offered to explain why the plain meanings of both §526a and §3369 were not intended to, and cannot be, applied and enforced in harmony. Nor do Appellants even acknowledge, much less attempt to justify the idea of *implying* an unexpressed meaning as to §3369, so as to emasculate the *express, stated purpose* of §526a. No policy or legislative objective is even tangentially served thereby. At the same time, such judicial legislation would violate most of the basic rules of statutory construction.

Indeed, it is only because Appellants belatedly raised this counter-intuitive argument that the "law of the case" issue arose. As explained *infra,* the original Summary Judgment order, and ensuing appellate reversal, were both in response to Appellants' continuing assertions that Respondents lack standing. Their entire defense was built around a variety of arguments to the effect that taxpayers lacked standing to bring such claims. The Court of Appeal considered all of those arguments and decisively resolved the standing issue against them.

Only after losing that appeal did Appellants immediately augment their "standing" arguments. They asserted §3369 for the first time right after the appeal, by way of demurrer. But, even the trial court (which granted the Summary Judgment which was reversed) recognized this as an attempt to relitigate the standing issue. (3CT:558-60) But unfazed, after losing at trial, Appellants raised, and the Court of Appeal again analyzed their standing claims. And once more it rejected them.

Thus, it separately analyzed §3369 as well as the doctrine of "law of the case." Reviewing all of these issues, the Court of Appeal found standing; no error; and no manifest miscarriage of justice.

Despite this history, it is a fundamental, unspoken tenet of Appellants' current assertions, that any litigant should be able to endlessly raise new arguments, despite adverse appellate rulings, all regarding the same requested relief. In this regard, their goal remains the same, to secure an order denying taxpayer standing under §526a.

If Appellants are correct, why should anyone be denied the right to add new arguments, at any time, as they are conceived? The answer is simple. The doctrine of "law of the case" evolved, to insure the exact

opposite. Absent a miscarriage of justice, once an issue has reached the level of an appellate court decision, it should be final. New arguments thereafter are simply too late. While it is a bright line test, it is both fair and entirely reasonable.

Thus, not only was the doctrine correctly applied by the trial court, but it was directly analyzed and properly applied again by the Court of Appeal. The entirety of the record, and this brief, confirm that there was no error in that regard, and certainly no manifest miscarriage of justice.

Indeed, the factual arguments which Appellants now offer to suggest there could be a miscarriage of justice, simply reaffirm their desire to completely depart from the fundamental rules of law which provide structure to our legal system, and thus our society. Specifically, they claim that Appellants will somehow be egregiously, unreasonably and unconstitutionally harmed if the equitable relief ordered by the trial court is enforced. These arguments are not only beyond the issues accepted for consideration by this Court, they miss the entire point.

No taxpayer wants to have to monitor the Zoo to "catch" Appellants in the act of repeatedly violating the limited and necessary

orders imposed by the trial court. But, if Appellants intend to do just that, it reaffirms the need for taxpayer standing to again step up and act, where public prosecutors fail to do so. Bottom line: Appellants veiled threats to serially violate the existing, valid, court orders certainly do not warrant relief or justify the reversal they seek.

III. APPELLANTS' FACTUAL SUMMARY IS BASED UPON INACCURATE AND MISLEADING INFORMATION.

Appellants spend almost 20 pages of their Factual and Procedural Summary reciting background information about: (i) how Billy, Tina and Jewel came to be in the LA Zoo: (ii) how they were purportedly well-cared for at the Zoo; (iii) their physical and mental health; (iv) the physical conditions at the Zoo.

While these issues are significant to an understanding of the facts raised at trial, none of this information is even remotely relevant to the issues presented by this appeal. They could not possibly bear upon whether §3369 bars a taxpayer action, given the express mandate of §526a, or whether law of the case applies. Nonetheless, in an apparent

attempt to sway this Court, Appellants have selectively cited the record, distorting both the evidence and the findings of the trial court.

While these mischaracterizations do not bear directly on the important legal issues presented by this appeal, they are transparently designed to imply that there is no need for §526a standing. As such, they cannot be left unchallenged.

Examples of Appellants' revisionist history include the following:

a. The Condition of the Exhibit.

Appellants boast about the size and condition of their facilities. (AOB:7) Largely irrelevant details are recited, while omitting the facts confirming the remarkably cramped and miserable conditions of even their new elephant enclosure.

Appellants do not mention the trial court finding and undisputed evidence proving that their new, expensive exhibit is the **same size or smaller** than the original exhibit.[1] Plus, much of the new exhibit is not

[1] When confronted, Zoo Director Lewis was forced to admit that the increased acreage of the new exhibit merely added space for the benefit (footnote continued)

even available to the elephants due to the use of electrified wires. (6CT:1226:17-1227:1; 6CT:1227:7-10) Worse still, due to their small size, the ground in the new elephant pens is just as dangerously hard as it was in the old exhibit. (3RT:50:19-22; 54:16-23; 57:7-28)

Appellants claim that the substrate on which the elephants walk "... is two feet of riverbed sand." (AOB:7) However, they omit the trial court findings that the sand is hard, not varied and soft, and the only other surfaces are concrete and immune to rototilling. (6CT:1223:1-5; 6CT:1223:11-15; 6CT:1223:18-20; 6CT:1224:12-1225:20; 6CT:1226:1-4; 6CT:1226:11-1227:1; 4RT:411:3 – 413:25; 7RT:1365:27-1366:7)

The small size of the enclosures is a key contributing factor to the hard ground. But, it is made worse by the fact that limited to such small spaces, excessive urine and fecal matter build up, which further endanger the health of the elephants. (6CT:1228:10-23)

In addition, despite their claims that "... the yards include enrichment devices ..." (AOB:7), the new exhibit plainly fails to provide

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of the public, not the elephants. (7RT:1416:23-1417:8, 1419:18-24; 8RT:1512:19-1513:24)

the elephants with an enriched, stimulating environment. (6CT:1222:6-8; 6CT:1235:18-20; 6CT:1263:23-25)[2] Indeed the trial court found that the elephants are teased by the close proximity of grass and trees to which they are attracted, but are denied access by hot electric wires. (6CT:1227:1-7; 6CT:1227:10–13) This makes life for the elephants in the Los Angeles Zoo even worse. (6CT:1227:10–13)

Appellants even try to spin the trial court emphasis upon the testimony of Leider expert Joyce Poole. She was singled out as "far and away **the most qualified witness at trial.**" (6CT:1230)[3] While Dr. Poole "... testified that the new exhibit is 'much better' than the old one ..." (AOB:8) in no way did she suggest it was even minimally adequate.

Indeed, in context, Dr. Poole explained at length why elephants desperately need much more space than this Zoo is providing in order to live any kind of quality existence. (6CT:1230:11-31:5; 1235:18-25) She could not have been more emphatic in proving the woeful inadequacies

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[2] Appellants cite to the trial court observation that Leider failed to prove "... how much space a captive elephant needs." (AOB:17) However, this was never a relevant issue. The proper question was how much *more* space would be required to safely keep elephants at the L.A. Zoo.

[3] All emphasis in quoted materials is added, unless otherwise stated.

and harm this exhibit is causing to the elephants. (6CT:1235:18-20: 4RT:462:23-28; 4RT:433:7-434:13)

b. The Condition of the Elephants.

As for the condition of the elephants, the trial court made several striking and critically important findings. All of them were completely omitted by Appellants, including the determination that:

- The elephants, which are an intelligent, self-aware species, are not healthy, happy, or thriving. They are suffering pain, boredom, purposelessness, poor physical and emotional health and they are socially deprived. (6CT:1221:19-22; 6CT:1229:1-3; 6CT:1240:21-22; 6CT:1242:17-23; 6CT:1257:23-25)

- The three elephants (including nine of the sixteen elephants who died at the Zoo) suffer from serious, painful foot, leg, nail and joint problems. (6CT:1223:1-7; 6CT:1230:15-16; 6CT:1236:12-13; 6CT:1237:1-3; 6CT:1237:18-22)

- All three elephants at the Zoo engage in an "abnormal" and "unhealthy" pattern of "stereotypic" behavior to a degree of

severity unique to the Los Angeles Zoo. (6CT:1229:1-1231:10; 6CT:1232:8-10; 6CT:1234:3-4; 6CT:1235:6-9)

- This is a life-threatening issue because stereotypic behaviors cause degenerative joint disease, abscesses, infections and arthritis, the leading cause of death for captive elephants. (6CT:1229:8-10; 1236:1-1239:23)

These conclusions were not just proffered by Dr. Poole and other experts for Leider, they were forcefully reaffirmed by the lead *defense* expert, Dr. Oosterhuis from the San Diego Zoo. (6CT:1236:1-1239:7)

Appellants not only bypassed all of these critical findings, they even try to gloss over their undisputed historical use of electric shock and bull hooks on their elephants. Instead they claim that Billy "... had been managed solely with protected contact since he was eight years old ..." and that in the new exhibit his muscle tone improved. (AOB:11)

These claims are offered without explanation, apparently to imply there was no abuse. But, like the 16 elephants that died in this facility, Billy was also a regular victim of physical abuse, caught on video tape.

That tape was admitted into evidence at trial *over the vigorous objections of Appellants*. (Trial Exh. 42)[4]

Appellants cannot dispute this evidence, so they minimize Billy's horrendous situation, claiming that "Billy looked to be 'in very good condition' and his foot issues were being addressed on a daily basis." (AOB:11-12) They skip over the fact his feet *need daily care* because the hard ground still *causes* him life-threatening foot abscesses.

But, Appellants' glib summary also ignores his well-documented stereotypic behavior. All experts agree it is typically caused by confinement in small spaces, on hard ground (6CT:1232:9-10) and is indicative of poor mental health and negative impact on the elephants' emotional well-being. (6CT:1235:6-9)[5]

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[4] As the video evidence reveals, Billy was trained through the use of bull hooks and block and tackle restraints (now expressly violative of Penal Code § 596.5). (4RT:319:12-322:22; 7RT:1395:20-23; 6CT:1240:5-20)

[5] In this respect it is significant that Zoo Director Lewis admitted that from Billy's standpoint, there is really not much difference between the new and old exhibits. (7RT:1415:25-1419:24)

Billy lives, and has always been forced to live in isolation, separated at all times from other elephants.[6] Currently, he is limited to hearing and smelling the two new elephants from afar. As summarized by Dr. Poole, the behavior of elephants in the wild is like "night and day" from that of the Los Angeles Zoo elephants. (6CT:1241:2-6)

Yet, Appellants mysteriously still contend that Billy ".... is not in isolation" (AOB:12) even though the trial court found exactly the opposite. (6CT:1240:22-1241:2-6; 6CT:1235:20-21; 6CT:1)

But, despite all of these telling factors, the most damning evidence that this Zoo continuously fails to provide proper care and attention to its elephants (which Appellants also studiously avoid) is the shocking (and undisputed) comparative death statistic provided by Dr. Poole on direct examination. This fact was established early in the case. Yet, the entire fleet of defense experts admitted the truth of this finding, by silence.

[6] Even Director Lewis admitted that Billy has been kept isolated and the Zoo intends to keep him isolated. (8RT:1502:7-9; 8RT:1503:20-24)

They know it is based upon the fact that 16 elephants in this Zoo died in pain, prematurely, due to a combination of abuses which dominated and truncated their lives. (Trial Exh. 22)

As Dr. Poole explained, without contradiction, Asian elephants at this Zoo are dying, on average, fully ten years younger than at all other North American zoos. This translates to a life expectancy averaging 25% younger than at all other comparable facilities. (4RT:464:25-467:4)

Even Zoo Director Lewis could not deny that these facts mean that the L.A. Zoo is doing something "very wrong." (8RT:1516:26-1517:3) Indeed, many things at this facility are "very wrong." [7]

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[7] Despite this admission at trial, on cross examination it became clear that Mr. Lewis was not nearly as forthcoming with the City Council. Appellants claim that the Council decision to move ahead with the recent $42 million construction was based upon all relevant information. (AOB:6-7)

However, the City Council was clearly given false information and assurances by, among others, Mr. Lewis. He totally misled them regarding the health and well being of the elephants in their care. (8RT:1523:1-1524:7; 8RT:1529:20-26; 8RT:1537:22-26; 8RT:1539:16-18; 8RT:1539:24-1540:5; 8RT:1553:17-24)

Unaware of the fact that two of their elephants were near death, and thus not "just fine" as represented by Mr. Lewis, the Council approved the costly expansion, which did nothing for those elephants. (6CT:1221:19-

(footnote continued)

c. **LA Zoo Staff.**

Appellants also assert that "the LA Zoo's protected contact system and its training, management, and elephant husbandry practices are state of the art.) (AOB:10)[8] This assertion is, not surprisingly, also completely contradicted by many other findings of the trial court, which established:

- The testimony of Appellants' witnesses, including Zoo employees and veterinarians, raised serious concerns about the level of care that the elephants were receiving. (6CT:1239:8-10; 6CT:1257:25-1258:3);

- Ms. Guarnett (the head elephant keeper) had shocking gaps in her knowledge, including "delusional" misconceptions. (6CT:1231:21-15; 6CT:1232, fn.10; 6CT:1239:12-14; 6CT:1239:23-24; 6CT:1242:2-3);

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22) They died soon after the approval was given. (1CT:22-23; 1CT:98-99; 1CT:240)

[8] Indeed, even the San Diego Zoo did not trust the care and management of the L.A. Zoo. It is undisputed that before the San Diego Zoo would agree to place Tina and Jewel at the LA Zoo, they demanded a contractual promise not to use bull hooks on those elephants. (AOB:11)

- The Zoo failed to conduct known tests to gauge the emotional health of its elephants ... ever. (6CT:12421:5-12);

- Zoo management and treatment of its elephants are causing the abscesses in their feet and nails. (6CT:1237:23-1238:2); and

- Zoo Staff incomprehensibly misplaced 1500 days (the equivalent of 3 full years) of key records, which would have documented much more abuse suffered by the elephants. (6RT:1082:14-1083:10; 6RT:1100:10-24; 7RT:1407:19-26; 7RT:1408:13-15; 7RT:1408:23-27; 7RT:1414:7-9)

The bottom line, directly stated by the trial court, was that it agreed "... with plaintiff that the evidence at trial shows that the elephants at the Los Angeles Zoo are not receiving 'proper care and attention'." (6CT:1259:19-20) Even the head Zoo researcher, Cathleen Cox, likened abuse of an elephant to that of a child. (7RT:1269:9-19) The trial court evidently credited this evidence, concluding over-all that:

> "Captivity is a terrible existence for any intelligent, self-aware species, which the undisputed evidence shows elephants are. To believe otherwise, as some high-ranking

zoo employees appear to believe, is delusional. And the quality of life that Billy, Tina, and Jewel endure in their captivity is particularly poor." (6CT:1242:17-23)

Thus, the sanguine, rosy picture of the LA. Zoo painted by Appellants is not just distorted, it plainly obfuscates the truth.

IV. §3369 DOES NOT BAR §526a ACTIONS TO ENJOIN PENAL CODE ANIMAL CRUELTY VIOLATIONS.

Appellants rely, without explanation, upon a former, and now functionally irrelevant, version of §3369. They do so to support their claim that §526a should not be applied, as drafted and enacted by the legislature. This flawed analysis merely begins with animal abuse issues, and would have the much broader, unspoken effect of precluding taxpayers from enjoining any illegal conduct at all.

To achieve their goal, to effectively eviscerate the express intent of the legislature in codifying §526a, Appellants knowingly urge this Court to violate several fundamental principles of statutory construction. No justification is offered for any of their remarkable departures from the

long and controlling history of California jurisprudence on statutory interpretation.

By contrast, Leider seeks only to apply the plain meanings of both §3369 and §526a. They were drafted in complete harmony with one another. Only by misconstruing §3369 is it possible to find a conflicting interpretation. But by doing so, Appellants ignore a cardinal rule.

All litigants and courts are required to seek out and apply only such interpretations which will harmonize, not create conflicts between relevant statutes. At all times, one must assume that the legislature fully understood the law, and enacted new laws with the intent that they could and would work in harmony with all other statutory laws.

a. Appellants Ignore Basic Canons of Statutory Interpretation

Enacted in 1872, §3369 barred direct efforts to enforce criminal laws in equity. At that time, the only stated exception to §3369 was for

cases involving claims of a nuisance.[9] (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 570) The Legislature has since amended the statute multiple times, and each amendment reflected a specific intention to further curtail the initial prohibition.

In 1933, the Legislature added unfair competition to §3369 as an exception, along with nuisance. Both were thus excluded from the bar against directly enforcing criminal laws in equity. (*Kraus v. Trinity Mgt. Services, Inc.* (2000) 23 Cal.4th 116, fn. 13) But as time passed, in 1977, the Legislature felt it necessary to amend this statute once again.

On this occasion, it made the changes which resulted in the current version of §3369, which provides:

> "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*."

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[9] At that time §3369 stated: "Neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, nor to enforce a penalty or forfeiture in any case."

At the same time, Business & Professions Code §17202 was independently added, stating:

> "Notwithstanding Section 3369 of the Civil Code, specific or preventive relief may be granted to enforce a penalty or forfeiture in a case of unfair competition."

This new §3369 language plainly rendered future, isolated amendments to add still more statutory exceptions unnecessary. Following that amendment, in *People v. E.W.A.P., Inc.* (1980) 106 Cal.App.3d 315, 320 the court correctly noted: "the fact that certain conduct is a crime will not prevent the issuance of an injunction if the conduct also falls within a specific statute authorizing an injunction." Nor should this be a controversial proposition.

Indeed, in this case, **Appellants never directly deny that §526a, is such an exception**. They know that it unequivocally authorizes "[a]n action to obtain a judgment, restraining and preventing any illegal expenditure of ...or injury to ...property of a ... city ... " (CCP §526a) No

cogent argument has yet been offered as to why this clear and controlling statute is not dispositive of the standing issue, despite §3369.[10]

The first Leider appellate decision in *Culp v. City Of Los Angeles* (Cal. Ct. App., Sept. 23, 2009, No. B208520) 2009 WL 3021762 (*Leider I*) directly confronted and resolved the standing issue. (1CT:237-2CT:253) But, as if never addressed, Appellants unsuccessfully challenged standing, this time by demurrer immediately after the trial court regained jurisdiction. (1CT:63-82) After trial, the Court of Appeal was thus forced to revisit the issue.

On the merits, the court again found standing. It explained that although the phrase "any illegal expenditure" may not be defined terms in the statute, pursuant to *Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, 763, the phrase "is surely broad enough to include criminal acts in addition to acts otherwise prohibited by law." (*Leider v. Lewis* (2016) 243 Cal. App. 4th 1078 (*Leider II*))

[10] Indeed, no claim has been or can be made that Leider has ever attempted to use the Courts of Equity to directly enforce a Penal Code.

After careful analysis, the court also reaffirmed that based on its plain meaning, §526a, at the very least, authorized taxpayer actions seeking to enjoin criminal acts. It explained that:

> "[W]hile Civil Code section 3369 prohibits injunctive relief to affirmatively enforce a penal law, Code of Civil Procedure section 526a provides an exception for taxpayer actions aimed at stopping government expenditures supporting conduct that is criminal." (*Leider II* at 22)

Nor is this a leap of logic or statutory construction. It merely follows the plain meaning of both statutes, honoring the basic canons of statutory construction. As stated by this Court, in *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 citing *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735:

> "If the [statutory] language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature."

Nor has any supportable argument yet been offered to suggest that either of these statutes is unclear or cannot be read in harmony with one

another. Leider relies upon the language of each statute as proof of the legislative intent that §3369 and §526a can easily be applied without conflict. The same cannot fairly be said of Appellants' interpretations, which violate the rule set forth in *People v. Kennedy* (2001) 91 Cal.App.4th 288, 297:

> "It is the court's duty when interpreting statutes to adopt, if possible, a construction which avoids apparent conflicts between different statutory provisions, even if the provisions appear in different codes."

An analogous point was stated in *Stone Street Capital v. California State Lottery Com'n* (2008) 165 Cal.App.4th 109, 118:

> "We presume that the Legislature, when enacting a statute, was aware of existing related laws and intended to maintain a consistent body of rules."

Despite these basic canons, Appellants seek to judicially eviscerate §526a and the plain meaning of §3369. To fill critical gaps in their reasoning, they rely heavily upon complete silence in the legislative

history. But, as stated in *People v. Kennedy* (2001) 91 Cal.App.4th 288, 296, trying to divine legislative intent is improper where a statute is clear:

> "Only if the language permits more than one reasonable interpretation does a court look to extrinsic aids, such as the object to be achieved and the evil to be remedied by the statute, the legislative history, public policy, the promotion of justice or favoring of lenity, and the statutory scheme of which the statute is a part."

Similarly, in *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239, the court stated:

> "If the meaning [of the statute] is without ambiguity, doubt, or uncertainty, then the language controls. There is nothing to 'interpret' or 'construe.' But if the meaning of the words is not clear, courts must take the second step and refer to the legislative history."

Evidently unsatisfied with their plain meaning, Appellants ask this Court to look to legislative history to justify their disregard for the "or

otherwise provided by law" amendment. While unnecessary and improper, this detour also leads nowhere.

The history of the statute shows that a series of exceptions were added and moved around over time. Without more, including absolutely no discussion as to why the "or otherwise provided" language was added, Appellants want this Court to divine an intent which reads it out of the statute. They urge that the sole purpose of the 1977 amendment was to facilitate the transfer of the unfair competition language to the *Business & Professions Code*. But, the plain meaning of the statute makes it clear that is not all it did.

The legislative history is silent as to why this key language was added ... but the language is also crystal clear and logical. So, what does it mean, if not what it says? Why must there be a *stated* reason for its addition, if its meaning is plain, obvious, and undeniable? We certainly cannot rely upon Appellants' spin, that its obvious meaning should be disregarded because (they conclude) the legislative history suggests the 1977 amendment was not intended to effect "substantive change." (AOB:39) This concept adds nothing to the analysis, particularly since the amendment imposes no substantive change.

It merely maintains the general prohibition of §3369, and reaffirms what should always be implied: it was not intended to contradict or supersede any other express authorizing statute or law. To find otherwise without plain language to that effect, not only reads words into §3369 without basis, it presumes the legislature did not know about §526a when it amended §3369. This violates yet another bedrock principle of statutory construction:

> "The Legislature is presumed to know existing law when it enacts a new statute, including the existing state of the common law."

(*Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th 1481, 1500; *see also Schmidt v. Southern Cal. Rapid Transit Dist.* (1993) 14 Cal.App.4th 23, 27 ["[I]t is assumed that the Legislature has existing laws in mind at the time that it enacts a new statute"])

Nor is a leap of faith required to recognize that the legislature may have chosen to procedurally avoid the need for future revisions to §3369 whenever a new law might create a conflict. By comparison, assuming complete legislative ignorance and incompetence, as suggested by

Appellants, is not only illogical and unsupportable, it is categorically contrary to law.

Nonetheless, Appellants claim the 1977 legislative history somehow proves that even though the "or otherwise provided by law" language was added, there was no intent to change §3369. (AOB:49) This illogical assertion alone demonstrates the extremely tenuous nature of Appellants' assertions. If the Legislature intended to leave the statute unchanged... *it would not have amended it.*

As stated by this Court in *People v. Perkins* (1951) 37 Cal.2d 62, 64:

> "The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act."

Appellants tangentially, and perhaps unwittingly, agree, citing *Torres v. Automobile Club of Southern California* (1997) 15 Cal.4th 771, 779-781 (*Torres*), which states:

"[C]ourts 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 by express declaration or by necessary implication."[11]

It is undeniable that the legislature added the "or otherwise as provided by law" language to §3369. It also created a new location for the unfair competition exception, even though there was no stated reason or requirement to create §17202. The fact that it enacted *both* provisions, at the same time, is a clear indication the Legislature did not create two provisions to duplicate each other.

b. Appellants Rely on Irrelevant Cases.

Appellants appear to intentionally rely exclusively on cases which (i) fail to address §3369; (ii) apply the pre-1977 version of §3369; or (iii)

[11] *Torres* looked to legislative history where the controlling statute was silent on the key issue. Since the legislative history was likewise silent, the court did not extend the meaning of the statute, as requested. (*Torres* at 779-781 .) Here, however, §3369 is neither silent nor unclear: it does not prohibit issuance of injunctions which are "otherwise provided by law."

allege nuisance, not §526a claims. For example, in *Perrin v. Mountain View Mausoleum Assc.* (1929) 206 Cal. 669, 671, the plaintiff alleged violations of certain ordinances, but did not establish the business at issue as a nuisance. Similarly, in *Carter v. Chotiner* (1930) 210 Cal. 288, 292, this Court found "no nuisance was shown to exist in this particular case." And again, in *People v. Seccombe* (1930) 103 Cal.App. 306, the prosecutor failed to state a claim for nuisance.

As a result, in *Perrin*, *Carter*, and *Seccombe*, no claimant triggered the nuisance exception to §3369. Under the pre-1977 version of the statute, no other exception was available.

Similarly, in *International Assn. of Cleaning and Dye House Workers v. Landowitz* (1942) 20 Cal.2d 418, 419-420 (*Landowitz*), the practices at issue did not amount to unfair competition, then excepted under §3369. Thus, *Landowitz* satisfied no exception and was also barred.

By contrast, Leider alleged violations under §526a, which expressly provides taxpayer standing to seek injunctive relief under certain circumstances. The allegations thus fall squarely within the 1977

amendment to §3369, i.e., by express statutory mandate, the requested injunctive relief is "otherwise provided by law."

Appellants rely on *People v. Lim* (1941) 18 Cal. 2d 872, 880 (*Lim*) to support their position. (AOB:2, 27-29, 37-38) *Lim*, however, discusses neither §3369 nor §526a. Instead, it turns upon the finding that the trial court erred in upholding a special demurrer where the allegations at issue were neither uncertain, ambiguous or unintelligible. Perhaps more importantly, while the 1941 *Lim* decision does not even address §526a, it makes it very clear how it would have analyzed the post-1977 provisions of §3369. The Court stated at page 880:

> "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."

Like *Lim*, *Monterey Club v. Superior Court of Los Angeles* (1941) 48 Cal. App. 2d 131, 144 (*Monterey*) addressed neither §3369 nor §526a. And, like *Lim*, *Monterey* concerned the abatement of a gambling house as

a public nuisance. This aspect of Appellants' analysis is irrelevant here, since this case does not involve a nuisance or a gambling house.

Given so many inapposite cases, it becomes clear that Appellants chiefly rely on *Nathan H. Schur, Inc. vs. City of Santa Monica* (1956) 47 Cal.2d 11 (*Schur*) for their §3369 argument. This is odd, if only because the iteration of the statute then in existence has no bearing on this case.

Plus, contrary to Appellants' assertions, *Schur* does not hold, or turn on the proposition (even under the old statute), that equity may not enjoin illegal actions. But even more instructive, the *Schur* court never criticized or questioned the applicability of §526a as part of its analysis.

As the Court of Appeal in *Leider II* explained: "As we read *Schur,* it viewed the action as one to enjoin a crime, not as a taxpayer action to stop the illegal use of funds." (*Leider II* at 1096) The court added:

> "Our conclusion is bolstered by the *Schur* court's failure to discuss the meaning of 'illegal expenditure' in section 526a, as well as its reliance on *Lim, supra,* 18 Cal.2d 872, 118 P.2d 472, which was an action against a private party to enjoin a nuisance, not a taxpayer action." (*Ibid.*)

These observations are both apt. Indeed, *Schur* mentions §526a only once in passing—and does so in a manner that directly supports the Leider claim before this Court, stating:

> "It is true that a taxpayer may obtain preventive relief against the illegal expenditure of funds by a municipal corporation. Code Civ. Proc., §526a..." (*Schur* at 17)

Focused on extremely unique facts, the *Schur* decision is neither clear nor applicable here. Specifically, *Schur* found no need to apply §526a or the pre-1977 version of §3369.[12]

Without explanation, Appellants assert that "Leider's action is indistinguishable from Schur's action." (AOB:36) But, this conclusion is not accompanied by any factual or legal nexus between the issues or holdings in *Schur* and the instant case. In its own words, the *Schur* court characterized that case as a "quasi-judicial determination" respecting the lawfulness of certain licenses, in which mandamus was appropriate.

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[12] To compare "apples to apples" the *Leider II* court conducted its analysis "based on the pre-1977 version present in *Schur*." (*Leider II* at fn. 8) But, even under this conservative approach, it found *Schur* inapposite.

(*Schur* at 17) In stark contrast, this case bears no factual resemblance, and involves no comparable "quasi-judicial" issues.

But, a clear understanding of the distinctions requires a struggle with the rather confusing *Schur* decision itself. That analysis reveals that the case turned on its unique facts, not the law. Reversal in the *Troeger* part of that action was based upon the holding that "the trial court was clearly in error in not reviewing the determination of the city council in accordance with the holding of this court in *Fascination, Inc. v. Hoover* 39 Cal.2d 60..." (*Schur* at 16)

Similarly, the reversal in the *Schur* portion of that action was primarily based upon the holding that "[w]e believe that judgment cannot stand because the city officials were vested with authority to make the determination and the only method of relief therefrom was by a review of their action without taking independent evidence on the subject..." (*Id.* at 17)

Only after detailing these dispositive conclusions did the Court offer the dictum selectively relied upon by Appellants.

Specifically, only as part of its remand observations, did *Schur* even address the issue relied upon by Appellants ... and even then noted that if in the future a crime is involved, it "will not prevent the intervention of equity where a clear case justifying equitable relief is present..." (*Id.* at 18-19) This is hardly support for the hard line ban on all §526a claims urged by Appellants.

To the contrary, this statement independently reaffirms the prior unqualified statement from the *Schur* court that a taxpayer may obtain relief under §526a for an "illegal expenditure of funds by a municipal corporation." (*Id.* at 17)

Thus, *Schur* plainly did not hold, and does not stand for the conclusions reached by Appellants. The *Leider II* court correctly analyzed the *Schur* decision and the related issues. Virtually everything Appellants rely upon from *Schur* is either irrelevant or outdated dictum.

c. Reliance on *ALDF* Is Not Warranted.

Throughout the procedural history of this case, Appellants have relied upon pre-1977 case law regarding §3369. Only one relatively recent case (i.e. after the 1977 amendment to §3369) discusses that

section and §526a. But that very recent decision is not only unpersuasive, it was wrongly decided. Nonetheless, for obvious reasons, appellate counsel here, *who was also appellate counsel in that case*, relies heavily upon the decision in *Animal Legal Def. Fund v. California Exposition & State Fairs* (2015) 239 Cal. App. 4th 1286, *review denied* (Nov. 10, 2015) (*ALDF*).

ALDF involved a §526a taxpayer **waste** action against a state agency responsible for organizing a state fair. ALDF filed suit to stop the transporting and exhibition of pregnant pigs in violation of various animal cruelty Penal Codes. The Court of Appeal affirmed the trial court order sustaining a demurrer without leave to amend, concluding that ALDF did not have standing. (*ALDF* at 1290)

In reaching its conclusion, *ALDF* relied primarily on *Animal Legal Defense Fund v. Mendes* (2008) 60 Cal. App. 4th 136 (*Mendes*). Notably, Appellants never relied upon *Mendes* throughout this litigation, despite the fact it was published in 2008. Nor should they have, as *Mendes* is legally irrelevant. The defendants in that case were not public officials or entities. As a result, *Mendes* has no bearing on the legislative

purpose or proper application of §526a. Nonetheless, without critical analysis, the *ALDF* court improperly relied heavily upon it.

To be clear, Leider does not disagree with the *Mendes* conclusion that "the Legislature intended there not be a private right of action to enforce Penal Code section 597t." (*Mendes* at 142) But, §526a actions using Penal Code standards to measure the conduct at issue, are not "private right of action" cases to enforce Penal Codes.

No one in this case is seeking public declarations of criminal conduct. There should be no confusion: **the legislature expressly authorized the former, but not the latter.**

But, *ALDF* flatly ignores this key distinction. En route, *ALDF* also relies on *Schur* without basis. As discussed, *supra*, *Schur* was not decided based upon either §526a or §3369. Even if both statutes were at issue and analyzed (which they were not), the Court would have had no choice but to rely upon the pre-1977 version of §3369.

Yet, without making any of these observations, *ALDF* misstates the holding in *Schur*, claiming, "[the] Supreme Court reversed, *holding that* unless the conduct complained of constitutes a nuisance as declared by

the Legislature, equity will not enjoin it even if it constitutes a crime..." (*ALDF* at 1301) As explained above, this dicta was plainly not the holding with respect to either part of the *Schur* decision.

Indeed, separate and apart from the dictum unreasonably relied upon by ALDF, *Schur* affirmatively stated the exact opposite: "It is true that a taxpayer may obtain preventive relief against the illegal expenditure of funds by any municipal Corporation [citing §526a]." (*Schur* at 17) But, *Schur* is not authority for either proposition and plainly does not provide support for Appellants' statutory arguments.

Regardless, they will undoubtedly rely heavily upon *ALDF* in their Reply Brief, even though they elected to simply mention it in their opening brief. (AOB:58, 68) This tactical reference, without substance, forces Respondents to assume Appellants will make the same *ALDF* arguments here, as they did below.

In this regard, it must be assumed that Appellants will again urge the irrelevant argument, relied upon in *ALDF* (AOB:58) that:

> "Section 526a does not create an absolute right of action in taxpayers to assert any claim **for governmental waste**. To

this list, we add a claim **for alleged governmental waste** based on an alleged violation of section 597 or 597t."

Appellants knowingly made this highly misleading argument below, without disclosing, that Leider made it plain long before trial, that **he is making no claim under the "waste" prong of §526a**.

As another part of its mistaken reliance on *Mendes*, *ALDF* rests upon a transparently false assumption regarding how animal cruelty prosecutions are initiated and prosecuted. *ALDF* cites §10400 of the Corporations Code, which empowers Societies for the Prevention of Cruelty to Animals *to hire humane officers*. The *ALDF* court then quotes and relies upon *Mendes* for the proposition that these provisions provide an "explicit and comprehensive legislative scheme for enforcement of anti-cruelty laws..." (*ALDF* at 1297) This is absolutely false.

This fundamental misunderstanding was exposed during post-argument briefing in the Second District. (Respondents' October 9, 2015 Letter Brief to Court of Appeal, pp. 7-8) In response to Appellants' earlier claims, Leider set the record straight. Humane Officers and Societies for the Prevention of Cruelty to Animals have no power to

prosecute animal cruelty cases. As briefed below, only the People can prosecute crimes. As cited below, in *People v. Eubanks* (1996) 14 Cal.4th 580, 588 this Court stated:

> "In California, all criminal prosecutions are conducted in the name of the People of the State of California and by their authority. (Gov. Code, §100, subd. (b).) California law does not authorize private prosecutions. Instead, prosecution of criminal offenses on behalf of the People is the sole responsibility of the public prosecutor ... No private citizen, however personally aggrieved, may institute criminal proceedings independently..." (Internal citations omitted)

Contrary to the law, *Mendes* and *ALDF* ignored the fact that the most private organizations can do is assist public investigations and prosecutions. The *Leider II* court was thus correct when it stated: "only public prosecutors may prosecute criminal offenses, and they have the sole discretion to determine whether to do so." (*Leider II* at 1100)

Now, without mention of this history, Appellants cited *People v. Eubanks* to this Court, pretending it has always somehow supported their position, and offer no explanation for their prior, unwavering reliance upon the *Mendes* and *ALDF* decisions. (AOB:30) Both cases place heavy emphasis upon the flawed premise that many people and organizations are empowered and actively engaged in criminal prosecutions involving animal abuse. Thus, they conclude there is no need for §526a.

Just the opposite is true.

Pretending that many private agencies can and will act to stop animal cruelty, when no one but public prosecutors have that power, is a legal fiction propagated by *Mendes* and *ALDF*. This single fact explains why no one, and most specifically the Los Angeles City Attorney's office, ever prosecuted the L.A. Zoo for its decades-long cruelty to elephants. Many knew about the problem, but no one but the conflicted City Attorney's office had the right and power to act.

For decades, the elephants were subjected to electric shock, abusive use of bull hooks, kept in tiny pens, on hard ground, left without veterinary care or even supervision when they could barely stand up (due

to foot infections caused by the combination of pen size and hard ground) and no one did a thing about it. 16 elephants died. Only then did Robert Culp and Aaron Leider feel compelled to file this §526a action...*which has been vigorously challenged on the standing issue.*

This statute is supposed to be liberally construed to permit citizens to challenge governmental action, which would otherwise go unchallenged due to the standing requirement. (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 267–68) Yet, fully aware of the truth, Appellants urge this Court to narrowly construe this statute and block the precise benefit it was enacted to provide.

Plus, they cite *Mendes* and *ALDF* to support this sleight of hand. Sadly, by definition, the public entities abusing animals control the public prosecutor who could stop their abuse. Indeed, no case suggests even one such entity has declared their conflict or acted to enforce the law despite it. Given the complete dearth of such criminal prosecutions, §526a quite literally offers the only remedy, limited though it may be.

Nor is §526a punitive or remotely comparable to a criminal prosecution as Appellants pretend. The statute affords purely equitable

relief. It was expressly enacted to authorize taxpayers to stop publicly funded abuses, not impose criminal penalties. It was designed for just this kind of case ... where no one else can or will act.

Appellants know this, and for indefensible reasons, seek judicial emasculation of §526a. This request does not just unreasonably interfere with the intent of the legislation in violation of the separation of powers, it ignores the plain and urgent need for this remedy. The Legislature was entirely correct. There are definitely times when no one else can or will step up and stop such abuses in our society.

If public agencies will not prosecute themselves, which sadly is not surprising, then the underlying purpose and intent of §526a is as relevant and necessary as ever. It should not be eviscerated.

d. The Primacy of Public Prosecutions Reinforces the Legislative Intent Underpinning §526a.

Now that Appellants have reversed position on appeal to this Court, the parties are in agreement regarding "the central and unique role of the district attorney in enforcing the criminal laws." (AOB:30) While public entities and government-controlled facilities are supposed to police

and prosecute themselves, the Legislature evidently did not expect miracles. It therefore included at least one form of check and balance. It expressly created standing for taxpayers to restrain and prevent illegal expenditures, waste of, or injury to government property. This equitable remedy is fairly limited by its own terms. Thus, as the Court of Appeal determined (in *Leider I*) there is §526a standing in this case.

This well thought out, narrowly drawn limitation on government has proven prescient. But, unwilling to be accountable – to anyone – Appellants seek a judicial determination overruling the legislature. They well know that to do so would violate multiple, fundamental precepts of statutory construction and the separation of powers. Their goal is to deny §526a accountability: already a seldom used remedy.

Nor are Appellants unaware that this statute permits no one to seek punishment, or even damages. It does not even allow the use of equity to enforce Penal Codes. Rather, it merely allows the Courts to measure public conduct against the standards set by Penal Codes. It is no different than Evidence Code section 669, which authorizes the use of any statute to measure conduct in "negligence per se" cases. Indeed, in identical

fashion, §526a is limited to civil actions. It merely creates standing to pursue equity, not criminal remedies.

Nonetheless, Appellants pretend that they face severe criminal penalties. (AOB:37) This hyperbolic rhetoric does not withstand scrutiny. Given any examination, it quickly becomes apparent that Appellants are not addressing §526a. They are projecting the likely response *of any reasonable jurist* forced to deal with *willful violations* of existing injunctions. That is the only possible scenario which could theoretically warrant more serious repercussions.

While willful violations should be met with appropriate remedies, the goal of this case and §526a is to simply stop illegal expenditures. Perhaps the real relevance of Appellants' claims is that they illuminate their true intentions. They seek to ignore more than the plain meaning of §526a and §3369 in order to eliminate taxpayer standing in appropriate cases. They also seek to entirely ignore the power of the judiciary to issue §526a injunctions.

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V. THE LAW OF THE CASE DOCTRINE PRECLUDES APPELLANTS' BELATED §3369 CLAIMS.

a. The Essential Standing Issues Under §526a Were Previously Decided.

Setting aside the absence of merit in Appellants' §3369 claims, the law of the case doctrine plainly foreclosed their effort to relitigate the standing issues. *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 309 (quotations and citations removed) accurately summarizes the basic purpose of the doctrine as follows:

> "Under the law of the case doctrine, the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case. ... **The doctrine promotes finality by preventing relitigation of issues previously decided."**

"The [law of the case] doctrine applies with equal force to legal determinations whether they are express or implied." (*City of Oakland v.*

Superior Court (1983) 150 Cal.App.3d 267, 277 (*City of Oakland*)) *City of Oakland* explains this conclusion at page 277–78 (conceded by Appellants at AOB:60-61), stating:

> "[W]here *a particular point* is essential to the decision, and the appellate court could not have rendered its decision without its determination, a necessary conclusion is that the point was impliedly decided, even though the point was not expressly mentioned in the decision."

In this regard, it is important to isolate what is meant by reference to a "point" or "issue" which is to be deemed final. The "issue" is the subject matter of the conclusion to be reached from an exchange of *arguments* and *authorities* on that issue. The "issue" is thus not any one argument or group of arguments. *It is the matter to be determined.*

The policy behind the doctrine is designed to prevent litigants from raising whatever arguments they choose, in a piecemeal fashion so as to get more than one chance to litigate the same issue. As explained in *Yu*, *supra*, at 311-312:

"Banks observe that the law of the case doctrine does not extend to issues that might have been, but were not, raised in a prior appeal – an oblique acknowledgement that the new arguments could have been asserted in *Yu I*. **However, the issue – whether the Yus have a cause of action for abuse of process under *Barquis*-is the same as before**; Banks have simply refined their arguments as to that issue.

* * *

Banks maintain that they are free to advance the new arguments because we did not previously address them in *Yu I*, but if that were true, then Banks could raise their arguments in piecemeal fashion and endlessly relitigate *Barquis*'s applicability... 'Fortunately, fundamental rules of appellate review are specifically designed to preclude the possibility of this type of multiple litigation of the same issue.' [Citation omitted.] **Litigants are not free to continually reinvent their position *on legal issues* that have been resolved against them by an appellate court.** 'It would be absurd that a

party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.' [Citation omitted.]"

Appellants' attempt to raise §3369 at this stage is precisely the same as the relitigation rejected in *Yu*. They hope to add a new argument to the many raised before, **as to the standing issue** which was initially resolved in their favor. But, once that issue was fully tested and resolved against them on appeal in *Leider I*, their attempts to add new arguments on the standing issue ran afoul of the policy explained in *Yu*.

The first two times, Appellants challenged standing under §526a for a variety of reasons. Among them, they urged that the subject of elephant management in a Zoo was purely political; that the City Council had already acted and foreclosed any judicial review of the issue; that the Penal Code lacked a legal standard by which a Court could measure Appellants' conduct; and that taxpayers should not be able to raise or question any such uniquely governmental concerns.

After careful consideration, the trial court found in their favor. But, the Court of Appeal decided against them in *Leider I*. It found this

action justiciable, not purely political; and therefore §526a provided standing, particularly because Appellants' conduct could be measured against Penal Code standards. (*Leider I* at 2CT:250-52)

Then, immediately after remand, as if the Court of Appeal had never addressed the issue, Appellants filed a demurrer raising a *new* and *different* argument for why the *Leider I* standing decision should be ignored. (1CT:63-82) In response, even the trial court which had granted Summary Judgment on this issue and was reversed, recognized that the Court of Appeal had spoken and fully and finally, resolved this issue. (3CT:558-60) The relevant portions of the court order denying Appellants' demurrer are discussed more fully below.

As such, it should have been clear to Appellants long before trial that the standing issue was "law of the case." But, after discovery, pre-trial motions and trial, Appellants now claim they are entitled to reverse the original Appellate decision, based upon an argument they never raised - grounded in a statute and case law that are decades old. But, perhaps most remarkably, they only address earlier versions of §3369, literally ignoring the current, dispositive exception to that statute, added in 1977, almost 40 years ago.

b. *Leider I* Implicitly Rejected the §3369 Issue.

i) *Leider I* Could Not Have Been Decided Without Implicitly Rejecting Appellants' §3369 Arguments.

Appellants filed a summary judgment motion arguing that Leider (and Culp) "were not challenging illegal activity at the Zoo, but were instead contesting the City's lawful discretionary spending and policy decisions." (*Leider I* at 1CT:238) The trial court granted summary judgment. (*Id.* at 2CT:242) Leider appealed and after full briefing and oral argument, the Court of Appeal reversed.

The *Leider I* decision made at least two key determinations relevant to the instant discussion.

First, the Court expressly held that if Leider established that Appellants violated Penal Code sections governing animal abuse, §526a injunctions would be proper:

> "Appellants in part allege the Zoo abuses its elephants in violation of Penal Code section 596.5 by physically abusing them with bull hooks and electric shocks. **However,**

assuming appellants proved these allegations were true and ongoing, the proper remedy under Code of Civil Procedure section 526a would be an injunction prohibiting the Zoo from engaging in such illegal abuse.

* * *

[W]e find that appellants have raised a triable issue of material fact as to whether the physical characteristics of the existing and proposed exhibits are such that keeping the elephants in such enclosures would violate Penal Code section 596.5. This in turn raises a triable issue of material fact as to illegal expenditures under Code of Civil Procedure section 526a." [13] (*Leider I* at 2CT:246-50)

It is therefore undisputed that *Leider I* concluded that **§526a provided standing for Leider to seek an injunction to stop public violations of the Penal Code.** This decision expressly established standing under circumstances completely at odds with Appellants claim

[13] Leider amended his complaint following remand to expressly allege additional violations of other Penal Code sections. The standing issue was then raised again by Appellants' demurrer.

regarding §3369. The failure of Appellants to raise this section does not alter the Court findings on the §526a standing issues. The Court could not have concluded both that there was, and was not, standing in this case.

It found that §526a expressly provides taxpayer standing. Clearly, §3369 also expressly authorized such relief, so long as it was "otherwise provided by law." The two provisions work in perfect harmony. No logical reason exists to suggest that the Court did or should have concluded otherwise, as reaffirmed by the findings in *Leider II.*

Second, the Court of Appeal in *Leider I* found that the claims alleged were justiciable:

> "Governmental bodies do not have the discretion to act illegally.
>
> Here, appellants' illegal expenditure claims are justiciable. **Appellants seek to restrict conduct they claim violates Penal Code section 596.5, thus there is a legal standard by which the alleged governmental conduct may be tested. Penal Code section 596.5 renders this issue**

subject to judicial determination because it provides a framework that takes the issue beyond one of mere governmental discretion. [Citations omitted.]

* * *

Appellants have raised a triable issue of material fact as to illegal expenditures under section 526a. **We therefore need not consider appellants' remaining arguments** and reverse the order granting respondents' motion for summary judgment." (*Leider I* at 2CT:252)

Thus, the Court not only recognized that Leider had standing under §526a, it concluded that it did not need to consider any additional arguments. As such, not only did its determination necessarily foreclose any other claim that there was no standing, *it expressly concluded that its decision was sufficiently final that no other arguments would be considered.* Fundamental to that determination is the implicit finding that no other case or statute warranted a different conclusion. This is law of the case. Thereafter, Appellants were properly precluded, first by the trial court and then in *Leider II,* from re-litigating the standing issue.

ii) The Controlling Cases Confirm *Leider I* Implicitly Decided the Applicability of Civil Code §3369.

The analytical framework offered by Appellants (AOB:61) is erroneous. It mistakenly relies upon two cases, *Estate of Horman* (1971) 5 Cal.3d 62 and *Nally v. Grace Community Church* (1988) 47 Cal.3d 278. Both are inapposite.

Horman is a probate case involving individuals claiming an interest in an estate. The State prevailed at the first trial after establishing that the claimants failed to prove their relationship to the decedent. On appeal, the judgment was reversed. Before a later trial, the State claimed for the first time that Probate Code §1026 barred the action since claimants failed to bring the case to trial within five years. The trial court denied the challenge and allowed the action to proceed. This time, Claimants prevailed at trial. The State appealed, relying on the five-year rule.

The second appellate court analyzed whether the first appeal implicitly decided whether Probate Code §1026 barred the action or that law of the case foreclosed relitigation of the issue. The Court concluded that the first appellate court had not impliedly decided the issue. It

reasoned that Probate Code §1026 issue was not essential to the first appellate decision, which focused on whether claimants established the elements of their case. This Court also agreed, stating at 73–74:

> "The questions presented and determined on the prior appeal in this case were whether the survivors had established the identity of the decedent and their relationship to him, the admissibility of certain evidence, the discretion of the trial court in denying the motions to reopen and for new trial and the trial court's failure to rule on the admissibility of certain evidence. [Citation omitted.] The Probate Code, section 1026 problem was not raised by either party and was not expressly determined by the court. **Neither can it fairly be said that determination of the issue was essential to the decision.** We have concluded, therefore, that the decision on the prior appeal did not foreclose the state from asserting this matter at the second trial."

In other words, since the initial appellate court could have issued its *substantive* rulings without determining the *procedural* applicability of

Probate Code §1026, there was no implicit decision on that issue. But, the factual and legal scenario presented here is entirely different. The precise issue of standing (being raised again now) was vigorously litigated at both the trial and appellate levels.

No new issue is being raised now, only a new argument, which was never asserted before. *Leider II* recognized this distinction, explaining the inapplicability of *Horman* at page 1092:

> "We reject the City's reliance on *Estate of Horman* [Citation omitted], for the proposition that *Leider I* did not implicitly decide the new issue it raises here. ... In the final appeal, the Supreme Court rejected the survivors' contention that law of the case barred the State from raising Probate Code section 1026 because the State had not raised the issue during the first and second trials and appeals. The Supreme Court held that the earlier proceedings **had reached only the substantive merits of the survivors' claims and therefore had not even implicitly reached the procedural time bar of Probate Code section 1026.** [Citation omitted.]

> We believe *Horman* is distinguishable because the new issue raised there was a procedural bar, while the earlier proceedings focused solely on the merits. In this case, as in *Yu* [citation omitted], the new issues raised—whether a taxpayer's action was proper based on violations of the Penal Code's animal abuse provisions—bore an analytically substantive relationship to the issues previously considered."

Appellants' reliance on *Nally v. Grace Community Church* (1988) 47 Cal.3d 278 is also misplaced, but for a different reason. *Nally* did not analyze whether an earlier court impliedly decided a point, thereby precluding later relitigation. Rather, *Nally* found the law of the case doctrine inapplicable because the party asserting it did so based on an erroneous premise. *Nally* explains at page 302:

> "We perceive no obstacle under the law-of-the-case doctrine to reviewing the evidentiary question regarding the tape recording's admissibility. Contrary to plaintiffs' assertion that we are bound by a theoretical imposition of liability on defendants based on the findings in *Nally I*, the

Court of Appeal there found only that plaintiffs had raised a triable issue of fact sufficient to defeat a summary judgment motion, and therefore did not determine liability as plaintiffs seem to imply."

Nally thus only provides general support for the notion that the law of the case doctrine does not apply to points of law that might have been, but were not, (expressly or impliedly) determined on the prior appeal. (*Id.* at 302) *Nally* does not aid Appellants, who concede that issues *implicitly decided* are final, and law of the case. (AOB:60)

The focus of Appellants current claim is whether *Leider I* implicitly assessed the relevance of Civil Code §3369. But, the proper question is whether *Leider I* addressed and resolved **the standing issue,** not their belated §3369 **argument**. Examination of the controlling cases of *Yu, supra, Puritan Leasing Co. v. Superior Court* (1977) 76 Cal.App.3d 140 and *Nevcal Enterprises, Inc. v. Cal-Neva Lodge, Inc.* (1963) 217 Cal.App.2d 799 make this plain.

Yu is a perfect example of when an implicit finding bars later relitigation. The plaintiffs in *Yu* sought redress for improper debt

collection practices. They relied upon *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94 (*Barquis*), which held that a creditor who knowingly files a debt collection action in an improper forum to impair the debtor's ability to defend themselves is guilty of abuse of process and unfair business practices. The trial court granted summary judgment for defendants.

The Court of Appeal reversed, finding that triable issues of fact existed under the standards set forth in *Barquis*. That Court also found *Barquis* indistinguishable from the *Yu* action. When the case was returned to the trial court, defendants filed a demurrer, arguing *Barquis* was wrongly decided. The trial court sustained the demurrer without leave. Plaintiffs appealed again.

In the second appeal, the plaintiffs contended the demurrer was foreclosed by law of the case. The Court of Appeal agreed, noting at pages 309-310 that its prior holding impliedly determined that plaintiffs stated a valid cause of action and that *Barquis* was good law:

> "The Yus contend that they have stated viable abuse of process and unlawful business practice causes of action

under the *Barquis* decision, and that the trial court's conclusions to the contrary violated the law of the case established in *Yu I.*

* * *

In *Yu I*, **we held** that *Barquis* was not distinguishable from the Yus' case and that, under *Barquis's* standards, **there were triable issues** as to Banks' knowledge and **intent that precluded summary judgment** against the Yus on their abuse of process claim. [Citation omitted.] **We thereby necessarily determined that the Yus had stated a cause of action for abuse of process, and that *Barquis* remained good law**. Under the principles set forth in the preceding paragraph, those explicit and implicit conclusions of law established the law of the case, and could be reexamined only as required to account for changes in the law after *Yu I*, or to avoid an injustice. Since neither of those exceptions to the law of the case doctrine is applicable, the trial court's decision is untenable."

Given the factual and procedural similarities, this conclusion is directly relevant to this case. *Yu* succinctly explains that when a court makes an express finding that a triable issue of fact exists as to a cause of action, which thereby precludes summary judgment, that conclusion necessarily means it also made an implied finding that the underlying cause of action, if proven, entitles the plaintiff to relief. Thus, a later-filed demurrer claiming that no cause of action is stated is barred by law of the case.

That is the exact situation here. *Leider I* expressly found that triable issues of fact existed as to whether Appellants violated the Penal Code, finding standing under §526a. (*Leider I* at 2CT:252) Implicit in that standing determination is the conclusion that §3369 did not preclude standing to proceed under §526a. This claim directly contradicted the holding in *Leider I.* Indeed, even the trial court rejecting Appellants' demurrer recognized that the law of the case precluded their §3369 defense. (3CT:558-60) That order states at page 2-4:

> "The demurrer is overruled because each count of the first amended complaint states a cause of action.

* * *

The City demurs on the basis of section 3369 of the Civil Code. Section 3369 provides '[n]either 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 City urges this section means equity will not enjoin a crime.

A respectable and deferential reading of the Culp decision suggests the Court of Appeal did not leave this issue open on remand. To accept the City's argument would render superfluous the entire appellate discussion of Penal Code section 596.5. If that is the proper reading of the Culp decision, the City will have to obtain that reading from the Court of Appeal."

Leider II later examined the same question after trial. It also found the §3369 argument barred by the law of the case, for the same reason. Focusing on the policy behind the doctrine, *Leider II* held at 1091-92:

"As the *Yu* court observed, '[l]itigants are not free to continually reinvent their position on legal issues that have been resolved against them by an appellate court,' because it would be absurd to place a party who has chosen not to argue a point on appeal in a better position than one who argued that point and lost. [Citation omitted.]

In short, the law of the case doctrine is not defeated by simply raising a new argument that is essentially a twist on an earlier unsuccessful argument. With this in mind, we see little difference between *Yu* and the facts of this case. In *Leider I*, the City argued that Leider could not maintain his taxpayer action for Penal Code animal abuse violations because those code sections did not provide a sufficient standard to make his claims justiciable. We rejected that contention, holding that the relevant Penal Code provisions supplied an adequate legal standard by which the City's conduct could be tested. [Citation omitted.]

In the present appeal, the City contends again that under its new theory Leider may not obtain injunctive relief for

conduct that violates Penal Code provisions. We disagree.

By deciding that the animal abuse statutes provided a sufficient legal standard to make Leider's taxpayer action justiciable, we also implicitly decided that California law permits section 526a actions based on violations of the Penal Code's animal abuse provisions. In short, the City is simply trying to refine its earlier argument by asserting another reason why taxpayer actions are not proper when based on the animal abuse provisions of the Penal Code."

Puritan Leasing and *Nevcal* further illustrate this principle. In *Puritan Leasing* it was determined that a lease was valid and enforceable. This was found to be law of the case barring later claims that the lease was unenforceable based on mistake or fraud. (*Puritan Leasing* at 149)

In *Nevcal*, the determination that a contract was enforceable in its place of execution (California) became law of the case barring the defense that the contract was unenforceable in Nevada, the place of performance. The express finding that a contract was enforceable could

not have been reached without the implied finding that no valid contract enforceability defenses existed. *Nevcal* summarizes the point at 804:

> "[T]he only point urged by government counsel in their opening brief is the issue of the contract's legality under Nevada law.
>
> * * *
>
> The difficulty, however, with this argument is that the question of the contract's legality in Nevada was decided on the first appeal and is now the law of the case. [Fn. omitted.]
>
> * * *
>
> The rule seems now to be fairly well settled that 'Where the particular point was essential to the decision, and the appellate judgment could not have been rendered without its determination, a necessary conclusion in support of the judgment is that it was determined.' [Citations removed'] **In the present case, therefore, an <u>essential condition</u>**

> **precedent to the previous determination of the contract's enforceability in California was its validity under the law of the place of performance, namely, Nevada; but for such determination it must be assumed that the judgment would not have been reversed. Or, as stated by plaintiff's counsel, 'The Appellate Opinion could not have been written if the District Court of Appeal had not found the contract to be valid in the place of performance. ...' "**

Puritan Leasing and *Nevcal* are entirely analogous. The *Leider I* finding that there was no impediment to §526a standing, which would bar pursuit of a cause of action based on Penal Code violations, was in the words of *Nevcal*, an essential condition precedent to the conclusion that no statutory or other impediment to standing existed. The *Leider I* court could not have reached its stated opinion without that implicit finding.

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iii) The Analytical Framework Proffered By Appellants Contradicts Their Prior Positions.

Faced with the logical conclusion compelled by the decisions in *Yu*, *Puritan Leasing* and *Nevcal*, Appellants hope to convince this Court to apply a different legal analysis. Appellants thus recast the opinions of those courts, claiming they only sought to prevent litigants from trying to "have-it-both-ways." (AOB:66)

They characterize *Yu* as a case where the defendants took "different positions on the same ... case in two appeals." (AOB:66) They similarly characterize *Puritan Leasing* and *Nevcal*, claiming "the parties' later positions were inconsistent with earlier determinations on the same subject." (*Ibid.*) Applying this new "test" Appellants urge that their Civil Code §3369 defense is not similarly inconsistent.

But, in so doing, they hopelessly ignore the facts. They pretend that they have not urged inconsistent positions ... precisely so they can have it both ways. In *Leider II*, the Court of Appeal pointed out the fact that Appellants previously conceded (in *Leider I*) that Leider had the

right to challenge illegal government activity in its Section 526a action. The Court characterized their core allegations at page 1090, as follows:

> "**The City acknowledged that a taxpayer action was proper when challenging 'illegal government action**,' but argued that such an action was not proper where the real issue involved a disagreement over the manner in which the government has exercised its discretion to address a problem. The City also contended that the Penal Code provisions that Leider relied on did not provide a legal standard by which its treatment of the elephants could be measured."[14]

Now, Appellants are taking the exact opposite position, claiming that a taxpayer action is not proper when challenging illegal government action, this time relying on a new argument, i.e. §3369. Appellants thus fail their own test.

However characterized, the essence of the "law of the case" doctrine is that new *arguments* cannot be raised to urge fundamentally the

[14] *Leider II* was quoting from Appellants Respondents' Brief in *Leider I*.

same conclusion on the same issue. Here, the issue is standing. Appellants urged a variety of arguments to block standing before ... and lost. Now, they hope to rely on new, and in some ways inconsistent arguments, to reach the same result they have always wanted.

Under any logical analysis, Appellants are barred by the law of the case from making seriatim arguments to deny standing in this action.

c. There Is No Applicable Exception to Law of the Case

Appellants claim, without basis, that the "unjust decision" exception to the law of the case doctrine applies here. (AOB:67) This exception is intentionally difficult to establish. It requires the proponent to establish that a manifest misapplication of existing principles occurred, which resulted in substantial injustice. This Court in *People v. Shuey* (1975) 13 Cal.3d 835 explained this principle at 845-56:

> "We pause finally to consider whether application of the doctrine in this case would result in an 'unjust decision.' (Citation omitted.) This broad exception has evolved gradually as courts strove to avoid the harsh consequences which may result from a strict application of the rule. ...

Yet if the rule is to be other than an empty formalism more must be shown than that a court on a subsequent appeal disagrees with a prior appellate determination. Otherwise the doctrine would lose all vitality and the holding of *Medina* would be reduced to a vapid academic exercise, since an unsuccessful petitioner for pretrial writ review could always maintain on subsequent appeal that the prior adjudication resulted in an 'unjust decision.' We do not propose to catalogue or to attempt to conjure up all possible circumstances under which the 'unjust decision' exception might validly operate, but **judicial order demands there must at least be demonstrated a manifest misapplication of existing principles resulting in substantial injustice before an appellate court is free to disregard the legal determination made in a prior appellate proceeding.**"

Indeed, this Court determined long ago that there is no automatic justification for departure from the law of the case *even if the prior decision might have been erroneous*. As confirmed by *Gore v. Bingaman* (1942) 20 Cal.2d 118, 120-21:

"The issue sought to be raised upon this appeal, however, is no longer open for determination in this case. **Although it may have been decided erroneously, the question whether the present action is... properly appealable directly to the District Court of Appeal is one which was determined by that court upon the prior appeal.** ... Where a question of law once determined is sought to be relitigated upon a second appeal to the same appellate court it is clearly established that the first determination is the law of the case and will not be re-examined in the absence of unusual circumstances leading to injustice or unfairness even though the issue sought to be raised involves the jurisdiction of the court on the prior appeal."

Leider I did not manifestly misapply existing legal principles. Appellants contend that the *ALDF* decision shows that *Leider II* misapplied §3369, finding it inapplicable to the facts of this case. As explained in detail above, not only did *Leider II* consider *ALDF,* it is that decision, *not Leider II*, which was improperly decided. This conclusion is warranted without even reaching the fact that taxpayer actions pursuant to §526a constitute an express exception to the §3369.

Simply stated: affirming the decision in *Leider II* would not be erroneous, nor would it result in a substantial injustice. Ignoring the issue, Appellants assert that the injunctions expose them to fines and imprisonment and could result in further litigation. (AOB:69) This hyperbolic argument fails for *at least* three reasons.

First, this argument defies the law, logic and common sense. The substantial injustice Appellants allegedly fear would not emanate from the existing orders. No City could be imprisoned, even for willful violations. Nevertheless, in effect, Appellants are silently promising to violate the injunctions issue to improve the conditions for their elephants, with the assumption that punitive enforcement remedies will follow.

They choose thereby to ignore the far more likely scenario, i.e. **a court in equity would simply shut down the elephant exhibit if Appellants elect to willfully violate its valid, reasonable orders**.

In short, if Appellants comply with the existing injunctions (requiring them to simply rototill the soil, exercise the elephants, and refrain from using electric shock and bull hooks), there will be absolutely no realistic potential for any of the "parade of horribles" proposed.

Second, Appellants can blame nobody other than themselves for choosing or failing to raise §3369 earlier. They certainly could have raised §3369 in *Leider I*, but did not do so. Nor would it have made any difference to the merits, as noted by *Leider II*. But, more fundamentally, as explained in *Puritan Leasing* at 149, Appellants alone are responsible for any perceived injustice:

> "Imposing obstacles face defendants in seeking to avoid the impact of the law of the case as a bar to their assertion of the defenses of mistake or fraud. No relevant change of law has occurred. **Any injustice flowing from the inability of defendants to assert the defenses at this late date seems of their own making. They did not include either question in their petition for hearing to the Supreme Court as one of the issues that should be adjudicated on remand.**"

Third, and finally, *Leider II* offers perhaps the most astute and compelling reason why compliance with the trial court injunctions will not result in substantial injustice. Simply put, even if the injunctions

were improperly issued as Appellants contend, **complying with them is still the right and humane thing to do.**

The elephants absolutely should be exercised. The soil in their enclosure absolutely needs to be rototilled regularly so their elephants do not suffer more than is absolutely necessary, given the size of their enclosure. Appellants should not be using electric shocks or bull hooks to control their elephants. Period. Allowing such abusive behavior to continue would be a substantial injustice, not enjoining it.

Leider II explains at page 1093-94 that the trial court injunctions, even if erroneous, clearly promote a just result:

> "Even where law of the case would otherwise apply, we may disregard the doctrine if doing so would lead to a substantial injustice by a manifest misapplication of existing legal principles or if there has been an intervening change in the law.
>
> As to the first exception, we assume for discussion's sake that Civil Code section 3369 does bar Leider's action, and that we would have so held had the issue been raised during

the first appeal. Even so, we conclude that keeping the trial court's judgment in place by applying the law of the case doctrine to our decision in *Leider I* would not result in a substantial injustice.

Pursuant to the trial court's judgment, the City is barred from using bull hooks, a practice it said it had already stopped, and was ordered to rototill the soil in the elephant exhibit and make sure that the elephants get sufficient exercise. As the case law in this area makes clear, allowing this result to stand, even if in error, is not a substantial injustice.

* * *

Otherwise, the City has failed to address whether the judgment as it currently stands will work any substantial injustice if it remains in place. The City must stop a practice (using bull hooks and electric shocks to discipline elephants) that it has disavowed, as well as exercise the elephants and turn the soil in the elephant exhibit. The City

does not contend, and we do not believe, that such a limited remedy amounts to a substantial injustice. **If anything, our decision tends to promote a just result, at least to the extent it aligns with the prohibitions of the animal abuse statutes and the requirements of federal regulations governing the treatment of elephants.** [Citation omitted.]"

For all of these reasons, *Leider I* resolved the standing issue, thereby establishing the law of the case. It barred Appellants from thereafter serially relitigating the standing issue. As such, §3369 was not properly raised to challenge standing after *Leider I,* and should be foreclosed by the law of the case now.

VI. CONCLUSION

The elephants at the Los Angeles Zoo were and are still being abused. Appellants have never even seriously urged a defense based on the merits. Instead, they attacked the standing issue on day one...and never stopped. As the trial court found, they are doing as little as possible to care for their captive, suffering elephants. Even now, they want to be

relieved of the obligation to do the bare minimum they were ordered to do so as to lessen the abuse they continue to inflict.

With that goal in mind, they ask this Court to legally disable those who would hold them accountable under §526a. They go so far as to ask this Court to disable anyone who might seek to hold any public entity or official similarly accountable. This issue was addressed and resolved by the Legislature. The relevant codes are clear. They are not conflicting.

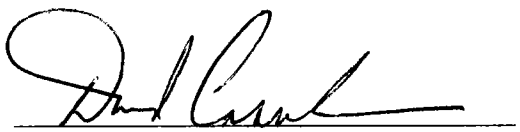
Any decision which undermines the trial court injunctions, would necessarily increase the suffering of the Zoo elephants. This would be a substantial injustice. Accordingly, the trial court decision, affirmed by the Second District below, should be affirmed and the *ALDF* case should be overruled as contrary to the express intent of the Legislature.

Respectfully submitted:

DATED: August 24, 2016

CASSELMAN LAW GROUP

ESNER, CHANG & BOYER

By: 

DAVID B. CASSELMAN
Attorneys for Respondent AARON LEIDER

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520, the foregoing Respondent's Opposition Brief consists of 13,840 words as counted by Microsoft Word word-processing program used to prepare it.

DATED: August 24, 2016

CASSELMAN LAW GROUP

ESNER, CHANG & BOYER

By: 

DAVID B. CASSELMAN
Attorneys for Respondent AARON LEIDER

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of LOS ANGELES, STATE OF CALIFORNIA. My business address is 5567 Reseda Boulevard, Suite 330, Tarzana, California 91356. I am over the age of eighteen years and am not a party to the within action;

On August 25, 2016, I served the following document(s) entitled **ANSWER BRIEF ON THE MERITS** on ALL INTERESTED PARTIES in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Michael N. Feuer, City Attorney
John A. Carvalho, Deputy City Attorney
200 N. Main Street, City Hall East 7th Floor
Los Angeles, CA 90012

Kathryn E. Karcher
Karcher Harmes PS
401 B. Street, Suite 2450
San Diego, CA 92101

BY MAIL: By placing a true copy thereof in a sealed envelope addressed as above, and placing it for and mailing following ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence, pleadings and other matters for mailing with the United States Postal Service. The correspondence, pleadings and other matters are deposited with the United States Postal Service with postage thereon fully prepaid in Tarzana, California, on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on August 25, 2016, at Tarzana, California.

Jamie Kessinger

Jamie D. Kessinger