S232622

IN THE SUPREME COURT OF CALIFORNIA

AARON LEIDER,

Plaintiff and Appellant,

v.

JOHN LEWIS, et al.,

Defendants and Appellants.

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

REPLY BRIEF ON THE MERITS

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I. INTRODUCTION.[1]

Aaron Leider argues that empowering taxpayers to enforce the criminal laws against cities and their employees is the only way to stop their criminal conduct, because cities will never prosecute themselves or their employees. Assuming the latter point is true, Leider's argument fails. At least three other prosecutorial agencies enforce the criminal laws in the City. They include the County of Los Angeles, the office of the Attorney General of California, and the United States Department of Justice, which enforces criminal violations of the Animal Welfare Act—which Leider alleged but failed to prove in this case. Ruling for the City and Lewis will not give California cities and their employees carte blanche to commit crimes.

On the core legal analysis, Leider's discussion of Civil Code section 3369 defies both precedent and secondary evidence of the Legislature's intent, and his discussion of law of the case misinterprets the issues in both appeals to reach the erroneous

[1] This brief follows the same conventions as the Opening Brief on the Merits (Opening Brief): individuals are referred to by their last names after an initial reference, the City of Los Angeles (City) and John Lewis are sometimes referred to as "defendants," and the Los Angeles Zoo is referred to as "LA Zoo."

conclusion that the first appeal implicitly decided the section 3369 issue. As for section 3369, only a "legislative declaration" can create an exception to its bar against enforcing criminal laws in equity, and the Legislature has never declared Code of Civil Procedure section 526a an exception, despite several opportunities. (*People v. Lim* (1941) 18 Cal.2d 872, 880.) As for law of the case, section 3369 presents an analytically different issue from the justiciability issue the Court of Appeal decided in *Culp v. City of Los Angles* (Sept. 23, 2009, B208520) [nonpub.opn.] (*Culp*), to which section 3369 was not essential. Law of the case does not prevent the City and Lewis from relying on section 3369, which bars Leider's action.

II. LEIDER'S VARIOUS NON-MERITS THEMES ARE UNFOUNDED.

A. Leider's Primary Policy Argument—That Without Taxpayers Enforcing Criminal Laws, Cities May Commit Crimes With Impunity—Is Based on an Erroneous Premise.

Leider argues throughout his brief that the City (by its city attorney) will never prosecute itself, so the criminal violations found in this case and any current and future violations are "a series of wrongs without a remedy." (Answer Brief on the Merits

(Answer Brief), pp. 3-4, see also 43, 44.) This is because, he argues, the City is the "sole agency charged with protecting these animals and sworn to enforce the Penal Code in the City[.]" (Answer Brief, pp. 2-3, 43 ["no one but the conflicted City Attorney's Office had the right and power to act"].) Leider cites nothing to support his claim. In fact, several prosecutors are empowered to enforce the criminal laws in the City.

First, the district attorney, not the city attorney, prosecutes felonies committed in the City. (See Gov. Code, § 26500.) Misdemeanors committed in the City are prosecuted primarily by the Los Angeles City Attorney. (Gov. Code, § 72193; L.A. Charter, § 271(c).) However, the district attorney may also prosecute state misdemeanors in the City, but she acts in a subsidiary or "backup" role to the city attorney. (Gov. Code, § 72193; 79 Ops.Cal.Atty.Gen. 46, 48 (1996); *Menveg v. Municipal Court* (1964) 226 Cal.App.2d 569, 571-572.) The backup role includes misdemeanor prosecutions when, for example, the city attorney is unable to prosecute an offense or when there has been a breakdown of law—the situations Leider argues exist here. (See

79 Ops.Cal.Atty.Gen. at p. 48, fn. 3, citing 65 Ops.Cal.Atty.Gen. 330, 332 (1982); 20 Ops.Cal.Atty.Gen. 234, 236 (1952).)

Leider has not argued the district attorney is conflicted or does not prosecute animal cruelty crimes. The Court of Appeal has observed that the many published cases addressing Penal Code section 597 "suggest that the statute is regularly enforced by California prosecutors" and that " 'California has one of the nation's toughest anticruelty laws, and enforcement of the law appears to be more rigorous than in many other states.' [Citations.]" (*Humane Society of the United States v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 359.) The court singled out the Los Angeles City Attorney's office for making " 'historic effort[s] in combating animal abuse' " and listed the measures it has taken. (*Id.* at fn. 5, citation omitted.)

The seriousness of the charges has a large impact on which prosecutor is most appropriate to handle a particular case. Leider alleged and attempted to prove that the City and Lewis violated animal cruelty laws that provide for both misdemeanor and felony charges, and he has persistently accused the City and Lewis of torturing and killing elephants through extreme abuse

and neglect—felonious conduct. (See, e.g., Pen. Code, § 597, subds. (a), (d) [maliciously and intentionally maiming, mutilating, torturing, wounding or killing an animal is a felony or alternatively a misdemeanor]; 1 CT 39 [¶ 5], 40 [¶ 8], 41 [¶¶ 9-10], 50-52, 54.) At the outset, the appropriate prosecutor for these alleged crimes is the district attorney, who typically investigates optional misdemeanor-felony crimes as felonies so that the most serious charges can be brought if warranted. The district attorney has the discretion not to prosecute the charge as a felony, in which case the city attorney may prosecute it as a misdemeanor. This system worked, for example, in the 2015 prosecution of a City employee for felony embezzlement. (http://www.scpr.org /news/2015/06/11/ 52367/former-ladwp-av-guy-charged-4-million-embezzlement/.) The Attorney General of California fits into the city attorney/district attorney division of labor by playing a backup role to the district attorney. (See 79 Ops.Cal.Atty.Gen., *supra*, at p. 48, fn. 3, citing 65 Ops.Cal.Atty. Gen., *supra*, at p. 332; 20 Ops.Cal.Atty.Gen., *supra,* at p. 236.)

The United States Department of Agriculture through its Animal and Plant Health Inspection Service (APHIS) enforces

the Animal Welfare Act in the City. (7 U.S.C. §§ 2131, et seq.; https://www.aphis.usda.gov/aphis/banner/aboutaphis.) This is particularly relevant here because Leider unsuccessfully tried to prove that the City and Lewis violated 9 C.F.R. section 3.128. (6 CT 1351-1352.) The Department of Justice prosecutes various federal crimes in the City. (https://www.justice.gov/usao-cdca.) In 2014 it obtained a bribery conviction and prison sentence of a City employee. (http://articles.latimes.com/2014/mar/25/local/la-me-building-inspector-corruption-20140325.)

Leider's main policy argument that the City and Lewis's alleged wrongs have no remedy because the City as sole prosecutor will never prosecute itself (and by extension neither will any other California city) collapses under scrutiny. The City is not even a possible prosecutor of the felonies and federal crimes Leider alleged; the City prosecutes only misdemeanors with the district attorney in a backup role. Leider's plea that "if you won't let me speak for the elephants, then who will?" is an emotional appeal that is built on sand. The answer is that several able prosecutors will.

B. The City and Lewis Are Not Threatening Contempt.

Leider asserts the City and Lewis threaten "willful violations of existing injunctions." (See, e.g., Answer Brief, pp. 4, 9, 47, emphases omitted.) At the outset, it is worth mentioning that the Court of Appeal majority was dismissive of contempt proceedings as a possible injustice to the City and Lewis because he was "enjoined solely in [his] official capacity[y]" so "[n]o private parties will be prosecuted[.]" (*Leider v. Lewis* (2015) 243 Cal.App.4th 1078, 1098-1099 (*Leider*).) But real people are enjoined only in official capacity. The human body is not divided into public and private roles at the jailhouse gate. The Court of Appeal majority missed this point. (*Ibid.*) The Opening Brief at pages 37 through 39 demonstrates the error; the Answer Brief fails to defend the majority. And a vague injunction, which is addressed below, will only exacerbate the "endless contempt proceedings" the dissent foretold. (*Leider*, at p. 1107 (dis. opn. of Bigelow, P.J.).)

In *People v. Lim, supra,* 18 Cal.2d at page 880, the Supreme Court held that equity "is loathe to interfere" with alleged criminal violations because of the "collateral effect[s]" of

injunctions on defendants. Those collateral effects are grave and were stated in the Opening Brief at pages 27 through 28. To consider the legal question posed—whether the nuisance exception to Civil Code section 3369 should be expansively or strictly interpreted—the Supreme Court assumed there would be a controversy about compliance with the equity injunction, and that the defendant would be threatened with and held in contempt. (*Lim,* at p. 880.) The legal issue cannot be addressed any other way, which is why the City and Lewis address it the same way here. This is not a threat to violate court orders. It is rather a legal argument.

There is much here to indicate that contempt litigation is more than a theoretical possibility if the Supreme Court affirms the Court of Appeal's judgment. First, the dissenting Court of Appeal justice believes that is so. (*Leider, supra,* 243 Cal.App.4th at p. 1107 (dis. opn. of Bigelow, P.J.) ["endless contempt proceedings"].) Second, the plaintiff who has prosecuted this case for nine years is passionate about his cause and divisions between the parties go deep. To confirm this fact, one need look no further than the Answer Brief.

Third, one of the trial court's two affirmative injunctions is not clear, making contempt litigation more likely at the same time it may worsen the parties' rancor. Unlike the exercise injunction, which mandates two hours of exercise a day, the rototilling injunction does not say how often the City and Lewis must rototill the exhibit. It instead commands compliance "consistent with the standards and recommendations of Dr. James Oosterhuis and Mr. Jeffrey Andrews." (6 CT 1300.)

Andrews's and Oosterhuis's lengthy testimony mentions rototilling several times. (6 RT 1027-1106 [Andrews]; 7 RT 1320-1370 [Oosterhuis].) Yet Andrews was unclear about the contents of the exhibit's substrate. (6 RT 1065.) He testified he would be concerned if it "was all hard and compacted ... if it's not managed." (6 RT 1066.) Given the staff's expertise, "they would know ... the right time to rototill[.]" (6 RT 1066.) Andrews is confident they would change substrates or rototill "to make sure [substrates are] soft and compliant." (6 RT 1067.) Oosterhuis testified that rototilling is important for small areas which become compacted and hard. (7 RT 1355.) He recommends to his

employer, the San Diego Zoo, to "periodically" rototill soft loamy soils. (7 RT 1364.)

The trial court chose defense experts Andrews and Oosterhuis to provide its rototilling injunction standards. (See 6 CT 1300.) The court did not choose Leider's expert, who testified that the LA Zoo should rototill "on a very frequent basis." (3 RT 99, 173.)

As noted above, Andrews and Oosterhuis did not provide a guideline like the court's exercise injunction. They did not come closer to clarity than that the substrates should be "managed," and the soil should be "soft" and "compliant," with "periodic" rototilling. Senior elephant keeper Vicky Guarnett testified the exhibit's substrate is not compacted or hard, even though it had never been rototilled (6 RT 961, see also 5 RT 751), and that she could make holes in the sand with her hand (5 RT 751). The trial court credited "in part" her testimony that the elephants can dig into the sand and throw it on themselves. (6 CT 1312, fn. 3.)

In contrast to Guarnett's belief that the exhibit need not be rototilled and is already soft, Leider believes it is as hard as concrete and cannot be rototilled enough. (3 RT 173 ["It would be

difficult to do it as frequent as you would need to[]"].) Sharply differing beliefs would not matter if the standard was clear, but the standard is subjective. What is "soft," or "compliant," or "periodic"? Based on the record here, that depends on whether you are Guarnett, the plaintiff's expert, or the defendants' experts. Presiding Justice Bigelow wrote that endless contempt litigation would result from these injunctions without considering this particular, potentially vexing issue. (*Leider, supra,* 243 Cal.App.4th at pp. 1107, 1111 (dis. opn. of Bigelow, P.J.).)

The City and Lewis address a legal issue like the court in *Lim* did when they assume they might be charged with contempt, and perhaps even held in contempt. In addition, they bring knowledge of the parties' relationship to this issue and how the trial court's unclear rototilling injunction could make a bad situation worse. These things inform the City and Lewis's approach to this issue. They are not threatening to violate the injunctions.

C. Leider Falsely Accuses the City and Lewis of "Misstating" the Record and "Knowingly Urg[ing]" the Court to Err.

Leider rebukes the City and Lewis for "misstating the trial court record[,]" "ignoring every single (stunning) trial court finding[,]" "sleight of hand," "an apparent effort to rewrite the record," "plainly obfuscate[ing] the record," and more. (See, e.g., Answer Brief on the Merits, pp. 3-4.) He accuses the City and Lewis of "knowingly urg[ing] this Court to violate" the law. (Answer Brief, p. 20.) The rest of the brief proceeds apace. The City and Lewis doubt that advocates mislead the California Supreme Court into error; as for the rest of the charges, the City and Lewis stand by their statements of fact, procedure, and their record citations. They examine Leider's claims in two brief and representative examples.

Leider asserts the City and Lewis "ignor[ed] every single" trial court finding. (Answer Brief, p. 4.) The City and Lewis's Opening Brief twice addresses the court's key findings on which the rototilling and exercise injunctions are based regarding soil compaction, the risk of it injuring elephants, and elephants developing foot problems. (Opening Brief, pp. 8, 17, see also 18-

19.) The City and Lewis quote the court's "[c]aptivity is a terrible existence" statement and its findings about stereotypic behavior and Guarnett's inadequacies, among others. (Opening Brief, pp. 18-19.)

Leider makes unfair comparisons in criticizing the City and Lewis. As one example, the City and Lewis stated true facts about the exhibit's enrichment devices and architectural features (Opening Brief, pp. 7-8), yet Leider criticizes the City and Lewis because he asserts the exhibit does not provide elephants with an "enriched, stimulating environment[]" (Answer Brief, pp. 11-12). But the City and Lewis did not address this issue, and they stated the trial court's findings about the exhibit accurately. (See, e.g., Opening Brief, pp. 17-19.)

III. EXCEPTIONS TO CIVIL CODE SECTION 3369 MUST BE BY "LEGISLATIVE DECLARATION"; THE LEGISLATURE HAS NOT EXCEPTED TAXPAYER ACTIONS.

A. Leider's Statutory Analysis Is Unavailing.

Leider frequently asserts that Civil Code section 3369 and Code of Civil Procedure section 526a are in "harmony" or "complete harmony" because the former's "otherwise provided by

law" language and the latter's "any illegal expenditures" language are plain. (See, e.g., Answer Brief, pp. 2, 6, 21, 55.) He argues that "any illegal expenditures" is an exception to section 3369's bar against enforcing criminal laws in equitable courts. (See, e.g., Answer Brief, pp. 23-26.) Leider relies on the rule of construction that interpretation should not create conflicts between statutes, which he contends the City and Lewis's proffered interpretation does. (Answer Brief, p. 26.)

The City and Lewis's interpretation creates no conflict between the two statutes. First, neither Code of Civil Procedure section 526a nor Civil Code section 3369 includes an exception to section 3369 for taxpayer actions. When the Legislature enacts an exception, it does so expressly, either by referring to the exception in the statute (nuisance) or by stating the exception from section 3369: "Notwithstanding Section 3369 of the Civil Code, specific or preventative relief may be granted to enforce a penalty or forfeiture in a case of unfair competition." (Bus. & Prof. Code, § 17202.) The Legislature has done neither for Section 526a. Taxpayer actions are not excepted, and the statutes do not conflict. (Opening Brief, § IV.C.)

Second, Civil Code section 3369 excepts from its bar cases of "nuisance or as otherwise provided by law." Section 3369 and its nuisance exception are the subject of a substantial body of case law which concerns the "fundamental rule" that equitable courts cannot be used to enforce the criminal laws. (See, e.g., *Perrin v. Mountain Mausoleum Assn.* (1929) 206 Cal. 669, 671; Opening Brief, pp. 23-30.) One line of cases restricted the nuisance exception to nuisances that caused exceptional damage or special injury to a private plaintiff. (*Perrin*, at pp. 670-671, 674; *Carter v. Chotiner* (1930) 210 Cal. 288, 290-291.) Courts further restricted the exception where public prosecutors relied on public nuisances to enjoin crimes in equity. (*People v. Seccombe* (1930) 103 Cal.App. 306, 310-311, 314 [criminal conduct does not give rise to equitable jurisdiction, rather, interfering with or injuring property rights does].)

These cases culminated in *Lim, supra,* 18 Cal.2d at page 880, which held that a "legislative declaration" is required before a court can broaden the field in which equitable injunctions against crimes may be granted. "[T]he basis for our action such as this must be found in our statutes rather than" in the common

law. (*Ibid.*) In *Lim* the nuisance exception was at issue, but nothing in *Lim* or the other earlier cases diminishes their application or relevance to other exceptions to Civil Code section 3369, contrary to Leider's claim.

This backdrop is important to considering the issue of statutory interpretation. As the City and Lewis explained, Assembly Bill 1280 effected a shift of the unfair competition law from the Civil Code to the Business and Professions Code. (Opening Brief, pp. 40-43.) The Legislature expressly declared in new Business and Professions Code section 17202 that the exception to section 3369 for unfair competition would be preserved. Section 3369's "otherwise provided by law" language replaced "or unfair competition" and referred, at a minimum, to the simultaneously-enacted section 17202 exception. (See, e.g., Augmented CT 32, 35-36, 40.) The Legislature did not include an exception for Code of Civil Procedure section 526a then or since.

Leider argues that the Legislature intended with the "otherwise provided by law" language to avoid the need for amendments to Civil Code section 3369 as exceptions are enacted. (Answer Brief, p. 23.) That gets Leider nowhere. The

Legislature must still declare the exception. (*Lim, supra,* 18 Cal.2d at p. 880.) As the City and Lewis explained, it passed on that opportunity three times with Code of Civil Procedure section 526a—when the Legislature enacted it in 1909, when it amended section 3369 in 1933 to add unfair competition, and again when it amended section 3369 in 1977. (Opening Brief, pp. 51-52.)

As Leider points out, the Legislature is deemed to be aware of existing laws when legislation is enacted and amended, including existing case law interpreting a statute. (*People v. Overstreet* (1986) 42 Cal.3d 891, 897; *Borikas v. Alameda Unified School Dist.* (2013) 214 Cal.App.4th 135, 150.) The Legislature's failure to enact an express exception for Code of Civil Procedure section 526a in each of these instances, including in 1977 when *Schur, supra,* 47 Cal.2d 11, had been decided 21 years earlier, indicates its intent not to except section 526a or to legislatively overrule *Schur*, contrary to Leider's claims. (*Cole v. Rush* (1955) 45 Cal.2d 345, 355, overruled on another ground in *Vesely v. Sager* (1971) 5 Cal.3d 153.) *Schur*, at pages 17 through 19, held that section 526a did not provide an exception to section 3369. "As a result, in 1977, ... there was no conflict between section

526a and section 3369.... Accordingly, the 1977 amendment to section 3369 replacing 'unfair competition' with 'as otherwise provided by law' would not include section 526a." (*Leider, supra,* 243 Cal.App.4th at p. 1122 (dis. opn. of Bigelow, P.J.).)

Leider makes the remarkable assertion that A.B. 1280's legislative history is "silent" or "complete[ly] silent" about the Legislature's intent. (Answer Brief, pp. 26, 28.) Never in this case has he addressed the legislative history's actual content or gone beyond dismissive labels.

The Legislature's purpose in A.B. 1280 was to enact "technical" "[c]ode adjustment," to move the unfair competition law, "which is located in the wrong part of the codes[,]" "without substantive change" to the Business and Professions Code. (Augmented CT 72, 77.) From Leider's perspective, if the "otherwise provided by law" language was not a substantive change, then the Legislature was not enacting an exception for Code of Civil Procedure section 526a and overruling *Schur*, which would undeniably be substantive changes. But "[t]he legislative history confirms only a single legislative intent behind the 1977 amendment—a 'code adjustment.' The history is devoid of any

intent to change any substantive law, either relating to the general rule under section 3369, or the unfair competition laws. In light of the caselaw, the language of the statute, and the legislative history, there is no basis to conclude that by amending section 3369 to replace 'unfair competition' with 'as otherwise provided by law,' the Legislature intended to effect a change in the law, or address a problem of conflicting statutes." (*Leider, supra,* 243 Cal.App.4th at p. 1122 (dis. opn. of Bigelow, P.J.).)

B. Leider Is Wrong About *Schur* and *ALDF*.

1. *Schur* Determines the Taxpayer Standing Issue.

Leider's analysis of *Schur, supra,* 47 Cal.2d 11, is primarily based on collapsing the court's analysis of the Troeger action and the Schur action. He refers to the "quasi-judicial determination" made in the Troeger action "in which mandamus was appropriate" and disposed of both actions, while failing to address what made the Schur action a taxpayer action. (*Schur,* at pp. 17-18; Answer Brief, pp. 35-36.) The Court of Appeal's majority's analysis of *Schur* is similarly flawed by reducing the Schur action to the holding in the Troeger action. (*Leider, supra,* 243 Cal.App.4th at pp. 1095-1096.)

The *Schur* Supreme Court recognized the Schur action was a taxpayer action. Schur alleged its standing as a taxpayer, it alleged that Santa Monica's licensing gambling games was a crime, that Santa Monica was engaging in illegal expenditures by licensing and policing the games, and that Schur sought to enjoin Santa Monica from doing so. (*Schur*, *supra*, 47 Cal.2d at pp. 12-13.) The Supreme Court recognized the Schur action presented a "different question" than the Troeger action because Schur sought an injunction restraining illegal expenditures. (See *id.* at p. 17; Opening Brief, pp. 34-35.)

Leider frequently quotes *Schur*'s statement that a taxpayer may obtain preventative relief against the illegal expenditure of funds by a municipal corporation, but the Supreme Court was stating the statute's language, not interpreting it. (*Schur, supra,* 47 Cal.2d at p. 17.) The court's citation to Code of Civil Procedure section 526a after its statement underlines the point. (*Schur,* at p. 17.) Leider attempts to make something out of nothing.

Leider criticizes the City and Lewis for not relying on Code of Civil Procedure section 526a cases applying Civil Code section 3369 until *Schur*. No case until *Schur* addressed the two statutes

together, and it took another 59 years for the second case to be decided. (*Animal Legal Defense Fund v. California Exposition and State Fairs* (2015) 239 Cal.App.4th 1286 (*ALDF*).) Leider writes that the City and Lewis selectively quote *Schur* and rely on irrelevant material and outdated dictum. The City and Lewis invite a comparison of their Opening Brief's discussion of *Schur* to Leider's charges. (Opening Brief, pp. 32-37.)

Schur applied the bar of Civil Code section 3369 to a taxpayer action against a city and *Schur* determines the outcome here. *ALDF* further supports this conclusion.

2. *ALDF* Supports *Schur*'s Holding.

Leider is especially vehement about *ALDF*, accusing the City and Lewis of making a "tactical reference, without substance," to the case, with an impact on his briefing. (Answer Brief, p. 40.) The City and Lewis devoted a full page to *ALDF* in their Opening Brief, so the sandbagging charge does not fit. (Opening Brief, pp. 57-58.) In addition, Leider states that appellate counsel here was also counsel in *ALDF*. (Answer Brief, p. 38.) This is disproved by the first page of *ALDF*—no counsel in

this action was counsel in *ALDF*. (*ALDF, supra,* 239 Cal.App.4th 1286.)

On the merits, the City and Lewis relied on *ALDF* as one of several examples of cases in different areas of the law holding that there are real limits on taxpayer actions. (*ALDF, supra,* 239 Cal.App.4th at p. 1298; see also *Schur, supra,* 47 Cal.2d at p. 17; *Sundance v. Municipal Court* (1986) 42 Cal.App.3d 1101, 1138-1139 [primarily political disputes cannot be enjoined]; *Daar v. Alvord* (1980) 101 Cal.App.3d 480, 485-486 [no injunction against spending illegally imposed and collected taxes]; Opening Brief, pp. 56-59.)

ALDF may be of particular interest to the Supreme Court because it addressed Penal Code sections 597t and 597 and held the purpose of Code of Civil Procedure section 526a is not served by allowing taxpayers to enforce the animal cruelty laws. (*ALDF, supra,* 239 Cal.App.4th at p. 1298.) That is because a 1905 statutory scheme provides more than one avenue to enforce those laws, including appointing humane officers on whom " '[p]owers to enforce anticruelty laws are conferred ... by statute.' " (*ALDF,* at p. 1296, citation omitted; Corp. Code, § 14502, subd. (i)(1)(A)-

(C), (2)(A)-(C); Pen. Code, §§ 597t, 599aa [humane officers may seize some animals].) Individuals may initiate search warrants that magistrates must issue to law enforcement or to humane officers to search for and arrest anyone committing animal cruelty. (*ALDF,* at pp. 1297-1298.) Yet another avenue is traditional law enforcement, which makes three ways to enforce the animal cruelty laws without taxpayer actions.

Leider focuses on a single aspect of *ALDF*'s analysis of this statutory scheme. He argues that the resources the statutory scheme created for combating animal cruelty mean nothing because only public prosecutors can prosecute these crimes. (Answer Brief, pp. 41-42.) As to the latter he is correct, but his point does not undermine *ALDF*'s basis or reasoning. Much of what determines which crimes are prosecuted is the limited resources of investigators and prosecutors. The 1905 statutory scheme makes a large amount of resources available in the enforcement process that other areas of the criminal law lack. Just because humane societies, officers, and citizens initiating searches and arrests do not take offenders to trial does not mean their contributions are insubstantial.

Leider charges that the City and Lewis have inconsistently denied, and then asserted, that only public prosecutors may prosecute crimes, and now are "pretending" this has always been their position. (Answer Brief, p. 43.) Leider again errs. The City and Lewis's Appellants' Opening Brief in the Court of Appeal devoted a headed section to the point. (AOB, § III.B.3.)

ALDF concerned a waste claim under Code of Civil Procedure section 526a. (See *ALDF, supra,* 160 Cal.App.4th at p. 1291.) Leider accuses the City and Lewis of having "knowingly made [a] highly misleading argument" below that *ALDF* is relevant because Leider "made it plain long before trial" that he was making no waste claim, only an illegal expenditures claim. (Answer Brief, p. 41.) The Clerk's Transcript tells a different story. Leider's trial brief continued to assert his waste claim, and the trial court resolved the claim in its statement of decision, so Leider pressed his waste claim through judgment. (4 CT 930; 6 CT 1353-1354.) Leider concedes himself out of his argument by making it depend on his not having pursued a claim for waste.

As the City and Lewis discussed in their Opening Brief, *Schur* controls, and *ALDF* supports, the outcome of the Civil

Code section 3369 issue. As discussed below, the law of the case doctrine does not preclude the City and Lewis from relying on that defense.

IV. THE CITY AND LEWIS'S CIVIL CODE SECTION 3369 DEFENSE ADDRESSED A DIFFERENT ISSUE THAN THE JUSTICIABILITY ISSUE DECIDED IN *CULP*, SO THE DEFENSE IS NOT PRECLUDED.

A. The Issue in *Culp* and Civil Code Section 3369 Is Not "Standing," as Leider Claims.

The law of the case issue boils down to whether the Court of Appeal in *Culp, supra,* B208520 at **3-9, implicitly decided the issue that the City and Lewis have sought to raise since they demurred to Leider's amended complaint. (The Opening Brief stated the preliminary legal propositions and are not repeated here.)

Characterizing an earlier appellate decision and comparing it to the point sought to be raised later is key to determining whether the former implicitly decided the latter. Only if the later point was "essential" to the earlier decision could it have been implicitly decided. (*Estate of Horman* (1971) 5 Cal.3d 62, 73.) Another way of stating the "essential" requirement is whether it was a step in the *ratio decedendi* or would have been decided as a

matter of standard procedure even if not mentioned in the opinion. (See *Eldridge v. Burns* (1982) 136 Cal.App.3d 907, 921.) As to the second point (the first is discussed below), if the *Culp* Court of Appeal was sua sponte considering an alternative ground to affirm summary judgment, Code of Civil Procedure section 437c, subdivision (m)(2), compelled the court to give notice and the opportunity to brief the issue. Since it did not, it could not have implicitly decided the Civil Code section 3369 issue unless it was a necessary step in the *ratio decedendi.*

Leider seeks to make the issues in the two proceedings the same, single issue: standing. Toward that end, he consistently refers to *Culp,* without citation, as having decided "the standing issue." (Answer Brief, pp. 52, 55.) He quotes *Culp* but the court's language demonstrates other points that (1) an injunction is the remedy Code of Civil Procedure section 526a provides if Leider were to prove a claim and (2) that Leider's proof raised a triable issue of fact as to defendants' illegal expenditures in violation of Penal Code section 596.5, which provided the framework to make his claim justiciable. (Answer Brief, pp. 53-56.) The court never uses the word "standing" in the quotations yet Leider follows

them by stating it is "therefore undisputed that *Leider I* concluded that §526a provided standing for Leider[.]" (Answer Brief, p. 54, emphases omitted.) It is not.

Leider also cites the *Culp* court's full analysis, but it yields nothing beyond his quotations. (Answer Brief, pp. 52, 54, citing 2 CT 246-252.) The analysis includes a discussion of summary judgment standards and the parties' evidence, the law of illegal expenditures, an analysis of Penal Code section 596.5, and of justiciability. (*Culp, supra,* B208520, at **4-9.) Nothing in *Culp* lends itself to a claim that the issue the court decided was standing, beyond the fact that a taxpayer standing cause of action was at issue. Leider also asserts that the *Culp* court intended to foreclose any future challenge to his claims when it declined "to consider appellant's remaining arguments[.]" (Answer Brief, p. 56.) The *Culp* court was merely declining to reach the other issues Leider (not defendants) was urging for reversal because they were unnecessary given the court's decision to reverse on the ground stated. (*Culp*, at *9.)

Leider's quotations and citations show that *Culp* decided that Penal Code section 596.5 provided a legal standard for

measuring his illegal expenditures claim, which was therefore justiciable. (*Culp, supra,* B208520, at **8-9.) His position on law of the case depends on *Culp*'s holding being different than it actually was so he can also characterize Civil Code section 3369 as a standing issue. *Culp* decided a standing issue only in the broadest sense that every case under Code of Civil Procedure section 526a is a taxpayer standing case—that is the claim the statute creates. Leider's position proves too much, that every section 526a case, no matter which prong is at issue and which body of law applies to the issues presented, decided a standing issue.

The bar against enforcing criminal laws in equitable courts does not present an issue of standing. The issue is whether Civil Code section 3369 permits a plaintiff in a taxpayer action to enjoin crimes. This is not a necessary step in *Culp*'s *ratio decidendi*, which includes elements that (1) the plaintiff is a taxpayer, (2) the taxpayer alleged illegal expenditures as defined under case law, and (3) whether the doctrine of justiciability permitted Leider's claim (whether his claim could be measured against a legal standard). (*Culp, supra,* B208520, at **8-9.)

Section 3369 is a defense against being sued in equity for an injunction against criminal conduct. It was not essential to the *Culp* decision to determine whether section 3369 bars Leider's claims.

Leider argues that the City and Lewis were inconsistent in *Culp* by stating that Code of Civil Procedure section 526a permits taxpayers to challenge governments' illegal expenditures and by challenging the justiciability of Leider's action. (Answer Brief, pp. 70-71.) The City and Lewis's statements were the same as the court's statement in *Schur, supra,* 47 Cal.2d at page 17, of the statute's substance, and the City and Lewis's justiciability challenge invoked different legal principles than does Civil Code section 3369. Their statements were not inconsistent.

Leider and the majority in *Leider, supra,* 243 Cal.App.4th at page 1091, both cite *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 312, for the proposition that "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." This statement is illogical. A party who strategically considers holding back a legal issue would quickly discover from case law that the

odds are overwhelmingly against the issue being decided on the merits if the party did so. By contrast, it is 100 percent likely the issue would be decided on the merits if the party raised it early. Logically, almost all parties facing a law of the case issue have simply overlooked the issue in question. Law of the case does not bar the City and Lewis from relying on their defense.

B. Precluding the City and Lewis's Defense Under Civil Code Section 3369 Would Be Unjust.

The City and Lewis assume for this discussion that to the extent *Culp* implicitly decided the Civil Code section 3369 issue against them, it manifestly misapplied longstanding bedrock principles of California law, which they have demonstrated in their briefs. (See *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491-492.) The Court of Appeal majority compared the City and Lewis's position unfavorably with the longstanding principles discussed in *Sefton v. Sefton* (2015) 236 Cal.App.4th 159, 172, fn. 6 (*Sefton*), which involved hundreds of years of probate law rulings. (*Leider, supra,* 243 Cal.App.4th at p. 1094, citing *ibid.*) But section 3369 was enacted in 1872, as one of California's first four codes. It seems a bit much to require that a legal principle be older than that to qualify as longstanding.

Because of the *Leider* majority's error concerning the defendants' exposure to contempt proceedings, the majority compared the injustice here (which it found was none) to the injustice in *People v. Shuey* (1975) 13 Cal.3d 835, 846. In *Shuey*, law of the case precluded the prosecution from arguing that the defendant was validly arrested for possessing marijuana. (*Ibid.*) This left the prosecutor with only the argument that the arrest issue had been wrongly decided, which is insufficient to meet the unjust decision exception to law of the case. (*Ibid.*) The majority here distinguished this case from the injustice in *Sefton, supra,* 236 Cal.App.4th at page 172, footnote 6, where an earlier erroneous decision cost a beneficiary his share of a large estate. (*Leider,* at p. 1094.) Unlike in *Shuey,* the City and Lewis do not merely disagree with an earlier decision. The continuing injunctions and the harms they will impose make the injustice in this case human and palpable, and like the injustice in *Sefton,* even though losing a large amount of money is a different kind of harm than facing endless contempt proceedings and possibly jail.

In addition, the City and Lewis face an unclear rototilling injunction. It will surely sharpen the parties' disagreements

about compliance and increase conflict at a time when the Court of Appeal has charged Leider with enforcing the injunctions. The City and Lewis have demonstrated that any person who carries out the injunctions, such as Lewis or Guarnett or other elephant keepers, are exposed to contempt charges and penalties like anyone else, and that the majority erred in dismissing contempt as a possible harm. (Opening Brief, pp. 37-39.) In any contempt proceeding, those charged will suffer the collateral effects on their fundamental rights discussed in *Lim, supra,* 18 Cal.2d at page 880. These harms will be a substantial injustice if the erroneous injunctions stand.

The Court of Appeal in *Culp* manifestly misapplied existing principles because Civil Code section 3369 and *Schur, supra,* 47 Cal.2d 11, bar Leider's action. It would be a substantial injustice to preclude the City and Lewis from asserting those principles in their defense.

V. CONCLUSION.

The City and Lewis request the relief they asked for in their Opening Brief—that the Supreme Court hold Civil Code

section 3369 bars Leider's taxpayer action, and that it reverse the judgment in all respects.

Respectfully submitted,

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

The foregoing Reply Brief on the Merits consists of 6,147 words as counted by the Microsoft Word word processing program used to prepare it.

September 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 September 26, 2016, I served the attached **REPLY 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 September 26, 2016.

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KATHRYN E. KARCHER