Case No. S253424

In the

Supreme Court

of the

State of California

ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, XAVIER BECERRA, AND CALIFORNIA DEPARTMENT OF PUBLIC HEALTH,
Defendants/Intervenors,

v.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE,
Respondent,

and

DR. SANG-HOON AHN, DR. LAURENCE BOGGELN, DR. GEORGE DELGADO, DR. PHIL DREISBACH, DR. VINCENT FORTANASCE, DR. VINCENT NGUYEN, AND AMERICAN ACADEMY OF MEDICAL ETHICS, D/B/A OF CHRISTIAN MEDICAL AND DENTAL SOCIETY,
Plaintiffs/Real Parties in Interest/Petitioners.

AFTER A PUBLISHED OPINION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION TWO, CASE NO. E070545,
SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF RIVERSIDE,
CASE NO. RIC1607135, HON. DANIEL A. OTTOLIA, JUDGE

REPLY TO ANSWER TO PETITION FOR REVIEW

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Petitioners Dr. Sang-Hoon Ahn, Dr. Laurence Boggeln, Dr. George Delgado, Dr. Phil Driesbach, Dr. Vincent Fortanesce, Dr. Vincent Nguyen, and American Academy of Medical Ethics, d/b/a of Christian Medical and Dental Society ("Petitioners") hereby reply to the Answer of Defendant-Intervenors and Petitioners Attorney General of the State of California and the California Department of Public Health (the "State Defendants").

I. The State Defendants' Answer Underscores The Conflict That The Court Of Appeal's Opinion Creates As To The Issue Of Whether The Judiciary Owes Deference To A Prosecutor's Constitutional Interpretation

The State Defendants have failed to refute the compelling reasons for review of the issues that Petitioners have asked this Court to address. In the context of public interest standing, the Court of Appeal's opinion raises an important issue as to whether the judiciary owes any deference when the executive branch engages in constitutional interpretation. In contending that there is no conflict in the law on the issue, the State Defendants' primary substantive argument is nothing but a variation of the Court of Appeal's observation that it is impermissible to compel a prosecutor to exercise discretion in a particular way in a specific criminal case. (*See* Answer, at 16, 19-20 [arguing that under *Dix v. Superior Court* (1991) 53 Cal.3d 442 and *People v. Cimarusti* (1978) 81 Cal.App.3d 314, public interest standing cannot prevail over prosecutorial discretion].) The Court of Appeal's

observation, while correct, entirely misses the point. The Petitioners are not seeking to compel the exercise of discretion in a particular criminal case. Rather, they are seeking to compel a prosecutor's mandatory duty to constitutionally apply the criminal law in any and all cases. The State Defendants make no mention of the latter duty at all, even though the Petition for Review establishes (with extensive citation to authority) not only the duty's existence, but that it can be compelled by mandate. (Petition, at 16-21.)

The State Defendants fail to distinguish *Anderson v. Phillips* (1975) 13 Cal.3d 733 and *Citizens for Amending Proposition L v. City of Pomona* (2018) 28 Cal.App.5th 1159. Both cases recognize that mandate lies to correct a legal misinterpretation when the misinterpretation occurs in the exercise of discretion. The State Defendants incorrectly state that "*Anderson* dealt with the alleged failure to perform a ministerial duty." (Answer, at 18-19.) In fact, this Court in *Anderson* found that the plaintiff was seeking to compel the defendant's "wholly discretionary" duty and found that duty compellable by mandate when a law is interpreted unconstitutionally. (*Anderson v. Phillips*, *supra*, 13 Cal.3d at 737.)

The State Defendants' effort to distinguish *Citizens for Amending Proposition L v. City of Pomona*, *supra*, 28 Cal.App.5th 1159, also fails. According to the State Defendants, *Citizens for Amending Proposition L* is distinguishable because there the plaintiffs "sought to prevent" an illegal

action, while here Petitioners "complain that the defendants are not enforcing [the] laws." (Answer, at 20.) Aside from mischaracterizing the Petitioners' claim,[1] this purported distinction is irrelevant if it even exists. Both this case and *Citizens for Amending Proposition L* concern claims that the law has not been enforced as a consequence of legal misinterpretation. The claim in this case is that the pre-existing criminal law is not being enforced based on a misinterpretation of the California Constitution. The alleged illegal action at issue in *Citizens for Amending Proposition L* occurred due to an incorrect interpretation of the billboard proposition and consisted of the consequent failure to enforce the proposition. (*Citizens for Amending Proposition L v. City of Pomona*, *supra,* 28 Cal.App.5th at 1166-1171.) Observing that mandate lies to correct abuses of discretion, *Citizens for Amending Proposition L* upheld public interest standing. (*Id.* at 1172-1177.) As such, on the issue of whether Petitioners can use mandate to correct the Riverside County District Attorney's incorrect application of law, *Citizens for Amending Proposition L* supports the Petitioners' position and contradicts the Court of Appeal's opinion.

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[1] Contrary to what is suggested by the State Defendants' statement that Petitioners "complain that the defendants are not enforcing [the] laws," Petitioners are not complaining about prosecutorial inactivity nor do they seek to enforce the law in a particular case. Rather, Petitioners seek to compel correct application of the law when the prosecutor exercises discretion as to whether or not to enforce the law.

The State Defendants' reliance on *Dix v. Superior Court, supra,* 53 Cal.3d 442, a case not cited by the Court of Appeal, is entirely misplaced. *Dix* held that a victim of criminal assault did not have public interest standing to challenge the sentencing of the perpetrator because sentencing in any particular case is not a matter of public interest. (*Id.* at 450-454.) There is no such issue here. Petitioners do not seek to dictate the exercise of prosecutorial discretion in a particular criminal case. Further, the Court of Appeal did not find, and the State Defendants have not claimed, that the constitutionality of the End of Life Options Act is not a matter of public interest. As opposed to criminal sentencing in a particular case, constitutional challenges to a statute are indisputably a matter of public interest and, as such, are appropriate for public interest standing. (E.g., *Green v. Obledo* (1981) 29 Cal.3d 126, 144 [public interest standing allowed to challenge entirety of welfare law where name plaintiffs had been denied benefits under only part of the law]; see *Wenke v. Hitchcock* (1972) 6 Cal.3d 746, 751 [mandamus is "appropriate for challenging the constitutionality or validity of statutes or official acts"].)

Similarly, *Cimarusti*, *supra,* 81 Cal.App.3d 314, does not in any way undermine the Petitioners' position. *Cimarusti* stands for the proposition that mandate does not lie to control the exercise of prosecutorial discretion in a particular case. (*Cimarusti*, *supra*, 81 Cal.App.3d at 322-324.) Again, however, Petitioners do not seek to dictate the prosecutor's discretion

whether to prosecute a particular case. Petitioners seek, rather, to compel the prosecutor to adhere to the prosecutor's mandatory duty to apply the law correctly when exercising that discretion.

In sum, the State Defendants' Answer repeats the Court of Appeal's failure to recognize that misinterpreting the law is never a permissible exercise of discretion. This misapprehension on the part to California's chief law enforcement officer and the Court of Appeal underscores the need for review in this case.

II. The State Defendants' Answer Fails To Address The Substantial Separation Of Powers Issue Presented By This Case

The State Defendants also ignore the adverse impact on judicial review that would result from denying Petitioners public interest standing here. The adverse impact is both legal and practical. Legally, the Court of Appeal's opinion undermines judicial review by deeming the executive branch's constitutional interpretation to be a matter of discretion that cannot be challenged in court. As a practical matter, there will be no judicial review if the Petitioners are denied standing. Since the End of Life Options Act became law in 2016, Petitioners have been the only legal challengers to the statute.

III. *Common Cause* Establishes That, Like The State Defendants And The Court Of Appeal Confuse The Merits With Standing

The State Defendants also fail to distinguish *Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, a case in which this Court found that public interest standing existed even though mandate did not lie because the duty at issue was discretionary. *Common Cause* demonstrates that when the Court of Appeal denied public interest standing on the ground that the prosecutor's duty is discretionary, it confused the substantive merits with standing. The State Defendants do not deny this. (See Answer, at 17-18.) Instead, they argue that *Common Cause* does not conflict with *Dix v. Superior Court*, *supra*, 53 Cal.3d at 442. (Answer, at 18.) However, nothing in *Dix* is relevant to the distinction *Common Cause* makes between the procedural issue of standing and the substantive issue of whether mandate does not lie because the duty that is sought to be compelled is discretionary.

IV. This Case Is Procedurally Ripe For Review

The main thrust of the Answer focuses on immaterial procedural issues. The Answer, for example, puts some emphasis on when public interest standing was raised in the trial court. This is immaterial because review is needed not of the trial court's ruling but of the Court of Appeal's opinion, which squarely addresses public interest standing. Similarly immaterial is the argument that Petitioners requested injunctive relief in

their complaint rather than mandate. *Common Cause* establishes that where a complaint seeks an injunction, but mandamus may otherwise lie, it is appropriate to evaluate the merits in light of the legal principles governing mandamus. (*Common Cause v. Bd. of Supervisors, supra,* 49 Cal.3d at 442.)

Contrary to the State Defendants' suggestion, the Court of Appeal's opinion raises no issue as to whether there are discretionary grounds for denying public interest standing. (*See* Answer, at 15-16 [arguing that public interest standing does not exist as of right].) The Court of Appeal did not purport to deny public interest standing on discretionary grounds or on any procedural failing in the trial court. Rather, based on a legal analysis, it found that public interest standing cannot exist because of prosecutorial discretion. (Opinion, at 24-25.) It is typical for this Court to address the purely legal issues associated with public interest standing. (See, e.g., *Common Cause v. Bd. of Supervisors, supra*, 49 Cal.3d at 438-439 [finding public interest standing when plaintiffs had alleged taxpayer standing and sought injunction rather than mandate].)

Moreover, there are no discretionary grounds for denying public interest standing to Petitioners in this case. With no citation to authority, the State Defendants misleadingly suggest that the Petitioners' other bases for standing and the standing of non-parties are such grounds. (See Answer, at 16.) In fact, however, Petitioners' other bases for standing are not grounds

for denying public interest standing. (See, e.g., *Common Cause*, *supra*, 49 Cal.3d at 439 [this Court finds it unnecessary to reach alternate ground for standing where public interest standing is "an independent basis for permitting [plaintiffs] to proceed"].)

The possible standing of others not participating in this litigation similarly is no ground to deny Petitioners the benefit of public interest standing. On the contrary, under California law the existence of others "who have a beneficial interest, and would have general standing, but who may be disinclined or ill-equipped to seek review" militates in favor of, not against, review so as to enable the protection of the interests of those who face obstacles to suit. (*Weiss v. City of Los Angeles* (2016) 2 Cal.App.5th 194, 205 [plaintiff who paid parking ticket and thus lacked beneficial interest in challenging ticketing procedure allowed to challenge procedure based on public interest standing], citing *Driving Sch. Assn. of Cal. v. San Mateo Union High Sch. Dist.* (1992) 11 Cal.App.4th 1513, 1518-1519 [in allowing public interest standing consideration is given to burden on those who have beneficial interest but are unable to bring suit]; see also *Common Cause v. Bd. of Supervisors*, *supra*, 49 Cal.3d at 440-441 [citing its "approval of citizen actions to require governmental officials to enforce the law," this Court declines to infer that Attorney General has exclusive enforcement power that negates public interest standing].) The purpose of public interest standing is to allow a person who "is interested as a citizen

in having the laws executed and the duty in question enforced" have "the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." (*Green v. Obledo*, *supra*, 29 Cal.3d at 144 [internal citations omitted].) This purpose would be impermissibly thwarted if the inactivity of others who have not sued constituted a veto on the rights of citizens who have.

Further, the Court of Appeal raised the issue of others' hypothetical standing not in the particular context of public interest standing but, rather, to rebut the argument made at oral argument that no one would have standing if Petitioners were denied standing. (See Opinion, at 26-27.) As such, contrary to what the State Defendants misleadingly suggest, the Court of Appeal's opinion does not find that public interest standing should be denied when non-parties would have standing.

Finally, the State Defendants' argument that there are other grounds for declaring the End Of Life Options Act unconstitutional militates in favor of, not against, review. It may take years to litigate all the standing and constitutional issues that this case raises. Further, if review is not granted, Petitioners will be foreclosed from public interest standing until appeal to this Court from final judgment. Meanwhile, doctors will be engaged in activities that, if Petitioners' legal position is correct, would constitute felonies resulting in death. The End of Life Option Act's "protections" to which the State Defendants point do not protect against

such felonies—they encourage them. At a minimum, as long as this case remains unresolved, doctors assisting suicide pursuant to the End of Life Options Act will be acting under a legal cloud and the public will be uncertain as to whether this highly controversial statute is valid.

The public interest standing and Article IV, section III issues that Petitioners have raised are purely legal issues that can be decided now. They should be decided now given the issues that they implicate and, even more critically, the lives that are at stake.

V. Conclusion

Petitioners respectfully urge that review be granted as requested in their Petition for Review.

Respectfully submitted,

Dated: February 7, 2019

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CERTIFICATE OF COMPLIANCE

[Cal. Rule of Court, 8.504(d)(1)]

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Dated: February 7, 2019

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